

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

4 RICHARD STEVENSON and MARLA)
5 STEVENSON,)
6)
7 Petitioners,)
8)
9 vs.)
10)
11 DOUGLAS COUNTY,)
12)
13 Respondent,)
14)
15 and)
16)
17 SANDY K. BRATTON and WAYNE)
18 BRATTON, dba OMEGA RECOVERY,)
19)
20 Intervenors-Respondent.)

LUBA No. 91-213
FINAL OPINION
AND ORDER

21
22
23 Appeal from Douglas County.

24
25 Wallace D. Cegavske, Roseburg, filed the petition for
26 review and argued on behalf of petitioners. With him on the
27 brief was Cegavske, Johnston & Associates.

28
29 No appearance by respondent.

30
31 Randolph Lee Garrison, Roseburg, filed the response
32 brief and argued on behalf of intervenors-respondent.

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

36
37 REVERSED 05/05/92

38
39 You are entitled to judicial review of this Order.
40 Judicial review is governed by the provisions of ORS
41 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal an order of the board of county
4 commissioners approving a conditional use permit for a home
5 occupation.

6 **MOTION TO INTERVENE**

7 Sandy K. Bratton and Wayne Bratton, dba Omega Recovery,
8 move to intervene on the side of respondent in this appeal
9 proceeding. There is no objection to the motion, and it is
10 allowed.

11 **FACTS**

12 The subject property is .93 acres in size, located
13 within a residential subdivision and zoned Rural Residential
14 (RR). Petitioners' residence is immediately adjacent to the
15 subject property.

16 Intervenors-respondent (intervenors) submitted an
17 application for permission to conduct an automobile
18 repossession business from their residence as a home
19 occupation.¹ The automobile repossession business includes
20 the following activities:

21 "Recovered vehicles are, from time to time,
22 temporarily placed on the subject premises. The
23 Applicant recovers vehicles, parking them in her
24 driveway until the vehicles are taken away for
25 disposition at an auction yard. * * * The
26 average length of time that a recovered vehicle

¹The automobile repossession business was established and conducted on the subject property before the disputed application was submitted.

1 remains on the premises is two - four days. Most
2 vehicles are temporarily held over at the subject
3 premises while on their way to be auctioned in
4 Eugene. Some vehicles are auctioned in Portland.
5 The Eugene auction occurs every Thursday. The
6 Portland auction occurs every Thursday. * * *
7 Some vehicles are transported to and from the
8 subject premises on their own power. Other
9 vehicles are transported to and from the premises
10 by tow/hauling truck. The tow/hauling trucks
11 carry a minimum of one vehicle. There was
12 testimony that one truck could carry as many as
13 four vehicles at a time. * * *" Record 5-6.

14 **STANDING**

15 Intervenor's response brief includes an objection to
16 petitioners' standing to appeal the challenged decision to
17 this Board. However, this Board determined petitioners have
18 standing to appeal to this Board, in the context of denying
19 petitioners' request for an evidentiary hearing. Stevenson
20 v. Douglas County, ___ Or LUBA ___ (LUBA No. 91-213, Order,
21 March 17, 1992). We adhere to that determination.
22 Petitioners have standing to appeal to this Board.

23 **FIRST ASSIGNMENT OF ERROR**

24 "The county decision permits a use that would
25 violate the Douglas County LUDO Section
26 3.9.100.9(c), in that a portion of said business
27 is not carried on within the buildings located on
28 the premises."

29 **A. Waiver**

30 Intervenor's argue petitioners waived certain issues
31 raised in this appeal concerning the proposal's compliance
32 with various sections of the Douglas County Land Use and

1 Development Ordinance (LUDO), including LUDO 3.9.100.9(c).²
2 Intervenors argue these issues were not raised below in the
3 same way they are raised in the petition for review.³

4 ORS 197.763(1) provides:

5 "An issue which may be the basis for an appeal to
6 [LUBA] shall be raised not later than the close of
7 the record at or following the final evidentiary
8 hearing on the proposal before the local
9 government. Such issues shall be raised with
10 sufficient specificity so as to afford the
11 governing body * * * and the parties an adequate
12 opportunity to respond to each issue."

13 LUBA's scope of review is limited by ORS 197.835(2), which
14 provides in part as follows:

15 "Issues shall be limited to those raised by any
16 participant before the local hearings body as
17 provided by ORS 197.763. * * *"

18 Intervenors contend petitioners' issues below
19 concerning the parking of repossessed cars outside

²LUDO 3.9.100.9 provides, in relevant part:

"HOME OCCUPTION: Any occupation or profession carried on by a
member of the family residing on the premises, if the
occupation or profession:

* * * * *

"(c) Will be operated in:

"i. The dwelling; or

"ii. Other buildings normally associated with uses
permitted in the zone in which the property is
located * * * [.]"

³Because of our disposition of this appeal, we need only consider
intervenors' arguments concerning waiver of the issue of compliance with
LUDO 3.9.100.9(c).

1 intervenors' dwelling were limited to arguments that the
2 parking of those cars means that a major portion of the
3 business is carried on outside of the dwelling, in violation
4 of LUDO 3.9.100.9(c). Intervenor complain petitioners are
5 precluded from arguing before this Board that the proposal
6 violates LUDO 3.9.100.9(c) simply because parking
7 repossessed cars outside the residence constitutes some part
8 of the business.

9 In Boldt v. Clackamas County, 107 Or App 619, 623, 813
10 P2d 1978 (1991), the Court of Appeals determined the purpose
11 of ORS 197.835(2) and ORS 197.763(1) is to to afford the
12 local decision maker and the parties "an adequate
13 opportunity to respond to each issue." Specifically, the
14 Court of Appeals stated:

15 "[ORS 197.763(1)] requires no more than fair
16 notice to adjudicators and opponents, rather than
17 the particularity that inheres in judicial
18 preservation concepts. Indeed, there would have
19 been no need for the second sentence in the
20 statute if the strict preservation principles
21 petitioner urges had been intended.

22 * * * * *

23 "Moreover, the dynamics of local land use
24 proceedings are not susceptible to the kind of
25 specificity that is required to preserve issues in
26 the courts. One of the objectives of the
27 proceedings is to facilitate citizen input.
28 Presentations are often brief and cursory, and
29 there is no expectation that participants need to
30 or will be represented by counsel in every
31 proceeding. * * *." Id. at 623-24.

32 Petitioners raised below the issue of whether the

1 outside storage of repossessed vehicles violates the
2 LUDO 3.9.100.9(c) requirement that a home occupation be
3 "operated" within a dwelling or within "buildings normally
4 associated with" that dwelling. Whether petitioners may
5 have articulated their concern by arguing that in view of
6 the outside parking of repossessed vehicles, a majority of
7 the proposed business is conducted outside of the dwelling,
8 does not change the fact that petitioners were complaining
9 about the outside storage of repossessed vehicles. We
10 believe petitioners' argument below afforded the county and
11 intervenors adequate notice to respond below to whether the
12 outside storage of repossessed vehicles violates
13 LUDO 3.9.100.9(c). In this appeal proceeding, petitioners
14 may raise the issue of whether intervenors' outside storage
15 of repossessed vehicles violates LUDO 3.9.100.9(c),
16 regardless of whether such outside storage constitutes a
17 major portion of the business.

18 **B. LUDO 3.9.100.9(c)**

19 The challenged decision states, in part:

20 "The Applicant's business will be operated in the
21 Applicant's dwelling. The subject residence has
22 an office area in which the primary business
23 activity is conducted. The primary business
24 activity is conducted via phone, typewriter, files
25 and fax. Under conditions described herein, the
26 parking of vehicles [outside] the residence is
27 merely an incidental and necessary activity of the
28 business, which does not otherwise detract from
29 the business otherwise being operated in the
30 dwelling. A major portion of Applicant's business
31 is not carried on outside of the residence located

1 on the property. The Applicant's request for a
2 Conditional Use Permit does not violate
3 LUDO 3.9.100.9(c)." Record 5.

4 The issue under this assignment of error is whether the
5 county correctly interpreted LUDO 3.9.100.9(c) to allow the
6 outside storage of repossessed vehicles as a "necessary and
7 incidental" part of the proposed home occupation. The
8 interpretation of local ordinances is a question of law
9 which must be decided by this Board. While some deference
10 is due a local government's interpretation of its own
11 ordinances, it is ultimately this Board's responsibility to
12 determine the correct interpretation of disputed code
13 provisions. McCoy v. Linn County, 90 Or App 271, 275-76,
14 752 P2d 323 (1988). Further, this Board may not disregard
15 explicit requirements of mandatory standards, absent an
16 explicit expression in the code to the contrary. See Von
17 Lubken v. Hood River County, 104 Or App 683, 803 P2d 750
18 (1990), adhered to 106 Or App 226, 806 P2d 306, rev den 311
19 Or 349 (1991).

20 LUDO 3.9.100.9(c) requires that a home occupation be
21 "operated in" a "dwelling" or "buildings normally associated
22 with" that dwelling. The operative language of
23 LUDO 3.9.100.9(c) is identical to local code provisions we
24 interpreted in Slavich v. Columbia County, 16 Or LUBA 704
25 (1988). In Slavich the issue was whether a day care center
26 in which an unlimited amount of activity by children and
27 staff was to occur outside of the residence, was properly

1 interpreted as constituting a home occupation "operated in"
2 a dwelling. We determined it was not.

3 Similarly, here, LUDO 3.9.100.9(c) requires a home
4 occupation to be "operated in" a dwelling or other building
5 normally associated with the dwelling. That a comparison of
6 the amount of business activity occurring in the home, with
7 the amount of business activity occurring outside the home
8 establishes that more business is conducted inside than out,
9 does not establish compliance with LUDO 3.9.100.9(c). The
10 challenged decision determines the parking of repossessed
11 vehicles outside of intervenors' residence, until such
12 vehicles are either loaded on trucks for disposal or driven
13 away, is a "necessary and incidental" activity of the
14 proposed business. Unquestionably, the proposed home
15 occupation will not, therefore, be "operated in"
16 intervenors' residence or other buildings normally
17 associated with intervenors' residence. Accordingly, the
18 proposal fails to comply with LUDO 3.9.100.9(c) as a matter
19 of law. Because the proposed use is prohibited as a matter
20 of law, the county's decision must be reversed. OAR 661-10-
21 071(1)(c).

22 The first assignment of error is sustained.⁴

23 The county's decision is reversed.

⁴Because the challenged decision must be reversed in any event, no purpose is served in deciding petitioners' other assignments of error.