

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

4 PHIL HOLSHEIMER, JR., and)
5 GEORGIE HOLSHEIMER,)
6)
7 Petitioners,)
8)
9 vs.)
10)
11 COLUMBIA COUNTY,)
12)
13 Respondent,)
14)
15 and)
16)
17 RONALD W. HUGHES and)
18 MAREN K. HUGHES,)
19)
20 Intervenors-Respondent.)

LUBA No. 94-119
FINAL OPINION
AND ORDER

21
22
23 Appeal from Columbia County.

24
25 Peggy Hennessy, Portland, filed the petition for review
26 and argued on behalf of petitioners.

27
28 No appearance by respondent.

29
30 Robert P. Van Natta, St. Helens, filed the response
31 brief and argued on behalf of intervenors-respondent. With
32 him on the brief was Van Natta & Petersen.

33
34 HOLSTUN, Chief Referee; SHERTON, Referee, participated
35 in the decision.

36
37 KELLINGTON, Referee, concurring.

38
39 REVERSED 11/15/94

40
41 You are entitled to judicial review of this Order.
42 Judicial review is governed by the provisions of ORS
43 197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a county decision approving certain
4 activities associated with a paving business as a home
5 occupation in a rural residential zone.

6 **MOTION TO INTERVENE**

7 Ronald W. Hughes and Maren K. Hughes, the applicants
8 below, move to intervene on the side of respondent in this
9 appeal. There is no opposition to the motion, and it is
10 allowed.

11 **FACTS**

12 Intervenors are the owners of Ponderosa Paving Company.
13 Following complaints about intervenors' use of the subject
14 property to store materials, equipment and vehicles and to
15 carry out other activities associated with Ponderosa Paving,
16 intervenors submitted a request for conditional use permit
17 to allow "parking of vehicles belonging to Ponderosa Paving
18 Inc." Record 79.

19 The subject 2.3 acre parcel is located in the RR-5
20 Rural Residential district. "Home occupations consistent
21 with ORS 215.448" are listed among the "Uses Allowed Under
22 Prescribed Conditions" in the RR-5 district.¹ CCZO 603.5.

¹Some of the county's zoning districts list "conditional uses" and some list "uses allowed under prescribed conditions." The RR-5 district uses the later terminology, but the challenged decision applies criteria governing "conditional uses" set out at Columbia County Zoning Ordinance (CCZO) 1503.5. No party questions that aspect of the challenged decision or argues there is a relevant distinction between "conditional uses" and

1 Home occupations are subject to CCZO 1507 which, as
2 relevant, simply incorporates the statutory requirements set
3 out at ORS 215.448.²

4 The challenged decision explains the county views
5 Ponderosa Paving Company's business as composed of two
6 parts. One part includes the actual paving operations.
7 That part of the business occurs at various locations away
8 from the subject property and involves an undetermined
9 number of employees. The second part, which is the subject
10 of the challenged decision, is composed of the routine
11 administration and bookkeeping functions of the business and
12 storage of the equipment and vehicles and some of the
13 materials used in the paving business. The challenged
14 decision allows operation of this second part of the
15 business on the subject property, to be carried out inside
16 the existing single family dwelling, an existing metal
17 building or in a new "suitable structure (pole building)" to
18 be constructed on the property. Record 73. The vehicles
19 and equipment stored on-site each evening will be moved as
20 needed each morning to sites away from the subject property
21 where Ponderosa Paving is conducting actual paving
22 operations.

"uses allowed under prescribed conditions," and we will assume there is no relevant distinction.

²We discuss the statutory requirements for home occupations, infra.

1 **PRELIMINARY ISSUE**

2 Before turning to the statutory provisions governing
3 home occupations, we address intervenors' contentions that
4 petitioners failed to raise certain issues before the board
5 of county commissioners and, by failing to do so, waived
6 their right to raise those issues before LUBA. See ORS
7 197.763(1); 197.835(2). Intervenors do not contend
8 petitioners failed to raise such issues at any point during
9 the local proceedings. So long as issues are raised before
10 the close of the final evidentiary hearing, such issues may
11 be raised at LUBA. Tice v. Josephine County, 21 Or LUBA
12 371, 376 (1991). Because intervenors do not contend the
13 disputed issues were not raised before the planning
14 commission, we do not consider intervenors' waiver arguments
15 further.

16 **INTRODUCTION**

17 Under ORS 215.448(1):

18 "The governing body of a county * * * may allow *
19 * * the establishment of a home occupation in any
20 zone * * * that allows residential uses, if the
21 home occupation:

22 "(a) Will be operated by a resident of the
23 property on which the business is located;

24 "(b) Will employ no more than five full or part-
25 time persons;

26 "(c) Will be operated in:

27 "(A) The dwelling; or

28 "(B) Other buildings normally associated with

1 uses permitted in the zone in which the
2 property is located; and

3 "(d) Will not interfere with existing uses on
4 nearby land or with other uses permitted in
5 the zone in which the property is located."

6 Although CCZO 1507 repeats the above statutory language, the
7 county is bound by the statute. Weuster v. Clackamas
8 County, 25 Or LUBA 425, 431 (1993). In their first three
9 assignments of error, petitioners allege the disputed home
10 occupation violates ORS 215.448 and the corresponding CCZO
11 provisions because it (1) employs more than 5 persons,
12 (2) is not operated within the dwelling or other buildings
13 specified in ORS 215.448(1)(c), and (3) contrary to
14 ORS 215.448(1)(d), will interfere with existing and
15 permitted uses on nearby land.

16 As an initial point, we note that because the first
17 three assignments of error concern compliance with statutory
18 requirements, the county is not entitled to the interpretive
19 discretion it would otherwise have under ORS 197.829 and
20 Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992). A
21 fundamental disagreement between the parties is the county's
22 determination that the subject home occupation (composed of
23 storage of vehicles, equipment and materials and the conduct
24 of administrative and bookkeeping functions) may be viewed
25 separately from the actual paving business. We turn to that
26 question first.

27 We see no reason why, in the abstract, a particular

1 business operation could not be viewed as having separate
2 and distinct parts. Moreover, so long as those parts of the
3 business operation actually are carried out as a separate
4 and distinct parts, we see no reason why one or more of the
5 parts of the business operation could not be allowed as a
6 home occupation, provided any part of the business operation
7 approved as a home occupation complies with the requirements
8 of ORS 215.448(1). However, where the overall business
9 operation is one that clearly could not be allowed as a home
10 occupation, there must be substance behind the separation of
11 the business operation into parts.³ Otherwise, viewing the
12 business as being composed of more than one part is simply a
13 fiction created to avoid the statutory limitations on home
14 occupations.

15 We have little difficulty agreeing the administrative
16 and bookkeeping functions of Ponderosa Paving Company could
17 be conducted as activities separate and distinct from the
18 actual day-to-day use and storage of the materials,
19 equipment and vehicles to conduct paving operations. If
20 that were the case, and assuming the administrative and
21 bookkeeping activities complied with the standards imposed
22 by ORS 215.448(1), they could be allowed separately as a
23 home occupation. However, viewing the daily use of

³Ponderosa Paving Company, viewed as an integrated enterprise, clearly could not qualify as a home occupation. Its paving activity does not occur within buildings on the subject property and it apparently employs more than five people.

1 materials, vehicles and equipment for paving separately from
2 the daily requirement that some or all of the materials,
3 vehicles and equipment be stored someplace for use the next
4 day is a different question.

5 We reject the county's view of the paving materials,
6 vehicles and equipment as having a separate identity and
7 situs, depending on whether they are actually being used for
8 paving or being stored. There is but one business
9 operation--the use of vehicles, material and equipment to
10 conduct a paving business. The use of the subject property
11 to store the vehicles, equipment and materials overnight
12 does not provide a sufficient basis for characterizing that
13 business operation as being composed of two separate parts.
14 Based on the record submitted in this appeal, the county's
15 attempt to so characterize the daily storage of the
16 materials, vehicles and equipment used by Ponderosa Paving
17 Company is a fiction without substance, invoked to avoid the
18 clear statutory limitations on home occupations.

19 **FIRST AND THIRD ASSIGNMENTS OF ERROR**

20 ORS 215.448(1)(c) requires that the home occupation be
21 conducted within the dwelling on the property or within
22 "buildings normally associated with uses permitted in the
23 zone in which the property is located * * *." The record
24 shows that Ponderosa Paving Company's paving operations
25 occur outside the prescribed structures. Because the
26 challenged decision clearly violates ORS 215.448(1)(c), we

1 sustain the first assignment of error and reverse the
2 county's decision.

3 As previously noted, ORS 215.448(1)(b) requires that a
4 home occupation employ "no more than five full or part-time
5 persons * * *." There is no finding that Ponderosa Paving
6 Company employs five persons or less.⁴ We therefore sustain
7 the third assignment of error.

8 **SECOND ASSIGNMENT OF ERROR**

9 ORS 215.448(1)(c) requires a finding that the proposed
10 home occupation "will not interfere with existing uses on
11 nearby land or with other uses permitted in the zone in
12 which the property is located." In finding the proposed
13 home occupation will not result in such interference, the
14 county considered only the storage and
15 administrative/bookkeeping aspects of the business. This
16 problem aside, petitioners contend they identified traffic,
17 visual and property value impacts that will result in
18 interference with existing uses on nearby land. Petitioners
19 complain that in rejecting their arguments, the county
20 improperly failed to identify the "uses permitted in the
21 zone in which the property is located," and shifted the
22 burden of proof to petitioners to demonstrate such

⁴The county did find that the administrative/bookkeeping and material, vehicle and equipment storage aspects of the business use five or fewer employees. However, we explain supra why at least the material, vehicle and equipment storage aspect of the business operation is not severable from the actual paving part of the operation.

1 interference will occur. Petitioners contend the county
2 should have identified the permitted uses in the zone and
3 required the applicant to produce evidence showing such
4 interference will not occur.

5 The county did not identify the "uses permitted in the
6 zone in which the property is located." For that reason the
7 second assignment of error must be sustained. Further,
8 although the question is a close one, we agree with
9 petitioners that the county improperly shifted the burden of
10 proof. We have explained that recitations in a decision
11 about the lack of evidence presented by opponents of an
12 application for land use approval do not necessarily show an
13 impermissible shifting of the burden of proof. Tucker v.
14 Douglas County, ___ Or LUBA ___ (LUBA No. 94-083, October
15 11, 1994); Zippel v. Josephine County, 27 Or LUBA 11, 30,
16 aff'd 130 Or App 24 (1994). However, we agree the decision
17 in this case indicates the county improperly relied on a
18 lack of evidence submitted by petitioners that the
19 interference prohibited by ORS 215.448(1)(c) will occur.
20 Record 22-23.

21 The second assignment of error is sustained.

22 **FOURTH ASSIGNMENT OF ERROR**

23 Petitioners' argument under this assignment of error is
24 difficult to understand. It appears to replicate arguments
25 presented in the other assignments of error. To the extent
26 it does, it is sustained. To the extent it contends parking

1 of commercial vehicles is not allowed as a conditional use
2 in the RR-5 zone, that contention is irrelevant because the
3 county did not approve the disputed application on that
4 basis.

5 The fourth assignment of error is sustained in part.

6 **FIFTH ASSIGNMENT OF ERROR**

7 One of the standards applicable to conditional uses is
8 CCZO 1503.5(E), which provides:

9 "The proposed use will not alter the character of
10 the surrounding area in a manner which
11 substantially limits, impairs, or precludes the
12 use of surrounding properties for the primary uses
13 listed in the underlying district[.]"

14 Petitioners argue the county findings addressing this
15 criterion are defective because they do not identify the
16 surrounding area considered in performing the analysis
17 required by CCZO 1503.5(E). See Spiering v. Yamhill County,
18 25 Or LUBA 695, 718 (1993). We agree with petitioners.

19 The fifth assignment of error is sustained.

20 **SIXTH ASSIGNMENT OF ERROR**

21 Another conditional use standard, CCZO 1503.5(F),
22 requires that the proposal satisfy "the goals and policies
23 of the Comprehensive Plan which apply to the proposed
24 use[.]" The county concluded no plan goals or policies
25 apply. Petitioners refer to two "plan provisions," that
26 they contend apply to the challenged decision.⁵ Petition

⁵Petitioners' argument is as follows:

1 for Review 21.

2 Where petitioners raise an interpretive issue that is
3 not addressed in the local governing body's decision, this
4 Board is required to remand the decision so that the
5 governing body may interpret its land use regulations or
6 plan in the first instance. Gage v. City of Portland, 123
7 Or App 269, 860 P2d 282 (1993), rev'd on other grounds 319
8 Or 308 (1994); Weeks v. City of Tillamook, 117 Or App 449,
9 453, 844 P2d 914 (1992). However, before a decision must be
10 remanded to provide the interpretation required by Weeks and
11 Gage, petitioners must offer some explanation for why they
12 believe the plan provisions they identify apply in the
13 circumstances presented in the appeal. Petitioners do not
14 do so.⁶

15 The sixth assignment of error is denied.

16 **SEVENTH ASSIGNMENT OF ERROR**

17 Another conditional use criterion is set forth in
18 CCZO 1503.5(G), which requires that "[t]he proposal will not

"Petitioners contend that a number of relevant comprehensive plan provisions apply to the disputed decision, including:

"(1) the requirement to control and limit the adverse impacts of noise (CCCP at 302); and

"(2) dedication of right of way to meet Transportation Plan standards shall be required of any person seeking a conditional use permit (CCCP at 194)." (Emphasis petitioners'.) Petition for Review 21.

⁶We cannot even tell which of the plan provisions concerning noise petitioners believe applies in this case.

1 create any hazardous conditions." Below, petitioners
2 expressed concern about traffic hazards and hazards
3 associated with storage of gasoline, oil and other materials
4 associated with the paving business. As was the case under
5 the second assignment of error, petitioners complain the
6 county's findings cite a lack of evidence that hazards will
7 occur and do not cite substantial evidence showing the
8 applicant has shown that the proposal will not result in
9 hazardous conditions. We agree the county improperly
10 shifted the burden of proof.

11 The seventh assignment of error is sustained.

12 The county's decision is reversed.

13

14 Kellington, Referee, concurring.

15 While I agree with the result, I am concerned about the
16 potential scope of the majority opinion. I write separately
17 to express my understanding of the holding of the majority
18 opinion, although there is dictum in the opinion suggesting
19 a broader sweep.

20 The determination of whether a lawful home occupation
21 exists or is proposed depends upon the composition of the
22 business-related activities conducted from a home. Nothing
23 more and nothing less. In determining the nature of a use
24 and whether it is a home occupation, it is the aggregate of
25 the business activities occurring at the particular dwelling
26 location that are the indicia of the use. There is no room

1 theoretically or otherwise to separate discrete parts of
2 business activities from one another to create a fiction
3 that looks like a home occupation.

4 For example, if one performs bookkeeping activities in
5 one's home for the local grocery store, that does not mean
6 such a person is running a grocery store out of the home.⁷
7 On the other hand, if the same person begins storing grocery
8 store inventory and distribution trucks begin to frequent
9 the home, then the home occupation transcends a simple
10 bookkeeping business and becomes something more. The focus
11 of the inquiry does not then become whether the primary
12 business served by the more intensive activities occurring
13 at the home is conducted off-site, or whether, as the
14 majority suggests, there is "substance behind the separation
15 of business operation into parts." What is relevant to
16 determining whether particular business activities
17 constitute a lawful home occupation, are the external and
18 internal indicia of the business activities occurring at the
19 home. As applied here, the external and internal indicia
20 establish that the business activities occurring at the site
21 of the subject dwelling exceed the statutory scope of a
22 permissible home occupation.

⁷This would be the case regardless of whether such a person owned the local grocery store.