

LAND USE
BOARD OF APPEALS
SEP 11 6 28 PM '89

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

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B. J. JOSEPH,)
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Petitioner,)
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vs.)
)
LANE COUNTY,)
)
Respondent,)
)
and)
)
MAJOR DEFOE,)
)
Intervenor-Respondent.)

LUBA No. 89-048
FINAL OPINION
AND ORDER

Appeal from Lane County.

Bill Kloos, Eugene, filed the petition for review and argued on behalf of petitioner. With him on the brief was Johnson & Kloos.

Stephen L. Vorhes, Eugene, filed a response brief and argued on behalf of respondent. With him on the brief was the Lane County Office of Legal Counsel.

P. Scott McCleery, Eugene, filed a response brief on behalf of intervenor-respondent. With him on the brief was Perrin, Gartland, Doyle & Nelson.

SHERTON, Referee; HOLSTUN, Chief Referee; and KELLINGTON, Referee, participated in the decision.

REMANDED 09/11/89

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

1 Opinion by Sherton.

2 NATURE OF THE DECISION

3 Petitioner appeals a decision of the Lane County Hearings
4 Official denying petitioner's application for a special use
5 permit for a home occupation in the Exclusive Farm Use (E-40)
6 zone.

7 MOTION TO INTERVENE

8 Major Defoe moves to intervene on the side of respondent in
9 this appeal proceeding. There is no opposition to the motion,
10 and it is allowed.

11 FACTS

12 Petitioner owns and resides on a 19.6 acre tract of E-40
13 zoned land containing a single family dwelling and a 50 foot by
14 68 foot metal storage building. The property is used for grass
15 seed production. The storage building contains some farm
16 equipment. However, it is also used to conduct petitioner's
17 business, which includes the fabrication and assembly of tanks
18 for spraying water and chemicals, and the mounting of such tanks
19 onto truck bodies. The business employs up to four individuals,
20 including petitioner, all of whom work on the subject property.
21 The adjoining properties are in farm use. There are six
22 dwellings within a quarter mile of the subject property.

23 After the county received a complaint from a neighbor that
24 petitioner's business operation violated the Lane County Land
25 Use and Development Code (Lane Code, or LC), petitioner applied
26 to the county for a special use permit for a home occupation.

1 Petitioner appealed the county planning director's decision
2 denying the permit to the hearings official. On February 13,
3 1989, after a hearing, the hearings official issued a decision
4 denying the permit. Record 81-88. After petitioner filed an
5 appeal of the hearings official's initial decision, the hearings
6 official reconsidered his decision and issued a supplemental
7 decision on March 13, 1989, also denying the permit.
8 Record 66-69. Petitioner filed an appeal of the hearings
9 official's decision to the board of commissioners. On April 12,
10 1989, the board of commissioners issued an order declining to
11 hear petitioner's appeal. This appeal followed.

12 FIRST AND SECOND ASSIGNMENTS OF ERROR

13 "The county erroneously construed the applicable law
14 in applying the Rural Plan policies as a standard for
this decision."

15 "Assuming that Rural Plan Agricultural Policy 8 and
16 Economic Policy 7 are applicable standards for the
17 decision, the county's conclusion that the policies
18 are not complied with is based upon an erroneous
construction of the policies, is not supported by
substantial evidence in the record and is based on
inadequate findings."

19 Under these assignments of error, petitioner argues (1) the
20 approval of special use permits for home occupations is governed
21 only by the provisions of LC 16.212(3)(d), not by policies of
22 the Lane County Rural Comprehensive Plan (plan);
23 (2) Agricultural Lands Policy 8 and Economy of the State
24 Policy 7 are not mandatory approval standards for special use
25 permits for home occupations in the E-40 zone; and (3) the
26 county's determination that the proposed home occupation does

1 not comply with these two plan policies is in error.

2 A. Application of Plan Policies

3 Petitioner argues that application of plan policies to the
4 subject special use permit application is erroneous because
5 nothing makes plan policies standards for the decision.
6 Petitioner cites Grindstaff v. Curry County, 15 Or LUBA 100, 103
7 (1986). According to petitioner, the standards applicable to
8 approval of a special use permit for a home occupation are found
9 only in LC 16.212(3)(d), which does not list "consistency with
10 rural plan policies" as such a standard. Petitioner points out,
11 in contrast, that LC 16.212(5) does specifically require that
12 certain other types of special uses in the E-40 zone be reviewed
13 for consistency with plan policies.¹ Petitioner concludes that
14 without a specific statement in the plan or code that plan
15 policies are approval standards for the subject special use
16 permit, they cannot be applied as such.

17 The county argues that in view of ORS 197.175(2)(d),² a

18 _____
19 ¹LC 16.212(5) provides approval criteria for special uses listed in
LC 16.212(4), including the following criterion:

20 "(a) Compatibility of the use or activities associated with
21 the use with the Agricultural Lands Policies of the Rural
Comprehensive Plan Policies * * *"

22 ²ORS 197.175(2)(d) provides in relevant part:

23 "(2) * * * each city and county in this state shall:

24 " * * * * *

25 "(d) If its comprehensive plan and land use regulations
26 have been acknowledged by the [Land Conservation
and Development] commission, make land use

1 local government need not specifically state in its plan or code
2 that plan policies apply in order for acknowledged plan policies
3 to be applicable to a particular land use decision. The county
4 argues that whether particular plan policies are mandatory
5 approval criteria for specific decisions depends on the text and
6 context of those plan policies. The county cites Bennett v. City
7 of Dallas, 96 Or App 645, ___ P2d ___ (1989) and McCoy v.
8 Tillamook County, 14 Or LUBA 108, 110 (1985).

9 ORS 197.175(2)(d) requires the county's land use decisions
10 to comply with its acknowledged land use regulations and its
11 acknowledged comprehensive plan. Furthermore, the county's plan
12 occupies the preeminent position in the county's exercise of its
13 land use planning responsibilities. Philippi v. City of
14 Sublimity, 294 Or 730, 735, 662 P2d 325 (1983); Baker v. City of
15 Milwaukie, 271 Or 500, 533 P2d 772 (1975). The county has
16 authority to deny a permit for failure to comply with an
17 applicable comprehensive plan provision, even if the permit
18 otherwise complies with all approval standards in the county's
19 implementing ordinances, Liles v. City of Gresham, 66 Or App 59,
20 61, 672 P2d 1229 (1983), if the comprehensive plan provision is
21 a mandatory approval criterion. See Standard Insurance Company
22 v. Washington County, ___ Or LUBA ___ (LUBA No. 87-020,
23 September 14, 1987).³ Therefore, the county's failure to

24
25 decisions in compliance with the acknowledged plan
and land use regulations."

26 ³Whether a particular plan provision is an approval standard applicable

1 specifically list "compliance with plan policies" in
2 LC 16.212(3)(d) as an approval standard for home occupation
3 special use permits does not prevent the county from applying
4 applicable plan approval standards to its decision.⁴

5 This subassignment of error is denied.

6 B. Agricultural Lands Policy 8

7 Agricultural Lands Policy 8 states:

8 "Provide maximum protection to agricultural activities
9 by minimizing activities, particularly residential,
10 that conflict with such use. Whenever possible
11 planning goals, policies and regulations should be
12 interpreted in favor of agricultural activities."

13 Petitioner argues that there is nothing in the text of this
14 policy to suggest it should be applied as an approval standard
15 for the subject special use permit. Petitioner also contends
16 this policy should not be applied as an approval standard for
17 home occupation permits because the county has incorporated
18 specific statutory standards for such uses into its code.
19 Petitioner further argues that the county erred by interpreting
20 this policy to protect agricultural lands, rather than
21 agricultural activities.

22 The county argues that the hearings official used
23 Agricultural Lands Policy 8 as an aid to interpretation of the

24 to a particular type of land use decision depends on the text and context
25 of the plan provision in question. Bennett v. City of Dallas, 96 Or App at
26 648-649, ___ P2d ___ (1989); Grindstaff v. Curry County, 15 Or LUBA at 103-
104; McCoy v. Tillamook County, 14 Or LUBA at 110.

⁴We address the parties' arguments concerning the applicability of
specific plan policies as approval standards under the following
subassignments of error.

1 provisions of the Lane Code concerning home occupations.

2 We do not agree with petitioner's contention that the
3 hearings official relied on Agricultural Lands Policy 8 as a
4 basis for denial of the special use permit. The original denial
5 of the subject special use permit by the county planning
6 director relied, in part, on failure to comply with Agricultural
7 Lands Policy 8. Record 109-110. However, the hearings
8 official's decision states:

9 " * * * [Agricultural Lands] Policy #8 is intended to
10 provide interpretive guidance in cases where
11 agricultural activities may be affected and in the
12 context of the present case (the property is zoned
13 E-40 and several of the approval criteria of Lane Code
14 16.212(3)(d) refer back to the uses allowed in the
15 zoning district) it is clear that the context of the
16 decision clearly makes Policy #8 applicable to
17 situations where agricultural lands may be impacted by
18 non-agricultural uses and activities.

14 "However, even given the above, it is doubtful whether
15 Policy #8 has much relevancy to the present request.
16 The home occupation approval criteria only obliquely
17 address the proposed uses [sic] impact on adjacent
18 agricultural activities. Only where there is an
19 interpretive issue concerning agricultural activities
20 and other uses will this policy have much
21 applicability. And only in those situations will the
22 policy be applied by the Hearings Official."
23 Record 85-86.

20 The hearings official's decision also concludes that "the
21 requested home occupation does not comply with Lane Code
22 16.212(3)(d)(iii), (iv) or (v) and therefore the Directors [sic]
23 denial must be affirmed." Record 88.⁵

25
26 ⁵The only reference to Agricultural Lands Policy 8 in the hearings
official's decision on reconsideration is the following statement:

1 It is clear from the above-quoted portions of the hearings
2 official's decision that he did not rely on noncompliance with
3 Agricultural Lands Policy 8 as a basis for denying the special
4 use permit. Therefore, petitioner's argument under this
5 subassignment of error, even if correct, provides no basis for
6 reversing or remanding the county's decision.

7 This subassignment of error is denied.

8 B. Economy of the State Policy 7

9 Economy of the State Policy 7 provides in relevant part:

10 "New industrial development shall normally take place
11 within adopted Urban Growth Boundaries * * *"⁶

12 Petitioner argues nothing in the text of this policy
13 suggests it should be applied as an approval standard for the
14 subject special use permit. Petitioner points out this policy
15 describes the "normal" pattern for industrial development.
16 According to petitioner, this policy does not preclude the
17 possibility of new industrial development occurring outside
18 urban growth boundaries (UGBs) in certain circumstances, such as
19 under Lane Code provisions for home occupations in rural zones.

20 The county argues approval of a new industrial use outside
21 of a UGB violates Economy of the State Policy 7. According to

22 " * * * In the present case, the Director relied upon
23 Agricultural Lands Policy #8 which, by its plain language, is
24 intended to be applied to the implementation of land use
regulations. * * * " (Emphasis added.) Record 67.

25 ⁶The quoted part of the policy statement is followed by a list of seven
26 exceptions. However, the parties do not contend that any of these
exceptions are applicable to the use proposed in this case.

1 the county, uncontroverted evidence in the record establishes
2 the proposed use is an industrial use and, therefore, Economy of
3 the State Policy 7 does not allow it to be outside a UGB.

4 The hearings official's decision on reconsideration states
5 as follows:

6 " * * * Also applicable is Economy of the State
7 Policy #7, which states that new industrial
8 development shall [emphasis in original] take place
9 within adopted Urban Growth Boundaries. The Director
10 has presented evidence that is persuasive in
11 demonstrating that the applicant's proposed use is
12 industrial in nature. The applicant has not presented
13 any evidence that the proposed use is not industrial
14 in nature or that his request falls within any of
15 Policy #7's exceptions to this mandate. Therefore,
16 the applicant's request can be denied on this basis
17 alone." (Emphasis added.) Record 67.

18 Because the county based its denial, in part, on
19 noncompliance with Economy of the State Policy 7, we must
20 determine whether this policy is an approval standard for the
21 subject special use permit.⁷ By the use of the term "normally,"
22 Economy of the State Policy 7 contemplates that there are
23 instances when new industrial development will not take place
24 within UGBs. We agree with petitioner that Economy of the State
25 Policy 7 is not an approval standard for home occupations in the
26 E-40 zone. Therefore, we conclude that the county erred in
construing this policy to prohibit the proposed use.

⁷The hearings official's decision on reconsideration states that he affirms his earlier decision, except as clarified or modified by his decision on reconsideration. Record 66. Accordingly, we consider the hearings officer's original decision as superseded by his decision on reconsideration, to the extent that the decision on reconsideration modifies the original decision.

1 This subassignment of error is sustained.⁸

2 The first and second assignments of error are sustained in
3 part.

4 THIRD, FOURTH AND FIFTH ASSIGNMENTS OF ERROR

5 "The county erroneously construed the applicable law
6 in LC 16.212(3) (d) (iii) and (iv)."

7 "The county erred in concluding that the structure has
8 not been shown to be one that is normally associated
9 with uses permitted under LC 16.212(2)."

10 "The county erred in concluding that the structure
11 would not otherwise be allowed in the EFU zone."

12 Petitioner argues the county improperly construed the
13 following approval standards for special use permits for home
14 occupations in the E-40 zone:

15 "(iii) [The home occupation] will be operated in a
16 dwelling or mobile home, or other buildings
17 normally associated with uses permitted under
18 LC 16.212(2) above.

19 "(iv) Any structure that would not otherwise be
20 allowed in this zone shall not be allowed for
21 use as a home occupation." LC 16.212(3) (d).

22 Petitioner argues that compliance with these approval
23 standards depends on the nature of the structure in which the
24

25 ⁸Petitioner asks that the decision "be remanded to the county for
26 further consideration based upon the proper construction of the applicable
standards." Petition for Review 15. However, we note that sustaining this
subassignment of error does not in itself form a sufficient basis for
remanding the county's decision. Rather, it merely means that we find one
of the county's bases for denying the special use permit in error. In
order to secure remand of the county's decision, petitioner must
successfully challenge all of the county's grounds for denial. Baughman v.
Marion County, ___ Or LUBA ___ (LUBA No. 88-117, April 12, 1989), slip
op 6; Kegg v. Clackamas County, 15 Or LUBA 239, 244 (1987). We address
petitioner's challenges to the county's other grounds for denial of the
permit under the third through sixth assignments of error.

1 home occupation will be conducted, not on the nature of the use
2 which will be conducted within the structure. Petitioner
3 contends the county's error in interpreting these standards can
4 be generally summarized as "focusing erroneously on the use of
5 this particular structure rather than on the type of structure."
6 Petition for Review 7.

7 Petitioner also argues that the home occupation provisions
8 of LC 16.212(3)(d) are essentially the same as the home
9 occupation provisions of ORS 215.448. Petitioner maintains that
10 ORS 215.448 is enabling legislation which sets minimum standards
11 for approval of home occupations. Petitioner contends the
12 county adopted the statutory standards substantially verbatim.
13 According to petitioner, the legislative history of ORS 215.448
14 shows it was intended to allow, as cottage industries, uses
15 which otherwise would violate land use laws. Petitioner
16 contends construction and use of auxiliary buildings that look
17 like barns or other farm buildings, but are used for cottage
18 industry, is precisely what ORS 215.448 was intended to allow.

19 Petitioner claims that the county improperly interpreted
20 LC 16.212(3)(d)(iii) and (iv) to impose requirements that
21 (1) the building in which the proposed home occupation is to be
22 conducted be substantially devoted to farm use; and (2) any
23 auxiliary building in which the proposed home occupation would
24 be conducted must not require a building permit. Petitioner
25 argues that the county's interpretation of its code to include
26 these requirements effectively prohibits, as a home occupation,

1 any use not otherwise permitted in the subject zone. Petitioner
2 argues that if the statute, and the identical language in the
3 Lane Code, are to have any reasonable meaning, they must be
4 interpreted to allow a broader range of uses than those
5 otherwise allowed in the E-40 zone.

6 The county agrees with petitioner that the purpose of
7 LC 16.212(3)(d) and ORS 215.448 is to allow, in dwellings and
8 "other structures," nonfarm uses not otherwise allowed in the
9 E-40 zone. However, the county contends that under ORS
10 215.448(1)(c) and (3) and LC 16.212(3)(d)(iii) and (iv), such
11 "other structures" must be related to farm use. The county
12 argues that if a structure is predominantly devoted to use for a
13 nonfarm home occupation, it cannot be said to be "normally
14 associated" with farm use. The county also contends, since a
15 structure serving farm use does not require a building permit,
16 if a structure requires a building permit because of an
17 industrial type of use being conducted within it, the building
18 becomes one "normally associated" with an industrial use,.

19 The county also agrees with petitioner that the legislative
20 history of ORS 215.448 indicates it was intended as enabling
21 legislation to allow counties discretion to determine what
22 standards to adopt for home occupations, and how to apply them.
23 However, the county argues that the language of ORS 215.448(3)
24 was adopted by the Senate as an amendment to limit home
25 occupations to existing buildings. According to the county, the
26 clear message of ORS 215.448(3) is that structures not otherwise

1 allowed in a zone cannot be constructed and used for home
2 occupations.

3 The county points out that the hearings official visited
4 the subject property and concluded that the structure in
5 question did not resemble similar buildings in the surrounding
6 area. The county also points out that in Slavich v. Columbia
7 County, ___ Or LUBA ___ (LUBA No. 88-007, May 18, 1988), we
8 upheld the county's denial of a home occupation permit for a day
9 care center, on the ground that contemplated extensive interior
10 remodeling of an existing pole building would change the
11 building's nature such that it would not retain its character as
12 a barn or shed. The county contends that its decision was
13 similarly based on a conclusion that the extensive modifications
14 required to use the subject building for the proposed industrial
15 use would convert the structure into one not "normally
16 associated with an agricultural use," or otherwise allowed in
17 the E-40 zone.

18 The requirements that (1) home occupations be conducted in
19 other buildings "normally associated with uses permitted" in the
20 E-40 zone; and (2) a structure "that would not otherwise be
21 allowed in [the E-40] zone shall not be allowed" for home
22 occupation use are ambiguous. LC 16.212(3)(d)(iii) and (iv). We
23 must determine, as a question of law, the correct interpretation
24 of LC 16.212(3)(d)(iii) and (iv). McCoy v. Linn County, 90
25 Or App 271, 275, 752 P2d 323 (1988). When we review a local
26 government's interpretation of ambiguous terms in its own

1 ordinances, we accord appropriate weight to that
2 interpretation.⁹ However, where county ordinance provisions are
3 drafted to correspond to a state statute, it is appropriate to
4 construe those ordinance provisions consistently with the
5 statute, in light of any available authority for interpreting
6 that statute. McCaw Communications, Inc. v. Marion County, ___
7 Or LUBA ___ (LUBA No. 88-068, December 12, 1988), slip op 17-18,
8 rev'd other grounds, 96 Or App 552 (1989); Goracke v. Benton
9 County, 12 Or LUBA 128, 135 (1984).

10 In this case, the home occupation special use permit
11 approval standards of LC 16.212(3)(d)(i) through (viii) closely
12 parallel the provisions of ORS 215.448(1) through (4).¹⁰ The
13 provisions of ORS 215.448 relevant to this case are as follows:

14 "(1) * * * the home occupation:

15 " * * * * *

16 "(c) Will be operated in:

17 "(A) The dwelling, or

18 "(B) Other buildings normally associated
19 with uses permitted in the zone in
which the property is located * * *

20 " * * * * *

21
22 ⁹We give more weight to a local government's interpretation if that
23 interpretation is based on legislative history to which the local
24 government has special access. McCoy v. Linn County, 90 Or App at 276.
However, the parties to this appeal do not cite any county legislative
25 history concerning LC 16.212(3)(d).

26 ¹⁰The single approval standard added to LC 16.212(3)(d) which does not
have a parallel provision in ORS 215.448 is LC 16.212(3)(d)(vi), that the
home occupation "[w]ill comply with sanitation and building code
requirements."

1 "(3) Nothing in this section authorizes the governing
2 body or its designate to permit construction of
3 any structure that would not otherwise be
4 allowed in the zone in which the home occupation
5 is to be established.

6 " * * * * * "

7 The above statutory provisions are essentially the same as
8 LC 16.212(3)(d)(iii) and (iv).¹¹ No party to this appeal argues
9 that these code provisions should be interpreted differently
10 from the corresponding statutory provisions, and we conclude
11 that LC 16.212(3)(d)(iii) and (iv) were intended to correspond
12 to the extent of the authority granted the county under ORS
13 215.448(1)(c) and (3).¹²

14 Prior to the enactment of ORS 215.448, by Oregon Laws 1983,
15 chapter 743, section 2, the only reference to home occupations
16 in chapter 215 was in ORS 215.213(2)(h), which stated:

17 ¹¹Whereas LC 16.212(3)(d)(iii) is virtually identical to
18 ORS 215.448(1)(c), we recognize that LC 16.212(3)(d)(iv) does differ
19 somewhat from ORS 215.448(3), which is phrased as a limitation on county
20 authority, rather than an approval standard. However, both provisions deal
21 with when a "structure" is "allowed" in a zone in connection with use by a
22 home occupation.

23 ¹²We note that we agree with the parties that ORS 215.448 grants
24 authority to counties to provide for home occupations in their exclusive
25 farm use zoning districts, but does not require counties to do so. The
26 Exclusive Farm Use Statute provides that "home occupations as provided in
27 ORS 215.448" may be established in an exclusive farm use zone. ORS
28 215.213(2)(o) and 215.283(2)(h). Also, we note that counties are free to
29 adopt in their codes standards for approval of home occupations in
30 exclusive farm use zones which are more stringent than required by statute,
31 so long as they do not exceed the authority granted counties by
32 ORS 215.448. See Washington County Farm Bureau v. Washington County, ___
33 Or LUBA ___ (LUBA Nos. 88-104 and 88-105, June 21, 1989), slip op 20-21;
34 Burkey v. Clackamas County, ___ Or LUBA ___ (LUBA No. 88-077, January 13,
35 1989), slip op 7.

1 "(2) The following nonfarm uses may be established,
2 subject to the approval of the governing body or
3 its designate in any area zoned for exclusive
4 farm use:

5 " * * * * *

6 "(h) Home occupations carried on by the resident
7 as an accessory use within dwellings or
8 other buildings referred to in ORS
9 215.203(2) (b) (F) or (G)."

10 The "other buildings" referred to in ORS 215.203(2) (b) (G) were
11 " * * * buildings supporting accepted farm practices." Thus,
12 the law prior to enactment of ORS 215.448 required, in an
13 exclusive farm use zone, that a home occupation be conducted by
14 residents of the property. Furthermore, if the home occupation
15 were in a building other than a farm dwelling, it had to be an
16 accessory use in a building "supporting accepted farm
17 practices."

18 The legislative history of Oregon Laws 1983, chapter 743
19 (HB 2625) indicates that the intent of the legislation was to
20 give counties greater flexibility in allowing home occupations.
21 For instance, there was testimony that HB 2625 would delete the
22 above-quoted ORS 215.213(2) (h) from the exclusive farm use
23 statute because the authority given counties by section 2 of
24 HB 2625 (now ORS 215.448) "is much broader." House Committee on
25 Environment and Energy, April 27, 1983, page 4.¹³ Furthermore,
26 when the chair of the house committee was asked whether what is

¹³The present references in ORS 215.213(2) (o) and ORS 215.283(2) (h) to allowing "home occupations as provided in ORS 215.448" in exclusive farm use zones were added by Oregon Laws 1985, chapter 811, sections 7 and 12.

1 now ORS 215.448(1)(c) would allow "a cottage industry to build a
2 small auxiliary building that looks like a house or barn," the
3 chair responded that this issue had been discussed and the
4 intent was for the bill "to be enabling legislation and to allow
5 the county to determine the rules." House Committee on
6 Environment and Energy, May 20, 1983, page 5.

7 The Senate Committee on Energy and Environment later added
8 to HB 2625 the limitation which became ORS 215.448(3), providing
9 that counties cannot allow "construction of any structure that
10 would not otherwise be allowed in the zone in which the home
11 occupation is to be established." This provision limits the
12 construction of new buildings to house home occupations. It
13 does not affect a county's authority to approve use of existing
14 buildings for home occupations under ORS 215.448(1)(c).

15 We conclude the provisions of ORS 215.448 were intended to
16 depart from the previous statutory standards for home
17 occupations in an exclusive farm use zone which required that
18 the home occupation be an accessory use in a dwelling or other
19 building supporting accepted farm practices. We, therefore,
20 interpret ORS 215.448(1)(c), and LC 16.212(3)(d)(iii), to
21 require only that an existing building proposed for use for a
22 home occupation, be a structure normally found in association
23 with uses permitted in the E-40 zone. Neither the statute nor
24 the Lane Code requires that any part of such building be used
25 for farm use, or for other uses allowed in the E-40 zone,
26 concurrently with its use for the home occupation. In addition,

1 ORS 215.448(3) and LC 16.212(3)(d)(iv) limit the approval of new
2 buildings for use for home occupations in the E-40 zone. They
3 do not impose additional limitations on the use of existing
4 buildings in the E-40 zone for home occupations.¹⁴

5 We now consider whether the county applied a correct
6 interpretation of LC 16.212(3)(d)(iii) and (iv) in making its
7 decision. The hearings official's decision on reconsideration
8 provides as follows:

9 "Lane Code 16.212(3)(d)(iii)

10 " * * * * *

11 "The applicant is asking the Hearings Official to
12 ignore the clear intent of the home occupation
13 regulation. This intent is to allow a land owner to
14 use his residence or assessor's [sic] building to
15 operate a small business if sufficient space is
16 available. Its intent is not to allow the erection of
17 a structure that has no substantial relationship to
18 the residential or agricultural use of the property
19 and to use that structure for a use not otherwise
20 permitted in that zoning district.

16 " * * * * *

17 "The applicant does not need to worry about the
18 application of vague standards to determine if the
19 building housing the home occupation is 'normally
20 associated with other uses permitted under LC
21 16.212(2)' because the Hearings Official will give her
22 an objective standard. The building must be
23 substantially devoted to a use normally associated
24 with a use allowed by LC 16.212(2). This is a
25 commonly applied standard applied by local governments

24 ¹⁴We note the county's decision in this case denies permission to use
25 the existing metal storage building on the subject property for the
26 proposed home occupation. It does not purport to deny permission to
construct the metal storage building. Indeed, the parties do not raise any
issue concerning how the metal storage building came to exist on the
property in the first place.

and the courts.

1
2 "Applying the above standard to the present request,
3 the Hearings Official finds that the applicant's
4 structure, which is intended to house the proposed
5 home occupation, is not one normally associated with
6 uses permitted under LC 16.212(2). Relatively little
7 farm equipment is stored in the building and none of
8 it has been used to farm the subject property. The
9 magnitude of the proposed industrial use dwarfs the
10 use of the structure for agricultural storage
11 purposes; in terms of numbers, floor area utilized,
12 estimated value of equipment and almost any other
13 standard worth mentioning.

14 "The Hearings Official affirms his conclusion that the
15 proposed home occupation violates Lane Code
16 16.212(3)(d)(iii)." (Emphasis added.) Record 67-68.

17 "Lane Code 16.212(3)(d)(iv)

18 " * * * * *

19 "The Lane County Building Inspector has testified that
20 any agricultural use, no matter how sophisticated or
21 mechanically involved, may be constructed [sic] with an
22 agricultural building permit. A dairy, a winery, an
23 electronically monitored pig-feeding operation are all
24 permissible operations needing just an agricultural
25 placement permit to authorize their construction. The
26 Building Inspector has further testified that the
applicant's proposed use is industrial in nature and
the storage structure would need a building permit
before it may house such a use. * * * "

" * * * * *

"The home occupation criteria, especially subsections
(iii) and (iv) of Lane Code 16.212(3)(d), must be
applied with common sense. The applicant may utilize
her on-premise dwelling for the 'office' component of
the home occupation since the residential use of that
structure would predominate over the business use of
the structure. In terms of the structure housing the
proposed use, however, the industrial use is clearly
predominant, both in terms of area and utilization of
that structure. The necessity of a building permit
for the industrial use of the structure also shows
that its agricultural use has become subservient to
the industrial. For these reasons, the Hearings
Official finds that the structure housing the proposed
home occupation is not one allowed within the E-40

1 district." (Emphasis added.) Record 68.

2 The above findings demonstrate that the county interpreted
3 both LC 16.212(3)(d)(iii) and (iv) to require the building in
4 which the home occupation was proposed to be conducted be
5 substantially or predominantly devoted to agricultural use.
6 Furthermore, the county concluded the proposed home occupation
7 failed to comply with these Lane Code provisions because it
8 found that the subject metal storage building was proposed to be
9 used predominantly for the home occupation.¹⁵ The county
10 applied an erroneous interpretation of LC 16.212(3)(d)(iii) and
11 (iv) in finding noncompliance with these standards.

12 The third, fourth and fifth assignments of error are
13 sustained.

14 _____
15 ¹⁵In his original decision, the hearings official stated that his "site
16 view did not disclose any similar structures in the surrounding area."
17 Record 86. We reject the county's contention that this statement evidences
18 application of an alternative interpretation of LC 16.212(3)(d)(iii) which
19 does not require the predominant use of the structure housing the proposed
20 home occupation to be agricultural, and constitutes a county determination
that the proposed use also failed to comply with that alternative
interpretation. Read as a whole, the hearings official's original and
reconsidered decisions clearly base his determination of noncompliance with
LC 16.212(3)(d)(iii) on his conclusion that industrial, not agricultural,
use of the metal storage structure would be predominant.

21 We also reject the county's contention that its determination of
22 noncompliance with LC 16.212(3)(d)(iii) was additionally based on a
23 determination that the metal storage building would require such extensive
24 modification for the proposed home occupation that it would no longer
25 constitute a structure normally associated with uses allowed in the E-40
26 zone. See Slavich v. Columbia County, supra. Although the hearings
official's original decision does mention that modifications to the metal
storage building will have to be made in order to qualify for a building
permit for a nonagricultural structure (Record 86-87), it does not indicate
that those modifications would be extensive, or that the building would
lose its original character as a storage building and be transformed into a
type of structure not normally found in the E-40 zone, except in that it
would be used for an industrial home occupation use.

1 SIXTH ASSIGNMENT OF ERROR

2 "The county has erroneously construed the applicable
3 law in LC 16.212(3)(d)(v); its findings and
4 conclusions on this standard are not supported by
substantial evidence in the record and the supporting
findings are inadequate to support the conclusion."

5 LC 16.212(3)(d)(v) establishes the following approval
6 standard:

7 "[The home occupation] will not interfere with
8 existing uses on nearby land or with other uses
permitted under [the E-40 zone]."

9 The hearings official's decision cites two types of interference
10 as bases for his conclusion of noncompliance with
11 LC 16.212(3)(d)(v). We address petitioner's challenges to the
12 county's determination with regard to each type of interference
13 separately below.

14 A. Parking and Traffic

15 With regard to impacts from parking and traffic, the
16 hearings official's decision on reconsideration states:

17 "Based upon the record the Hearings Official found
18 that some of the impacts from the proposed home
19 occupation could not be mitigated. * * * How will the
20 applicant mitigate the delivery of steel every week?
21 While [this] does not impede agricultural practices it
22 currently poses an impact on residential vehicular
23 traffic in the area. To mitigate the parking along
24 the road or backing out into the road after delivery
25 of the steel, the applicant proposes to put in a
26 turn-around. More of this 'agricultural' land will
then be used to accommodate the 'industrial' home
occupation. The tail again wags the dog." Record 69.

Petitioner points out that the hearings official's original
decision found there were "twice-monthly" deliveries of metal to
the subject property, and the impacts of such deliveries could

1 be mitigated. Record 87. Petitioner argues that the
2 conflicting finding in the reconsidered decision that there will
3 be weekly steel deliveries is not supported by substantial
4 evidence in the record. Petitioner further argues that the
5 county's rejection of her mitigation proposal because it would
6 consume agricultural land misconstrues the standard applicable
7 under LC 16.212(3)(d)(v).

8 The county argues that interference caused by the use of
9 agricultural land for the proposed turn-around "includes
10 eliminating the potential for farm uses that would otherwise
11 occur on that land absent the appropriation for industrial
12 related uses." Respondent's Brief 13.

13 The county cites no evidence in support of its finding that
14 there would be weekly steel deliveries to the subject property.
15 The evidence in the record to which we are cited does not
16 support such a finding. While it is clear that the county
17 believes that weekly deliveries would cause interference with
18 residential use of nearby properties, it is not clear that the
19 county would find the same with regard to the twice-monthly
20 deliveries which petitioner concedes occur. Furthermore, we do
21 not understand the county's decision to conclude that
22 interference with residential traffic caused by deliveries of
23 steel to the proposed home occupation cannot be avoided, but
24 rather that the applicant's proposed method of mitigation is
25 unacceptable because it would employ additional agricultural
26 land. However, the use of additional agricultural land to

1 mitigate impacts of the proposed home occupation is not in
2 itself a basis to conclude that the noninterference requirement
3 of LC 16.212(3) (d) (v) is not satisfied.¹⁶

4 This subassignment of error is sustained.

5 B. Noise

6 With regard to noise impacts, the hearings official's
7 original decision states:

8 "The residents of the adjacent parcels to the north
9 and east have complained about the noise created by
10 the applicant's fabricating process. The hammering
11 and the grinding of metal components were explicitly
12 listed as noise considered as interference,
13 particularly when it occurred in the evening. While
14 the hours of operation of the requested home
15 occupation can be regulated, the nature of the noise
16 from the fabrication operation cannot. The shaping
17 and grinding of metal on a continuous basis is not
18 normal for a farm operation. True, farm operators do
19 work on their machinery but it is their own machinery
20 and only during times of maintenance or repair. The
21 requested home occupation is an industrial use with
22 industrial-strength noise generation and, as such,
23 will interfere with adjacent residential uses."
(Emphasis added.) Record 87.

17 The hearings official's decision on reconsideration additionally
18 states:

19 "Based upon the record, the Hearings Official found
20 that some of the impacts from the proposed home
21 occupation could not be mitigated. No indication was
22 given that the industrial noises (grinding, pounding,
23 etc.) could be mitigated to the point that they would
24 be similar in intensity and duration to those
25 agricultural noises in the vicinity. * * *" (Emphasis
26 added.) Record 69.

¹⁶We note that use of agricultural land for the proposed truck
turn-around might violate other standards of the plan or E-40 zone. The
county's decision does not, however, cite noncompliance with any standard
other than LC 16.212(3) (d) (v) as the basis for denial in this regard.

1 Petitioner argues the county misconstrued the applicable
2 standard "by focusing on the nature and the source of the noise
3 (from industrial use rather than farm use) rather than on
4 whether or not the noise generated will actually cause
5 interference." Petition for Review 13. Petitioner also argues
6 that finding complaints about noise were made does not equate to
7 finding the noise causes interference with adjoining uses.

8 Petitioner further argues that the county's finding that
9 noise generated by the proposed home occupation will interfere
10 with adjacent residential uses is not supported by substantial
11 evidence. Petitioner also contends the county's finding that
12 the noise from the proposed home occupation cannot be mitigated
13 is not supported by substantial evidence. Petitioner contends
14 she proposed imposing specific noise standards on the proposed
15 use to mitigate any noise impacts, but the county failed to
16 consider the imposition of such conditions.

17 The county responds that the hearings official's decision
18 "adequately describes the nature of the [noise] interference in
19 the record." Respondent's Brief 13. The county also argues
20 that petitioner fails to point to evidence in the record
21 sufficient to establish there will be no interference with
22 existing uses on nearby lands. Finally, the county argues that
23 the hearings official considered mitigation measures and
24 concluded they would not eliminate interference.

25 The county in several places in its findings refers to the
26 noise from the proposed home occupation as being "industrial in

1 nature" and "not normal for farm operations." Record 69, 87.
2 The county did find that noise from the proposed home occupation
3 "will interfere with adjacent residential uses." Record 87.
4 However, it appears from the portions of the county's findings
5 emphasized above, that the county based its conclusion on an
6 interpretation that LC 16.212(3)(d)(v) prohibits noise which is
7 different in nature from agricultural noise. LC 16.212(3)(d)
8 contemplates that types of uses otherwise not permitted in the
9 E-40 zone may be allowed as home occupations. It is incorrect
10 to interpret LC 16.212(3)(d)(v) to presume that noise which is
11 not agricultural in nature constitutes interference with
12 adjoining uses.

13 In addition, we are cited to no evidence in the record
14 concerning the intensity and duration of the noise produced by
15 the proposed home occupation.¹⁷ Because of this, we must
16 conclude, in any case, that the county's finding that the noise
17 will interfere with adjacent residential uses is not supported
18 by substantial evidence.

19 The sixth assignment of error is sustained.¹⁸

20
21 ¹⁷The hearings official's decision refers to complaints from residents
22 of adjacent parcels concerning noise. Record 87. Neither the decision nor
23 the parties' briefs, however, refer to where in the record such complaints
24 might be found. We will not search the record for evidence to support the
25 county's findings. Oregon State Parks v. City of Portland, 96 Or App 202,
26 205, ___ P2d ___ (1989); City of Salem v. Families for Responsible Gov't.,
64 Or App 238, 249, 668 P2d 395 (1983); Freels v. Wallowa County, ___
Or LUBA ___ (LUBA No. 88-046, November 14, 1988), slip op 7.

25 ¹⁸We emphasize that we express no opinion concerning whether the
26 proposed use satisfies LC 16.212(3)(d)(v). We only decide that the county
misconstrued the applicable standard, and that the evidence in the record

1 CONCLUSION

2 The county denied a special use permit for the proposed
3 home occupation based on determinations of noncompliance with
4 plan Economy of the State Policy 7 and LC 16.212(3)(d)(iii),
5 (iv) and (v). Petitioner has successfully challenged each of
6 those determinations of noncompliance. Under the first and
7 second assignments of error, we concluded Economy of the State
8 Policy 7 is not an approval standard for the subject permit. On
9 remand, the county must apply a correct interpretation of
10 LC 16.212(3)(d)(iii), (iv) and (v) to the special use permit for
11 the proposed home occupation.

12 The county's decision is remanded.

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does not establish that the proposed use violates LC 16.212(3)(d)(v) for
the reasons stated by the county in its findings.

1 CERTIFICATE OF MAILING

2 I hereby certify that I served the foregoing Final Opinion
3 and Order for LUBA No. 89-048, on September 11, 1989, by
4 mailing to said parties or their attorney a true copy thereof
5 contained in a sealed envelope with postage prepaid addressed
6 to said parties or their attorney as follows:

7 Bill Kloos
8 Johnson and Kloos
9 757 Willamette Street
10 Suite 203
11 Eugene, OR 97401

12 William A. Van Vactor
13 Steve Vorhees
14 County Counsel
15 125 East 8th Avenue
16 Eugene, OR 97401

17 P. Scott McCleery
18 Perrin, Gartland, et al
19 44 Club Road, S-200
20 Eugene, OR 97401

21 Dated this 11th day of September, 1989.

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Jan Zwemke
Management Assistant