

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 DEBRA STEVENS and SCOTT STEVENS,
5 *Petitioners,*

6
7 vs.
8

9 CITY OF ISLAND CITY,
10 *Respondent,*

11 and
12

13 JON FREGULIA,
14 *Intervenor-Respondent.*

15 LUBA No. 2013-036
16

17 FINAL OPINION
18 AND ORDER
19

20
21 Appeal from City of Island City.
22

23 Philip Wasley, La Grande, filed the petition for review and argued on behalf of
24 petitioners.
25

26 Jennifer M. Bragar, Portland, filed the response brief and argued on behalf of
27 respondent. With her on the brief were Carrie A. Richter and Garvey Schubert and Barer.
28

29 Jon Fregulia, La Grande, represented himself.
30

31 BASSHAM, Board Member; RYAN, Board Member, participated in the decision.
32

33 HOLSTUN, Board Chair, concurring.
34

35 REMANDED

08/07/2013
36

37 You are entitled to judicial review of this Order. Judicial review is governed by the
38 provisions of ORS 197.850.
39

NATURE OF THE DECISION

Petitioners appeal a city council decision approving a commercial trucking operation and maintenance facility as a home occupation.

MOTION TO INTERVENE

Jon Fregulia (intervenor), the applicant below, moves to intervene on the side of the city. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is a four-acre parcel 200 feet wide and 800 feet deep, zoned Low Density Residential (R-E). The parcel is developed with a single-family dwelling, and a 4,500 square foot workshop that intervenor constructed in 2008. Surrounding property is also zoned R-E, except for property across Buchanan Lane, which is zoned and developed for industrial use. Petitioners are adjacent property owners. Their dwelling is located approximately 125 feet from intervenor's workshop, and the access driveway to the workshop is located approximately 75 feet from their back patio.

Intervenor owns a commercial trucking operation consisting of six semi-trucks, along with a number of trailers, which intervenor has operated from the subject property since 2008 without obtaining a home occupation permit. In response to neighbors' complaints, in June 2010 intervenor applied for a home occupation permit. At that time the property was located in the county, but within the city's urban growth boundary. The city processed and approved the permit with conditions, but the county board of commissioners ultimately denied the permit on appeal. In February 2012, the property was annexed into the city, and in September 2012 intervenor filed with the city the present application for a home occupation permit and site plan review.

1 City of Island City Development Code (ICDC) 10.07 sets out the standards for home
2 occupations.¹ ICDC 10.07(B) requires in relevant part that if the home occupation is located
3 within an accessory structure, the home occupation shall not utilize over 600 square feet of
4 floor area. ICDC 10.07(D) provides that not more than one non-resident person may be
5 engaged in the home occupation.

6 Intervenor proposed to operate the commercial trucking business from a 600 square
7 foot space in the 4,500 square foot workshop, and to engage one non-family employee to
8 maintain and repair his trucks within that space. City staff recommended approval, based on
9 a number of conditions limiting home occupation activities. The city council conducted a
10 hearing on the application, at which petitioners appeared in opposition. On March 5, 2013,
11 the city council voted to approve the application with conditions. Among other limitations,
12 the conditions limit use of the workshop to 600 square feet, for maintenance of intervenor's
13 trucks, prohibit more than one truck on the site at any time, prohibit outdoor storage of
14 trailers, parts or materials, prohibit use of maintenance machinery outdoors, limit truck trips

¹ ICDC 10.07 has since been amended, but as applicable here provided in relevant part:

“The following standards shall apply to home occupations:

- “A) **Secondary to Residence.** The home occupation shall be secondary to the main use of the property as a residence.
- “B) **Not Greater than 25 Percent of Primary Structure.** The home occupation shall be limited to either an accessory structure or to be not over 25 percent of the floor area of the main floor of the dwelling. If locat[ed] within an accessory structure, the home occupation shall not utilize over 600 square feet of floor area.
- “C) **Residential Appearance.** Structural alterations shall be minimized and shall not detract from the outward appearance of the property as a residential use.
- “D) **Maximum 1 Employee.** Not more than one person other than the immediate family residing in the dwelling is to be engaged in the home occupation.
- “E) **Equipment Limitation.** No materials or mechanical equipment shall be used which are detrimental to the residential use of the dwelling or adjoining dwellings because of vibration, noise, dust, smoke, odor, interference with radio or television reception, or other factors.”

1 to one outgoing trip and one incoming trip per truck per day, and limit truck maneuvering
2 during non-business hours to portions of the site within 100 feet of Buchanan Lane.

3 This appeal followed.

4 **FIRST, SECOND AND SIXTH ASSIGNMENTS OF ERROR**

5 ICDC 10.07(B) provides that a home occupation is limited to either (1) an accessory
6 structure, or (2) the dwelling. *See* n 1. If located in an accessory structure, the home
7 occupation is limited to 600 square feet. If located in the dwelling, the home occupation is
8 limited to 25 percent of the main floor. In these three assignments of error, petitioners argue
9 that the city’s findings of compliance with ICDC 10.07(B) are not supported by substantial
10 evidence.²

11 **A. 600 Square Feet in Accessory Structure**

12 Intervenor testified that his six trucks are eight feet wide and 75 feet long, which
13 means that a single truck will occupy exactly 600 square feet inside the workshop. Record
14 59. During the proceedings below, petitioners argued that the truck maintenance operation
15 will occupy much more than 600 feet of the 4,500-square foot workshop, because the
16 maintenance operation necessarily requires tools, machinery and supplies, and the space to
17 store and use them in. Record 109; *see also* Record 411 (photograph of workshop interior
18 showing tools and equipment).

19 The city’s findings do not address this issue, other than to recite that a condition of
20 approval limits truck maintenance operations in the workshop to 600 square feet. Record 10.
21 The city argues that that condition is sufficient to ensure compliance with ICDC 10.07(B).
22 We disagree. Given the undisputed evidence that (1) each truck occupies 600 square feet and

² Substantial evidence is evidence a reasonable person would rely on in making a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993). In reviewing the evidence, LUBA may not substitute its judgment for that of the local decision maker. Rather, LUBA must consider all the evidence to which it is directed, and determine whether based on that evidence, a reasonable local decision maker could reach the decision that it did. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988).

1 (2) the truck maintenance operation requires additional space for storage, tools, machinery
2 and the space to use them in, no reasonable person could conclude that it is possible for the
3 truck maintenance operation, as proposed, to comply with the 600 square foot limitation in
4 ICDC 10.07(B). Given the undisputed evidence, simply imposing a condition of approval
5 requiring compliance with ICDC 10.07(B) is insufficient to ensure compliance with that
6 standard.

7 **B. Business Office**

8 In the 2010 home occupation application, intervenor proposed conducting secretarial
9 and office functions for the commercial trucking operation inside the dwelling, in addition to
10 conducting truck maintenance in the workshop. Record 373, 377. As noted, ICDC 10.07(B)
11 allows the home occupation to be located either in an accessory structure or the dwelling, but
12 not both. In the present application, intervenor stated that “no business office space is needed
13 onsite.” Record 71. During the proceedings below, petitioners questioned the assertion that
14 no business office functions would occur on the subject property, given the prior proposal to
15 locate office functions in the dwelling. Petitioners speculated that intervenor intends to
16 continue to conduct office functions in the dwelling, in addition to maintenance functions in
17 the workshop, in violation of ICDC 10.07(B). Alternatively, petitioners suggest that
18 intervenor will maintain an office in the workshop, but in that case the space devoted to
19 office equipment, filing cabinets, etc., would have to fit within the 600 square foot limitation.
20 As discussed above, the record does not support a finding that the truck maintenance
21 operation, much less an office, can fit within the 600-square foot limitation.

22 The only city council finding on this point simply reiterates intervenor’s statement
23 that “he will not have a home office” and that “600 square feet of the workshop will be used
24 for truck maintenance activities.” Record 10. The city council did not impose any conditions
25 directed at the location of office functions or equipment.

1 The city responds that a commercial trucking business does not necessarily require a
2 home office, and all business functions can be accomplished using a mobile telephone and a
3 laptop computer, operated entirely within the accessory structure. That may be so, but the
4 city cites no evidence in the record on that point. The record is silent regarding the location
5 and characteristics of the office functions of intervenor’s commercial trucking operation. It
6 may be that all office functions and equipment will be located off-site, as intervenor’s
7 statement suggests. Or it may be that some or all office functions and equipment will be
8 located in the accessory structure. However, if so, such functions and equipment would have
9 to comply with the 600-square foot limitation, which based on the current record will be
10 difficult if not impossible.

11 Given (1) the undisputed evidence that office functions and equipment for the
12 commercial trucking operation have been located on the property, (2) the complete absence
13 of evidence regarding where proposed office functions and equipment will be located in the
14 future, and (3) the problematic 600-square foot limitation that applies to the workshop—
15 which is the only lawful place on the property where an office for the home occupation could
16 be located—we agree with petitioners that remand is necessary for the city to address the
17 issue and, at a minimum, impose conditions sufficient to ensure that any office functions on
18 the property will be consistent with ICDC 10.07(B).

19 The first, second and sixth assignments of error are sustained.

20 **FIFTH ASSIGNMENT OF ERROR**

21 ICDC 10.07(A) provides that the home occupation “shall be secondary to the main
22 use of the property as a residence.” The city council found that the commercial truck
23 operation is secondary to the residential use of the property, based on the fact that intervenor
24 and his family reside in the dwelling, no customers or sales are allowed on site, no sign is
25 proposed, and the imposition of ten conditions that limit the location, time and activities
26 associated with the commercial trucking operation. Record 10.

1 Petitioners disagree with that conclusion, arguing that by any empirical measure the
2 commercial trucking operation is the main use of the property. However, petitioners' mere
3 disagreement with the city's conclusion does not establish a basis for reversal or remand.
4 Petitioners have not established that no reasonable person could conclude, as the city council
5 did, that as conditioned the home occupation is secondary to the main use of the property as a
6 residence.

7 The fifth assignment of error is denied.

8 **SEVENTH ASSIGNMENT OF ERROR**

9 ICDC 10.07(C) provides that “[s]tructural alterations shall be minimized and shall not
10 detract from the outward appearance of the property as a residential use.” Petitioners argue
11 that the 4,500 square foot workshop permitted and built in 2008 is a “structural alteration”
12 that detracts from the outward appearance of the property as a residential use, in violation of
13 ICDC 10.07(C).

14 The city responds, and we agree, that the city's decision approved no structural
15 alterations, and petitioners cannot challenge in this appeal the 2008 building permit
16 approving the workshop.

17 The seventh assignment of error is denied.

18 **EIGHTH ASSIGNMENT OF ERROR**

19 ICDC 10.07(D) provides that “[n]ot more than one person other than the immediate
20 family residing in the dwelling is to be engaged in the home occupation.” As noted,
21 intervenor proposed that one full-time mechanic would be engaged on the site. Petitioners
22 argued below that intervenor's other five employees, his truck drivers, would also be engaged
23 on-site, for example when delivering or picking up trucks, or dropping off paperwork, and
24 thus there will be times when there are at least two non-family employees on-site, in violation
25 of ICDC 10.07(D)

26 The city council's findings state:

1 “The Council received testimony that multiple employees have been observed
2 on site, and the applicant’s company employs at least 5 people. The applicant
3 proposes to employ one on-site employee, and lives on site. The Council
4 interprets this standard to limit on-site (i.e. home occupation) employees, not
5 total employees for a business. With the Council’s adopted condition that no
6 more than one commercial truck will be allowed on-site at any time, this
7 standard can be met.” Record 11.

8 The city council thus relied on Condition 6, which prohibits more than one commercial truck
9 on the premises at any one time, to ensure that the one employee requirement is met.
10 However, neither that condition nor any other condition cited to us addresses the problem
11 posed by petitioners: if there is one full-time mechanic on site, then any other employees that
12 come onto the property, for example to deliver or pick up trucks, will result in two non-
13 family employees engaged on the site, in violation of ICDC 10.07(D).³

14 In its response brief, the city notes that during a city council hearing the city attorney
15 discussed the problem posed by petitioners, argued that the problem could be avoided by
16 having intervenor pick up and deliver the trucks to the site himself, and suggested a condition
17 of approval to that effect. Record 39. However, the city council did not impose any
18 condition regarding truck drivers, or indeed any express condition addressing or limiting the
19 number of employees on the site. The only condition that touches on the number of
20 employees is Condition 2, which states that “[a]ny modification in scale or scope of the use,
21 including but not limited on-site loading/offloading of commodities, *additional vehicles or*
22 *employees*, or materials vending, shall require a review of this permit through the public
23 hearing process by the City Council.” Record 13 (emphasis added). The city argues that
24 because the application proposed only one non-resident employee on-site, Condition 2
25 effectively limits the number of employees on-site to one, and thus Condition 2 implicitly

³ Petitioners also argue that vendors coming onto the property to make deliveries should be counted as persons “engaged in the home occupation” for purposes of the ICDC 10.07(D) “one-person” limitation. However, petitioners do not explain why third-party vendors must be viewed as persons “engaged in the home occupation” under ICDC 10.07(D), and we reject the suggestion.

1 prohibits intervenor’s other employees from delivering or picking up trucks on the property if
2 such would violate the one-employee limitation.

3 We disagree with the city. While the application proposed one full-time mechanic
4 employed on the property, nothing cited to us in the application addresses how trucks will be
5 delivered or picked up, or by whom. If the application is silent on that point, then Condition
6 2 cannot be construed to implicitly prohibit intervenor’s other employees from delivering or
7 picking up trucks on the property. We agree with petitioners that the record and conditions
8 are insufficient to ensure that the approved home occupation will comply with the one non-
9 resident employee limitation in ICDC 10.07(D).

10 The eighth assignment of error is sustained.

11 **NINTH ASSIGNMENT OF ERROR**

12 ICDC 10.07(E) provides that “[n]o materials or mechanical equipment shall be used
13 which are detrimental to residential use of the dwelling or adjoining dwellings because of
14 vibration, noise, dust, smoke, odor, interference with radio or television reception, or other
15 factors.” The city’s findings addressing ICDC 10.07(E) state, in relevant part:

16 “The applicant proposes to load/offload trucks offsite. To limit noise impacts
17 from truck maintenance, Council adopted a condition of approval limiting
18 maintenance work involving machinery to occur only inside the garage, and
19 only during working hours.

20 “The Council heard testimony that working-hour activities related to vehicle
21 maintenance will be detrimental to existing and adjoining residential uses.
22 The Council notes that normal daytime activities within 300 [feet] of the site
23 include operation of farm equipment, power tools, tractors, riding
24 lawnmowers, and industrial machinery, as well as commercial truck traffic
25 related to active industrial uses. The Council finds that daytime operations
26 under adopted conditions of approval will be compatible with existing and
27 nearby residential uses, and consistent with the character of the neighborhood.

28 “To limit noise and glare impacts from truck movements during the hours of
29 6pm to 8am, Council adopted a condition restricting truck onsite truck
30 maneuvering during non-working hours to an area within 100 [feet] of
31 Buchanan Lane. This would limit non-working hour truck impacts to a

1 location near to and across the street from active industrial uses and several
2 hundred feet away from neighboring residences.

3 “With adopted conditions of approval, the Council finds the applicant will not
4 cause substantial detrimental levels of noise, vibration, dust or other factors.
5 The Council finds this standard can be met with the adopted conditions.”
6 Record 11-12.

7 Petitioners challenge these findings, disputing the city council’s comparison between
8 occasional noise from power tools and riding lawnmowers in the residential neighborhood
9 with the continual noise of a commercial truck maintenance facility operating six days per
10 week for up to ten hours per day. The city responds that the findings also compared noises
11 from farm uses in the area, truck traffic on Buchanan Lane, and industrial uses across the
12 street from the subject property. The city cites to testimony from the owner of the industrial
13 property that noise from his property is louder than noise from intervenor’s trucking
14 operation. We agree with the city that the findings regarding noise during business hours are
15 supported by substantial evidence.

16 Petitioners also dispute the conclusion that the condition allowing truck maneuvering
17 between the hours of 6:00 p.m and 8 a.m. in an area within 100 feet of Buchanan Lane will
18 avoid detrimental levels of noise, glare and vibration. According to petitioners, allowing
19 diesel trucks to operate in the quiet of the middle of the night, within a few hundred feet of
20 residences, will have a detrimental impact on residential uses. The city offers no focused
21 defense of this finding, or the condition it refers to. Condition 9 states that “On-site
22 commercial truck parking, start-up, and driving shall be limited to areas south of the shop and
23 north of Buchanan Lane during the hours of 6pm to 8am[.]” Record 13. This condition is
24 apparently intended to allow a truck parked on the site to be started up and driven off the site
25 early in the morning. Record 9 (relying on Condition 9 to satisfy a site review criterion
26 requiring mitigation of impacts, by limiting early morning start-ups and driving to the area
27 close to the road); *see also* Record 396 (testimony that trucks are dispatched from the
28 property beginning at 3 a.m.).

1 However, Condition 9 is not limited to early morning hours, but allows parking, start-
2 up and driving at any time of night. The city’s findings state that Condition 9 will limit “non-
3 working hour truck impacts to a location near to and across the street from active industrial
4 uses[.]” However, it seems unlikely that any “active industrial uses” occur in the middle of
5 the night at the property across the street, and no party cites any supporting evidence in the
6 record on that point. It also seems unlikely that there is much night-time truck traffic on
7 Buchanan Lane. We understand petitioners to assert that the sound of a diesel truck starting,
8 warming up, and driving off the property at night or early in the morning, when there are no
9 other sounds to mask it, would be audible at their residence even several hundred feet away,
10 and detrimental to quiet enjoyment of their property. As noted, the city offers no response to
11 that assertion or cites to any evidence supporting the city’s findings regarding the truck
12 operations allowed by Condition 9 during non-business hours. We agree with petitioners that
13 the record and findings do not establish that the on-site truck operations authorized by
14 Condition 9 during non-business hours are consistent with ICDC 10.07(E).

15 The ninth assignment of error is sustained in part.

16 **THIRD ASSIGNMENT OF ERROR**

17 The city’s decision also approves a site design plan for the proposed home
18 occupation. ICDC 12.04 sets out the site design review criteria. In relevant part, ICDC
19 12.04(C) requires a finding that “[t]he site is appropriate for the proposed use, considering
20 neighboring land use, adequacy of transportation and access, site size and configuration, and
21 adequacy of public facilities necessary to support anticipated development.” The city council
22 found that, as conditioned, the site is appropriate for the proposed use.

23 Petitioners dispute that conclusion, arguing that a commercial truck operation and
24 maintenance facility is inappropriate for a rural residential neighborhood, no matter how
25 conditioned. However, petitioners merely express disagreement with the city’s decision on

1 this point; petitioners do not identify any legal error, evidentiary insufficiency or other basis
2 for reversal or remand.

3 The third assignment of error is denied.

4 **FOURTH ASSIGNMENT OF ERROR**

5 ICDC 12.04(D) and (E) require findings that:

6 “(D) **Impacts on Neighborhood.** Identified adverse impacts on
7 neighboring property owners can be mitigated by conditions of
8 approval. Such conditions shall be clear and objective and readily
9 administered by City staff. If complex conditions of approval are
10 required, this is an indication that the proposed use may be
11 inappropriate for the proposed site.

12 “(E) **Impacts on Community.** Identified adverse impacts on the
13 community as a whole have been mitigated through conditions of
14 approval.”

15 Petitioners argue that the city imposed similar conditions in its 2010 home occupation
16 approval, but that intervenor failed to comply with those conditions, and the city consistently
17 failed to enforce them. According to petitioners, the record demonstrates that none of the
18 conditions imposed in the present decision are “readily administered by City staff.”

19 The city responds that the ten conditions imposed in the present decision are
20 significantly more restrictive than the conditions imposed in the 2010 decision, and that each
21 of the ten conditions are clear and objective and readily administered by city staff. The city
22 argues that the 2010 decision never became effective, so city staff had no chance to
23 administer the conditions imposed by that decision. Further, the city argues that if intervenor
24 fails to comply with any condition, and petitioners are dissatisfied with city staff
25 administration of those conditions, the city’s code allows petitioners to file a code
26 enforcement action.

27 We agree with the city that petitioners have not demonstrated that the ten conditions
28 imposed in the present decision are not “readily administered by City staff.” The conditions
29 set out reasonably clear and objective limitations, almost all of them restrictions on outdoor

1 activities that can be readily observed and verified, by city staff or petitioners. ICDC
2 12.04(D) is not concerned with whether city staff are willing or unwilling to administer the
3 conditions, only whether the conditions are clear and objective and readily administered by
4 staff. As the city notes, if petitioners believe that city staff are not enforcing the conditions,
5 petitioners may institute a code enforcement proceeding.

6 The fifth assignment of error is denied.

7 The city's decision is remanded.

8 Holstun, Board Member, concurring.

9 City zoning ordinances commonly allow home occupations, and by adopting ORS
10 215.448, the legislature has authorized all counties to permit them. But neither ORS 215.448
11 nor most city zoning ordinances that authorize home occupations set any sideboards on the
12 kinds of uses that may be proposed as a home occupation, beyond imposing standards that
13 must be met for approval. As a result, proponents of home occupations have proposed an
14 incredible variety of uses as home occupations. *Green v. Douglas County*, 63 Or LUBA 200,
15 208-09, *rev'd and remanded* 245 Or App 430, 263 P3d 355 (2011). We now add commercial
16 trucking businesses to that list.

17 In denying the fifth assignment of error, the majority concludes that the city council
18 could reasonably conclude that, as conditioned, the applicant's commercial trucking business
19 will be secondary to the main use of the property as a residence. On this record, I agree with
20 petitioners that to conclude that the proposed commercial trucking business will be secondary
21 to the property's residential use is preposterous, and that a reasonable person would not
22 conclude on this record that the approved commercial trucking business will "be secondary to
23 the main use of the property as a residence." I would sustain the fifth assignment of error.