

**BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON**

SCOTT STEVENS and DEBRA STEVENS,
Petitioners,

VS.

CITY OF ISLAND CITY,
Respondent,

and

JON FREGULIA,
Intervenor-Respondent.

LUBA No. 2014-105

FINAL OPINION AND ORDER

Appeal from City of Island City.

Philip M. Wasley, La Grande, filed a petition for review and argued on behalf of petitioners.

William K. Kabeiseman, Portland, represented the city.

Andrew G. Martin, Ontario, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Yturri Rose LLP.

BASSHAM, Board Member; RYAN, Board Chair; participated in the decision.

HOLSTUN, Board Member, concurring.

REMANDED 05/06/2015

39 You are entitled to judicial review of this Order. Judicial review is

1 governed by the provisions of ORS 197.850.

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a city council decision approving a home occupation permit for a commercial truck business.

MOTION TO FILE REPLY BRIEF

Petitioners move to file a reply brief to address two “new matters” raised in the response brief: (1) an argument whether the city planning official instead of planning staff provided a code interpretation, and (2) an argument regarding how to determine the floor area needed to perform truck maintenance.

Intervenor-respondent (intervenor) argues that neither argument raised in the response brief is a “new matter” warranting a reply brief under OAR 661-010-0039 (limiting a reply brief to “new matters” raised in a response brief). We disagree with intervenor. Intervenor’s arguments on the above two points were not limited to responses to the petition for review, but presented arguably new issues or theories that in our view warrant a reply brief. The reply brief is allowed.

FACTS

This matter is before LUBA for the second time. In *Stevens v. City of Island City*, 68 Or LUBA 112, aff'd 260 Or App 768, 324 P3d 477 (2014), we remanded the city's initial approval of intervenor's application for a home occupation permit for a commercial truck operation, on three grounds. Two of those grounds remain relevant in the present appeal.

Island City Development Code (ICDC) 10.07(B) provides in relevant part that a home occupation must be limited to either an accessory structure or dwelling and, if located within an accessory structure, the home occupation

1 “shall not utilize over 600 square feet of floor area” of the accessory structure.¹
2 Intervenor owns and operates a commercial trucking business, and proposed
3 that portions of the business be operated within a 4,500-square-foot workshop
4 that is an accessory structure to the residence on his residentially-zoned
5 property. Almost all of the proposed home occupation activities within the
6 workshop would consist of maintenance performed on intervenor’s fleet of
7 trucks and trailers.

8 In the original proceeding, the city council found the proposal complied
9 with ICDC 10.07(B), and imposed a condition of approval limiting the home
10 occupation to 600 square feet of floor area. However, we held that that finding
11 was inadequate and not supported by substantial evidence.² In addition, we

¹ ICDC 10.07(B) provides:

“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 located within an accessory structure, the home occupation shall not utilize over 600 square feet of floor area.”

² Specifically, we held:

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

“The city’s findings do not address this issue, other than to recite that a condition of approval limits truck maintenance operations in

1 remanded for the city to consider whether and where office functions for the
2 trucking business would be conducted on the property.³

3 During the remand proceedings, intervenor clarified that no large fuel
4 trailers remain in his fleet, and proposed to maintain only trucks and smaller
5 log and hopper trailers. Intervenor testified that the largest truck/trailer
6 combination that would ever be inside the 4,500 square foot shop at one time
7 would only occupy 332.75 square feet [truck and stinger (251 square feet) +
8 log trailer (81.75 square feet) = 332.75 square feet]. Record 111-12.

the workshop to 600 square feet. Record 10. The city argues that that condition is sufficient to ensure compliance with ICDC 10.07(B). We disagree. Given the undisputed evidence that (1) each truck occupies 600 square feet and (2) the truck maintenance operation requires additional space for storage, tools, machinery and the space to use them in, no reasonable person could conclude that it is possible for the truck maintenance operation, as proposed, to comply with the 600 square foot limitation in ICDC 10.07(B). Given the undisputed evidence, simply imposing a condition of approval requiring compliance with ICDC 10.07(B) is insufficient to ensure compliance with that standard.” 68 Or LUBA at 115-116.

³ We held with respect to the home occupation’s office functions:

“Given (1) the undisputed evidence that office functions and equipment for the commercial trucking operation have been located on the property, (2) the complete absence of evidence regarding where proposed office functions and equipment will be located in the future, and (3) the problematic 600-square foot limitation that applies to the workshop—which is the only lawful place on the property where an office for the home occupation could be located—we agree with petitioners that remand is necessary for the city to address the issue and, at a minimum, impose conditions sufficient to ensure that any office functions on the property will be consistent with ICDC 10.07(B).” *Id.* at 117.

1 Intervenor also has a hopper trailer (320 square feet) and a hopper pup (160
2 square feet), but those would be worked on separately in the shop, never at the
3 same time, and they would be backed into the shop, so that the truck would not
4 be inside the shop at the same time as the hopper or hopper pup and therefore
5 would not count against the 600 square foot limit. Record 112.

6 Inside the workshop are a workbench, a tool chest, and a supply shelf
7 and storage area that intervenor testified would occupy a cumulative total of
8 93.25 square feet of floor area. The workbench, tools, and supplies are located
9 along the interior walls of the workshop, with a large open adjoining space
10 used for parking and performing maintenance on trucks and trailers. Intervenor
11 proposed to limit maintenance activities to oil changes, lubrication, brake
12 maintenance and repairs, and replacement of filters, lights and wheel seals.
13 More extensive repairs or maintenance would be conducted off-site.
14 Maintenance work would be performed by the driver of each truck, with
15 occasional assistance from intervenor. Adding the 332.75 square feet for the
16 largest truck/trailer combination and the 93.25 square feet of floor area for the
17 workbench, a tool chest, supply shelf and storage area, the applicant took the
18 position that the maximum total area of the storage building that would be
19 utilized by the proposed home occupation is 426 square feet. However, during
20 the hearing, the applicant testified that an additional 16 square feet would be
21 utilized when the truck engine head is raised for maintenance. Intervenor's
22 Brief 4. In that circumstance the applicant's estimate of the maximum total
23 area that would be utilized by the proposed home occupation is 442 square feet
24 (426 square feet + 16 square feet).

25 With respect to office functions, intervenor proposed a dropbox within
26 the workshop for his drivers to deliver paperwork, which would be collected by

1 a bookkeeper, but all other office functions would be performed off the
2 property. Intervenor testified that he does not plan to locate an office in the
3 workshop, but if he does, the desk and office equipment would utilize no more
4 than 50 square feet. If that figure is added to the 442 square feet above, the
5 total would be 492 square feet, less than the maximum 600 square feet.

6 In its staff report to the city council, planning staff recommended an
7 approach to determining compliance with the 600-square-foot limitation, by
8 identifying the scope of the home occupation activity and where those activities
9 will occur, and then drawing a box around that portion of the workshop where
10 “the operations activities happen, where the repairs are performed, where tools
11 and equipment are stored, and where the workers need to move while
12 working.” Using that approach, staff speculated that the proposed home
13 occupation would occupy much more than 600 square feet. Record 105.

14 Intervenor proposed a different interpretation, to the effect that only the
15 following square footage is counted toward the 600-square foot limitation:

16 “The amount of floor space physically occupied at any one time
17 during the home occupation, including that floor space which is
18 physically occupied by materials and equipment necessary for the
19 home occupation.” Record 108.

20 Under intervenor’s proposed interpretation, unused or “dead space” in
21 the workshop is not included in calculating floor area utilized by the home
22 occupation. *Id.* Intervenor took the position that if the work space is
23 calculated in this manner, the 600-square foot limitation is satisfied.

24 At a special meeting on August 25, 2014, the city council voted to adopt
25 intervenor’s proposed interpretation. The city planning official issued a notice
26 on August 26, 2014, stating that the city council’s interpretation applies not

1 only to intervenor's application but all future home occupation applications.
2 Record 97.

3 The city council held an evidentiary hearing on the remand proceedings
4 on October 13, 2014. In its staff report, planning staff applied the city council
5 interpretation and estimated that, based on intervenor's testimony regarding the
6 square footage occupied by trucks, trailers, the workbench, tool chest, supply
7 area and equipment, the maximum amount of space physically utilized by the
8 proposed home occupation would not exceed 600 square feet. Record 94.⁴

9 At the hearing, petitioners argued that intervenor failed to account for the
10 amount of space used by the mechanic to perform maintenance operations.
11 Petitioners argued that at least a two-foot work perimeter must be assumed to
12 exist all around the periphery of the largest truck/trailer combination, and in
13 front of the workbench, tool chest, supply shelves, etc., because those floor
14 areas are necessarily used by the mechanic to perform maintenance operations
15 and to access tools and supplies. If such a two-foot work perimeter is assumed,
16 petitioners argued, the proposed home occupation will exceed 600 square feet
17 in floor area. Supplemental Record 8-10.

18 The city council rejected that argument, finding that intervenor
19 "provided testimony that the maintenance activities are performed within the
20 floor space/footprint of the truck and do not require additional space around the
21 footprint." Record 8. The city council rejected petitioners' calculations of the
22 two-foot perimeter needed for the mechanic to work around the truck or trailer,

⁴ Staff arrived at a figure of 426 square feet, a figure that does not include the 16 square feet occupied when the engine head is raised for maintenance or the 50 square feet that would be occupied if applicant elected to have an office on the property in the future.

1 the workbench, etc., as “not credible” and “little more than conjecture.”
2 Record 9. The city council’s decision ultimately concludes that the home
3 occupation will not require more than 600 square feet of floor space within the
4 workshop, and again approved the home occupation permit.

5 This appeal followed.

6 **ASSIGNMENT OF ERROR**

7 Petitioners argue that the city council misconstrued ICDC 10.07(B) and
8 adopted findings not supported by substantial evidence, in concluding that
9 intervenor established that the 600-square foot limitation is met.

10 The city council’s interpretation of ICDC 10.07(B) is set out below:

11 “The City Council interpreted ICDC 10.07(B) as requiring the
12 following in applying the 600 square feet limitation:

13 “The amount of floor space physically occupied at any one
14 time during the home occupation, including that floor space
15 which is physically occupied by materials and equipment
16 necessary for the home occupation.”

17 “The City finds that its interpretation of standard 10.07(B) is
18 consistent with standard 10.07(A) which provides that home
19 occupations are secondary to the primary use of the property as a
20 residence. The City finds that because the home occupation is a
21 secondary use within an accessory structure, an Applicant may
22 have components of the home occupation situated in varying
23 locations within the structure and not be required to include
24 unused/dead space in calculating the 600 square feet. * * *”
25 Record 7.

26 Petitioners challenge the foregoing interpretation, on two grounds.

27 **A. ICDC 2.02**

28 ICDC 2.02 provides a methodology to be used when interpreting
29 ambiguous ICDC provisions. Under ICDC 2.02, the interpreter should first
30 refer to any code, comprehensive plan or relevant statutory or rule-based

1 definitions. If no such definitions are available, the interpreter shall refer to the
2 most recent available edition of Webster’s Collegiate Dictionary. If the term is
3 not defined in the code or dictionary, the “Planning Official shall interpret the
4 meaning of the term.” ICDC 2.02(E). Petitioners contend that ICDC 2.02(E)
5 compels the city council to adopt the planning staff’s interpretation of ICDC
6 10.07(B) set out in the August 25, 2014 staff report to the city council. As
7 noted, planning staff recommended an approach where a box is drawn around
8 all activities associated with the home occupation, and the whole floor area of
9 that box is used to determine compliance with ICDC 10.07(B).

10 Intervenor responds, and we agree, that petitioners misread ICDC
11 2.02(E). That code provision does not require the city council to defer to an
12 interpretation made by the planning official or planning staff, or to end the
13 interpretative process at the planning official’s desk. Where a land use
14 decision is subject to appeal to the city council, as in the present case, it is the
15 city council, as the city’s governing body, which provides the final and
16 authoritative code interpretation. While the city council possibly could choose
17 to adopt a code provision that makes the planning official’s code interpretation
18 the city’s final word on the matter, even where the land use matter is appealed
19 to the city council, ICDC 2.02(E) does not purport to delegate such authority to
20 the planning official.⁵ Nothing in ICDC 2.02 suggests an intent to make the

⁵ The parties dispute whether the planning staff’s interpretation in the staff report to the city council constitutes an interpretation of the “planning official” for purposes of ICDC 2.02(E). We need not resolve that dispute, although we tend to agree with petitioners that an interpretation provided in a staff report (presumably at the direction or under the supervision of the planning official) is an interpretation of the planning official for purposes of ICDC 2.02(E).

1 planning official's interpretation controlling over the city council's
2 interpretation.

3 **B. Inconsistent with the Express Language of ICDC 10.07(B)**

4 As noted, the city council interpreted ICDC 10.07(B) to base calculation
5 of the 600-square foot limitation on areas "physically occupied at any one time
6 during the home occupation," including areas occupied by vehicles or
7 equipment, but not including "unused/dead space."

8 Petitioners argue that to the extent the city council's interpretation of
9 ICDC 10.07(B) does not take into account the space a mechanic needs to work
10 around the truck or trailer, that interpretation is not consistent with the express
11 language of ICDC 10.07(B) and is not "plausible." Petitioners recognize that,
12 pursuant to ORS 197.829(1)(a) to (c), the standard that LUBA must apply in
13 reviewing a governing body's code interpretation is whether the interpretation
14 is inconsistent with the express language, purpose and underlying policy of that
15 provision.⁶ As interpreted by the Oregon Supreme Court, the shorthand
16 question under ORS 197.829(1)(a – c) is whether the governing body's code

⁶ ORS 197.829(1) provides, in relevant part:

"[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:

- "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation; [or]
- "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]"

1 interpretation is “plausible.” *Siporen v. City of Medford*, 349 Or 247, 259, 243
2 P3d 776 (2010). If so, LUBA must affirm that interpretation.

3 Petitioners argue that the key term in ICDC 10.07(B) is the word
4 “utilize,” which Webster’s Collegiate Dictionary defines in relevant part to
5 mean “make use of: convert to use.”⁷ Petition for Review 7. We understand
6 petitioners to argue that the home occupation operations conducted within
7 workshop “make use of” more than the floor area physically occupied by the
8 truck or trailer, the workbench, tool chest, supply shelf and supply area, but
9 also include the floor area occupied, used and needed by the mechanics, drivers
10 and bookkeeper to perform their tasks. Petitioners contend that, to the extent
11 the city council’s interpretation limits the area utilized by the home occupation
12 to the floor area occupied by the truck, trailer, workbench, etc., and fails to
13 account for the floor area used by the employees, the city council’s
14 interpretation is inconsistent with the express language of ICDC 10.07(B) and
15 not plausible.

16 Intervenor responds that the city council’s interpretation *does* take into
17 account the floor area needed for a mechanic to perform maintenance
18 operations. According to intervenor, under the city council’s interpretation the
19 city takes account of all space that is physically occupied by the home

⁷ As noted, ICDC 2.02 sets out the methodology to be used in interpreting ambiguous code language, and in relevant part requires that where no code, plan or statute provides a definition of the code term, the interpreter should refer to the latest edition of Webster’s Collegiate Dictionary. Because no party argues otherwise, we assume that the ICDC 2.02 also supplies the appropriate methodology for the city council to interpret ambiguous code terms, and that the dictionary definition of “utilize” should be applied in interpreting ICDC 10.07(B).

1 occupation, “which would include the space occupied by an employee while
2 they are working no matter where they are at within the building.” Response
3 Brief 14. Intervenor contends that the city council’s interpretation simply
4 rejected the planning staff approach to define a box around all home
5 occupation activities, because that box would include some dead space not
6 utilized by the home occupation. Similarly, intervenor argues, the city council
7 correctly rejected petitioners’ proposed approach in adding a two-foot space
8 around the periphery of trucks and trailers, and before all the workbench and
9 supply areas, etc., because that approach also would include some dead or
10 unused space.

11 We tend to agree with petitioners that any interpretation of ICDC
12 10.07(B) that fails to take into account the square footage of floor area
13 “utilized” by employees in performing home occupation tasks would not be
14 consistent with the express language of ICDC 10.07(B). The proposed home
15 occupation is not a storage facility for vehicles and equipment; its primary
16 function is to perform maintenance *seriatim* on intervenor’s fleet of trucks and
17 trailers. That function is accomplished by the driver/mechanic performing
18 various maintenance tasks on the truck or trailer (changing oil, replacing wheel
19 seals, etc.). The floor area utilized for those maintenance tasks and all home
20 occupation tasks must fit within the 600-square foot limitation, and any
21 interpretation of ICDC 10.07(B) that ignores the floor area utilized by the
22 mechanic to perform maintenance tasks is simply implausible.

23 That said, intervenor appears to be correct that the city council did not
24 adopt the extreme interpretation that petitioners challenge. The city council
25 obviously wished to reject the planning staff “box” approach, and exclude areas
26 that were “unused” by the home occupation, but the findings do not expressly

1 address floor areas that are used by employees or take a clear position on how
2 use of such areas is taken into account in determining whether the home
3 occupation will “utilize” more than 600 square feet of floor area.

4 Nonetheless, it is reasonably clear that the city council believed that
5 floor areas actually used by employees to maintain trucks and trailers must fit
6 within the 600 square foot limitation. As intervenor notes, the city council
7 findings recite testimony that “maintenance activities are performed within the
8 floor space/footprint of the truck and do not require additional space around the
9 footprint.” Record 8.⁸ We discuss that problematic finding below, but for

⁸ The city council findings summarize intervenor’s testimony:

- “1. The trucks and trailers that will be maintained within the workshop occupy less than 600 square feet of floor space. Specifically, the trucks occupy 251 square feet of floor space within the shop, the log trailers occupy 81.75 square feet of floor space, the hopper trailers occupy 320 square feet of space, and the hopper pup trailers occupy 160 square feet. A hopper trailer is backed into the shop, disconnected from the truck and worked on individually.
- “2. The maintenance activities that are performed on the trucks and trailers within the workshop include: changing engine oil, lubrication (grease), brake maintenance and repairs, filter replacement, maintenance and replacement of lights and replacement of wheel seals. *The Applicant provided testimony that the maintenance activities are performed within the floor space/footprint of the truck and do not require additional space around the footprint.* Major repairs and/or work that would require additional space to perform that type of work, such as engine overhauls and major mechanical work are all performed off-site.

1 present purposes we note that that finding would be unnecessary if the city
2 council had interpreted ICDC 10.07(B) to be concerned only with floor area
3 occupied by vehicles or equipment, without regard for the actual maintenance
4 activities that are the main function of the home occupation.

5 As we understand intervenor's position on the meaning of ICDC
6 10.07(B), there is no real interpretative dispute between the parties that ICDC
7 10.07(B) requires the city to take into account the floor area utilized by home
8 occupation employees in performing their functions. The only real dispute is
9 how that floor area is determined, and whether the evidence in the record
10 supports the city's finding that as proposed and conditioned the home
11 occupation will not utilize more than 600 square feet of the workshop. We
12 therefore turn to those questions.

13 The city's findings include almost no discussion of the floor area utilized
14 by employees in performing their home occupation functions. The only
15 exception is the above-quoted finding that intervenor testified that
16 "maintenance activities are performed within the floor space/footprint of the
17 truck and do not require additional space around the footprint." *See* n 8.
18 However, there are several problems with that finding.

19 First, there is no dispute that the proposed home occupation includes
20 more than maintenance activities. It includes functions such as delivery and
21 pickup of paperwork. The dropbox and the floor area associated with its use,
22 although minimal in size, are just as much part of the home occupation as the
23 truck maintenance component. Further, intervenor testified that he does not

"3. The floor space occupied by tools, equipment, supplies and area needed for maintenance activity is no more than 93.25 square feet." Record 8 (italics added).

1 currently maintain an office in the workshop, but may do so, and estimated that
2 the desk and office equipment would occupy 50 square feet of floor area. For
3 those reasons alone, the home occupation as a whole involves more floor area
4 than is required to perform maintenance on a truck or trailer.

5 Second, as far as we can tell intervenor did *not* testify that all
6 maintenance activities are performed within the footprint of the truck or trailer.
7 Intervenor argues that testimony supporting the city council's finding to that
8 effect is located at Record 19 and 120. Record 19 includes intervenor's
9 statement that if the hood of the truck is opened it would take an additional 16
10 feet of space "but no more than a human body would use." However, nothing
11 on Record 19 states or suggests that all maintenance activities are performed
12 within the footprint of the truck or trailer. Record 120 includes intervenor's
13 estimates of the space physically occupied by the truck or trailer, workbenches,
14 etc., but again includes no testimony that all maintenance activities are
15 performed within the footprint of the truck or trailer.

16 Finally, even if such a statement existed in the record, it would not
17 constitute substantial evidence.⁹ No reasonable person could conclude that a
18 mechanic can accomplish all tasks associated with oil changes, lubrication,
19 brake maintenance and repair, and replacement of filters, lights and wheel seals
20 entirely within the footprint of a truck or trailer. At least some maintenance

⁹ 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 tasks would necessarily have to be performed in part while the mechanic is
2 standing, sitting or lying just outside the footprint of the truck or trailer. In
3 addition, in order to use the workbench, and access the tool chest, supply shelf
4 and supply shelves, the mechanic would necessarily have to move to and from
5 those areas and work or stand adjacent to them.

6 We do not understand intervenor to contend otherwise. Instead, as
7 noted, intervenor argues that the record supports the city council's finding that
8 the home occupation, excluding "unused/dead space" but including the floor
9 area occupied and used by employees to perform their functions, fits within the
10 600-square-foot limitation.

11 The problem with that argument is that nothing in the findings addresses
12 how much floor area is "unused/dead space" and how much floor area is used
13 for maintenance and other home occupation activities, and intervenor cites
14 nothing in the record that provides any evidence on those points. Intervenor
15 apparently supplied no estimates whatsoever on how much floor area is
16 "unused/dead space" and how much is used for home occupation activities. As
17 noted, petitioners provided estimates, which assume a two-foot perimeter
18 around the periphery of the truck/log trailer and the workbench, tool chest,
19 supply shelf and supply area. The city council rejected that testimony as
20 conjectural, but neither the findings nor intervenor cite to *any* other estimates
21 in the record.

22 We agree with intervenor that the approach that petitioners argued for
23 below and continue to argue for on appeal—to assume a two-foot perimeter
24 around the periphery of the truck/trailer—is not the only way to estimate how
25 much floor area outside the footprint of the truck or trailer employees use to
26 perform their functions. Such an undifferentiated approach may include

1 “unused/dead space” where no work is actually performed, and therefore space
2 that cannot be considered under the city council’s interpretation. For example,
3 given the limited range of maintenance operations proposed (oil change,
4 brakes, wheel seals, etc.), petitioners have not established that employees must
5 perform maintenance around the entire periphery of the truck or trailer.

6 Nonetheless, because the city council rejected the only evidence in the
7 record on the question of how much floor area is utilized for maintenance
8 operations outside the footprint of the truck/log trailer, the record consequently
9 includes no evidence on that question that the city can rely upon to conclude
10 that the home occupation will not occupy more than 600 square feet.

11 We understand intervenor to argue that specific evidence of how much
12 floor area employees utilize outside the footprint of the truck/log trailer is
13 unnecessary, because a reasonable person could conclude that all home
14 occupation activities can be accomplished within 600 square feet. As noted,
15 the floor area occupied by the footprint of the truck/log trailer, workbench, etc.
16 is 442 square feet. Intervenor argues that leaves 158 square feet of floor area
17 for use by employees to perform all home occupation functions outside the
18 footprint of the truck/log trailer, etc. According to intervenor, there is no
19 evidence in the record (other than petitioners’ estimates, which the city
20 rejected) suggesting that all home occupation functions outside the footprint of
21 the truck/log trailer etc. would use more than 158 square feet.

22 However, it is equally true that there is no evidence in the record
23 suggesting that all home occupation functions outside the footprint of the
24 truck/trailer will use less than 158 square feet, and some reason to believe that
25 it may be difficult or even impossible to do so.

1 As noted, the city council concluded that office equipment occupying 50
2 square feet could be located within the workshop consistent with the 600-
3 square-foot limitation. Adding that 50 square feet for an office brings the total
4 to 492 square feet of floor area occupied by vehicles or equipment (442 plus
5 50), leaving only 108 square feet within the 600 square foot limitation for
6 actual use by employees.

7 In addition, although the city council rejected petitioners' estimates of
8 the space needed around the periphery of the truck/log trailer to perform
9 maintenance, we do not understand intervenor to dispute that employees will
10 use *some* floor area adjacent to the workbench, tool chest, supply shelf and
11 supply area in order to access and use that equipment. Petitioners argued that,
12 assuming a two-foot-wide work space adjacent to the workbench, tool chest,
13 supply shelf and supply area, the floor area necessary to access and use that
14 equipment could in itself total close to 100 square feet. *See* Supplemental
15 Record 9-10. If that estimate is accurate or even reasonably close, then the
16 total floor area used by the home occupation is already bumping up against the
17 600 square foot limitation, even without considering (1) the floor area needed
18 to perform maintenance tasks on the truck or trailer outside their footprints, (2)
19 the floor area needed to walk back and forth between the truck or trailer and the
20 workbench, tool chest, supply shelf and supply area, (3) the floor area needed
21 to access and use the dropbox, or (4) the floor area needed to access and use the
22 office space. Such floor areas are "utilized" by the home occupation under any
23 conceivable understanding of that term. If the city council's "unused/dead
24 space" finding was an attempt to interpret ICDC 10.07(B) not to require that
25 the city account in some way for this temporarily occupied floor area as space

1 that is “utilized” by the home occupation, we reject that interpretation as
2 implausible.

3 We do not mean to suggest that the city must accept petitioners’
4 estimates of how much floor area employees need to use the workbench, etc.
5 However, without *some* evidence in the record regarding how much floor area
6 employees are likely to use in performing truck/trailer maintenance and other
7 home occupation functions, the record does not support the city council’s
8 finding that the home occupation will not utilize more than 600 square feet of
9 floor area in the workshop.

10 Remand is necessary for the city to re-open the record to allow the
11 parties to submit evidence regarding the amount of floor area outside the
12 footprint of the vehicles and equipment that employees are likely to use in
13 performing home occupation functions. On the present record, we agree with
14 petitioners that the city’s finding that the proposed home occupation will not
15 utilize more than 600 square feet in floor area is not supported by substantial
16 evidence.

17 The assignment of error is sustained.

18 The city’s decision is remand.

19 Holstun, Board Member, concurring.

20 The extreme deference that is due the city council’s interpretations of its
21 land use regulations under *Siporen* is, in my opinion, the only reason an
22 interpretation of ICDC 10.07(B) that is not at least very close to the
23 interpretation offered by planning staff *might* be possible. *See n 1.*