

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a county decision granting a home
4 occupation permit for a bed and breakfast inn on property
5 zoned Rural Residential, five-acre minimum (RR-5).

6 **MOTION TO INTERVENE**

7 Russell R. Reichert and Katherine R. Johnson, the
8 applicants below, move to intervene on the side of
9 respondent in this matter. There is no opposition to the
10 motion, and it is allowed.

11 **MOTION TO STRIKE**

12 Petitioners move to strike Exhibits A through E
13 attached to intervenors' brief. Petitioners contend these
14 documents are offered as evidence in support of the
15 challenged decision, but are not included in the record
16 submitted by the county in this matter.

17 Our review of the decision challenged in this appeal is
18 limited to the local government record. ORS 197.830(13);
19 Van Mere v. City of Tualatin, 16 Or LUBA 671, 673 (1988).
20 Intervenors did not object to the record submitted by the
21 county in this matter and do not argue that the disputed
22 documents were placed before the local decision maker.¹

¹None of the disputed exhibits were placed before the decision maker during the local proceedings in this matter. Exhibits B through D, which address the timing of development on the property and issuance of development permits for the dwellings, were prepared after this appeal was filed and, therefore, could not have been placed before the local decision maker prior to the adoption of the challenged decision.

1 Bloomer v. Baker County, 19 Or LUBA 482 (1990); Panner v.
2 Deschutes County, 14 Or LUBA 512 (1986); Lamb v. Lane
3 County, 14 Or LUBA 506 (1985). Intervenors may not fail to
4 object to the record submitted by the county in this matter,
5 and thereafter attempt to supplement the record by attaching
6 to their brief documents that they believe should be
7 included in the record. Van Mere v. City of Tualatin,
8 supra.

9 The motion to strike is allowed.²

10 **FACTS**

11 The subject property includes 19.59 acres. The central
12 issues in this appeal concern the adequacy of access to the
13 property and whether the existing structures on the property
14 were issued required permits.

15 The property is not located on a public right of way,
16 and legal access is provided to the property over an
17 easement. The access easement resulted from litigation
18 between petitioners and intervenors' predecessors in
19 interest. Under the circuit court's decree, the access
20 easement is shared by petitioners and the intervenors and

²Petitioners also move to strike certain arguments contained on two pages of intervenors' brief, because those arguments concern matters that are not included in the record submitted by the county in this matter. That portion of the motion to strike is denied. However, where argument is not supported by evidence in the record, we disregard the argument. Hammack & Associates v. Washington County, 16 Or LUBA 75, 78, aff'd 89 Or App 40 (1987). Intervenors do not identify any evidence in the record supporting the disputed argument, and we therefore do not rely on those facts alleged in intervenors' argument in reaching our decision.

1 crosses property owned by petitioners as well as property
2 owned by intervenors. A single lane driveway is generally
3 located on the easement, but a portion of the driveway is
4 located partially outside the easement, on property owned by
5 Kudlac, a neighboring property owner.

6 There are three dwellings on the subject property. In
7 this opinion, we refer to these dwellings as the main house,
8 the mobile home and the guest cottage. The parties dispute
9 whether the mobile home was first placed on the property
10 prior to the adoption of zoning in 1973. There does not
11 appear to be any serious dispute that the guest cottage and
12 main house were first constructed prior to the adoption of
13 zoning in 1973.

14 Petitioners argue that the guest cottage and main house
15 were subsequently improved at a time when permits were
16 required and that the required permits were not secured.³
17 Intervenors contend the guest cottage was fully converted to
18 its present form prior to the adoption of zoning in 1973 and
19 that all required building permits were secured in
20 conjunction with the 1985 modifications to the main house.
21 As we explain below, the record does not establish whether
22 petitioners' or intervenors' version of the permit history
23 of the disputed dwellings is correct.

³Petitioners argue the guest house was significantly remodeled in the late 1970's or early 1980's. There is no dispute that the main house was remodeled in 1985 to add a second floor and increase the number of bedrooms from two to four.

1 **FIRST ASSIGNMENT OF ERROR**

2 A bed and breakfast inn (hereafter B&B) is allowable as
3 an accessory use to a single family residential dwelling,
4 subject to the limitations imposed on home occupations.
5 Josephine County Zoning Ordinance (JCZO) 1.006(24), 14.100.
6 JCZO 14.100(A) lists twenty separate requirements for home
7 occupations. JCZO 14.100(B) authorizes the county to
8 approve home occupations "notwithstanding [certain
9 requirements of JCZO 14.100(A)]," provided certain findings
10 and requirements set out in JCZO 14.100(B) are met. JCZO
11 14.100(B) therefore provides a way to grant approval for
12 home occupations that would otherwise be denied because they
13 violate certain provisions of JCZO 14.100(A).

14 Citing JCZO 14.100(B)(3), petitioners contend the
15 county failed to demonstrate that the subject property has
16 legal access. JCZO 14.100(B)(3) requires "[a] site plan in
17 conformance with [JCZO] 15.216 through 15.219." Petitioners
18 cite JCZO 15.219(1) and JCZO 15.219(2)(d), (e) and (f) as
19 establishing a requirement that the intervenors establish
20 the existence of legal access to the property.⁴

21 We do not understand the county to have approved the
22 challenged B&B under the provisions of JCZO 14.100(B) for
23 home occupations which do not satisfy certain requirements

⁴Petitioners also cite JCZO 14.112 as establishing a legal access requirement. However, that provision governs land divisions and has no applicability in this case.

1 of JCZO 14.100(A). Therefore, the JCZO provisions cited by
2 petitioners do not appear to be applicable in this case, and
3 violation of those provisions would provide no basis for
4 reversal or remand. However, even if those sections do
5 apply, or other applicable JCZO provisions impose a
6 requirement that the intervenors establish the existence of
7 legal access to the property, the intervenors satisfied that
8 requirement in this case. There is no dispute that the
9 intervenors have an access easement to Williams Highway, a
10 public right of way to the west of the property. That
11 portions of the existing driveway may not be located on the
12 existing easement does not affect the existence of the
13 access easement. Neither is there any suggestion that the
14 existing easement could not be enlarged to include the
15 existing driveway or, if necessary, that the existing
16 driveway could not be relocated so that it would be entirely
17 within the existing easement. We conclude there is
18 substantial evidence in the record to support the county's
19 finding that the subject property has adequate legal access.

20 The first assignment of error is denied.

21 **SECOND ASSIGNMENT OF ERROR**

22 JCZO 8.020(4) allows one single family residence or one
23 mobile home as a permitted use in the RR-5 zone.⁵

⁵JCZO 8.030(4) establishes provisions for allowing "[o]ne additional dwelling," subject to certain requirements. Apparently none of the existing dwellings were approved under this provision.

1 Petitioners contend that because the main house was
2 remodeled in 1985 without the required building permits, it
3 constitutes an illegal additional dwelling. Petitioners
4 argue that, at the very least, the challenged approval must
5 be conditioned on removal of the existing mobile home and
6 guest house. Petitioners also point out that the
7 intervenors expressed an intent to use the guest house in
8 conjunction with the B&B and that the planning commission
9 stated it was not possible to restrict the B&B to the main
10 house.

11 To the extent petitioners are arguing under this
12 assignment of error that the challenged decision improperly
13 authorizes a B&B in a dwelling that violates county
14 permitting requirements, we address that argument under the
15 fourth assignment of error, infra. However, that potential
16 problem aside, the challenged decision merely allows an
17 additional use of the existing main house. It does not, as
18 petitioners suggest, authorize either an additional dwelling
19 or structural alterations to an existing dwelling.
20 Furthermore, although the application at one time proposed
21 use of the guest house in conjunction with the B&B, the
22 challenged decision only approves use of the existing main
23 house for the B&B.

24 The second assignment of error is denied.

1 **THIRD ASSIGNMENT OF ERROR**

2 Before issuing an administrative permit,⁶ JCZO
3 15.229(1)(b) requires that it be demonstrated that several
4 conditions exist, including the following:

5 "The proposed use is consistent with the intent
6 and purpose of the zone in which the property is
7 located and will not exceed the physical
8 capabilities of the land to support the proposal."

9 Petitioners point out JCZO 8.010, the purpose section
10 of the Rural Residential District, states that the densities
11 established for each of the Rural Residential Districts are
12 to assure that development does not exceed the physical
13 capabilities of the land.⁷ Petitioners argue under this
14 assignment of error that because the decision authorizes an
15 additional use for one of three dwellings on the subject
16 property, and the current zoning allows only one dwelling on
17 the property, the density envisioned by the applicable zone
18 is violated and the decision is therefore inconsistent with
19 the intent and purpose of the zone.

20 Petitioners further point out the county previously
21 denied a 1973 request to divide the subject property to
22 create a new five acre parcel for the mobile home on the

⁶JCZO 14.144 establishes specific requirements for B&Bs. JCZO 14.144(1) requires issuance of an administrative permit under JCZO 15.228 through 15.230.

⁷The Rural Residential District establishes minimum lot sizes of one acre (RR-1), two and one half acres (RR-2.5) and five acres (RR-5). As noted earlier, the subject property is designated RR-5.

1 property. That denial was based on lack of the public right
2 of way access required by JCZO 14.112 for land divisions.⁸
3 Petitioners contend the additional traffic that will be
4 carried by the existing access easement results in a
5 violation of JCZO 15.229(1)(b).

6 We reject the first argument for the same reason we
7 rejected the second assignment of error. The challenged
8 decision does not authorize any new dwellings. Petitioners
9 do not argue the more intense use of the existing main house
10 violates JCZO 15.229(1)(b), and the findings and evidence in
11 this case support the opposite conclusion.

12 The second argument concerning additional traffic
13 impacts might provide a basis for arguing JCZO 15.229(1)(b)
14 is violated. However, the county adopted findings
15 specifically addressing JCZO 15.229(1)(b) in its decision
16 and other findings addressing both the potential impacts of
17 the B&B generally and the adequacy of the existing roadway.⁹
18 Petitioners make no attempt to challenge the adequacy of
19 these findings or their evidentiary support. Where a local
20 government adopts findings specifically addressing an
21 approval standard, and adopts other relevant findings

⁸As we previously noted, JCZO 14.112 applies only to land divisions; it does not apply to the challenged decision.

⁹The county's findings at Record 18-19 explain why the county believes there would not be significant impacts on adjoining properties, in view of the nature of the limited additional traffic to be generated by the B&B, distance of existing residences from the road, and the conditions of approval.

1 concerning similar related standards, petitioners may not
2 fail to challenge the adequacy of the local government's
3 findings, or their evidentiary support, and simply allege
4 reasons why they believe the standard might be violated.
5 Williams v. Wasco County, 18 Or LUBA 61, 70 (1989); Vizina
6 v. Douglas County, 16 Or LUBA 936, 944 (1988).

7 The third assignment of error is denied.

8 **FOURTH ASSIGNMENT OF ERROR**

9 **A. Development Permits**

10 Among the requirements for home occupations established
11 by JCZO 14.100(A), is the following:

12 "18. The home occupation shall be conducted in
13 accordance with all local, state, and federal
14 requirements to include proper permits for
15 all structures, sanitation facilities, and
16 water uses."

17 JCZO 15.200 provides that:

18 "No building or structure, subject to the
19 provisions of this regulation, shall be
20 constructed, changed in use, erected, moved,
21 reconstructed, extended, enlarged or altered
22 without first obtaining a development permit from
23 the County Planning Director or his assistants. *
24 * *"

25 Petitioners raised an issue during the local proceedings
26 concerning whether required development permits were secured
27 when the main house was remodeled in 1985. According to
28 petitioners, during the local proceedings they submitted the
29 only development permit issued for the main house; and it is
30 a permit for a two bedroom house, not the four bedroom house

1 that presently exists by virtue of the 1985 remodel.

2 Although the county adopted a finding suggesting that
3 the main house where the proposed B&B would be located has
4 all required permits (Record 14), intervenors cite no
5 evidence in the record supporting that finding. We are
6 unable to locate substantial evidence in the record that
7 required permits were issued.¹⁰

8 We do not mean to suggest that a standard such as
9 JCZO 14.100(A)(18) in all circumstances requires that a
10 local government actually place before the decision maker
11 all development permits ever issued for the structure that
12 will house a home occupation. In the usual case, a written
13 or oral representation by planning staff that all required
14 development permits for a structure proposed for a home
15 occupation were issued would likely be sufficient to
16 constitute substantial evidence of compliance with JCZO
17 14.100(A)(18). McGowan v. City of Eugene, 18 Or LUBA 299,
18 306-07 (1989), aff'd 102 Or App 512 (1990); Foster v. City
19 of Astoria, 16 Or LUBA 879, 891 (1988); Loos v. Columbia
20 County, 16 Or LUBA 528, 540 (1988). This would certainly be
21 the case where there was no testimony or other evidence in
22 opposition to the planning staff position. A more detailed
23 written or oral staff explanation of the existence of all
24 required permits, and the consistency of the proposed home

¹⁰The intervenors' attorney claimed below that all permits had been issued, but provided no evidentiary support for the claim.

1 occupation with those permits, would only be required if the
2 staff position were challenged with sufficient evidence to
3 the contrary.

4 However, in this case there is no planning staff
5 position concerning whether the existing dwelling obtained
6 all required development permits. Further, petitioners
7 clearly raised an issue concerning whether all required
8 development permits for the main house have been issued.
9 Petitioners specifically argued that the 1985 remodel
10 occurred without the required development permits. In view
11 of this focused argument that approval of the requested B&B
12 for the main house would violate the requirement of JCZO
13 14.100(A)(18), the county was obligated to explain why the
14 standard is met. Norvell v. Portland Area LGBC, 43 Or App
15 849, 853, 604 P2d 896 (1979); White v. Oregon City, 20 Or
16 LUBA 470, 477 (1991); Benjamin v. City of Ashland, 20 Or
17 LUBA 265, 270 (1990). We conclude the county's finding that
18 there have been no violations concerning the permits
19 required for the main house is an adequate finding to
20 address the issue raised by petitioners. However, the local
21 record in this appeal does not contain substantial evidence
22 to support that finding.

23 As noted earlier in this opinion, intervenors attach
24 several documents to their brief to establish that all
25 required development permits were issued for the main house,
26 including the 1985 main house remodel. However, those

1 documents are not part of the record and, therefore, they
2 may not be considered by this Board in determining whether
3 the county's finding that the main house has all required
4 permits is supported by substantial evidence in the record.
5 ORS 197.830(13)(a); Van Mere v. City of Tualatin, supra.

6 **B. Other Permits**

7 Petitioners also argue the challenged decision violates
8 the requirements of ORS 215.130(5)-(9) (concerning
9 alteration of nonconforming uses), ORS 215.448(3) (limiting
10 structures that may be approved for home occupations) and
11 JCZO 14.100(A)(8) (prohibiting certain structural
12 alterations for home occupations). We question whether the
13 cited statutory and JCZO provisions are implicated by the
14 challenged decision, particularly if required development
15 permits were issued in 1985. However, we have already
16 determined that the challenged decision must be remanded
17 because the evidentiary record is insufficient to establish
18 compliance with JCZO 14.100(A)(18). If these issues are
19 raised again on remand during the local government
20 proceedings, the evidence submitted to demonstrate
21 compliance with JCZO 14.100(A)(18) may demonstrate that
22 those provisions do not apply; or, if they apply, that
23 evidence may demonstrate that the cited statutory and JCZO
24 provisions are satisfied. We therefore do not consider
25 further the remaining issues raised by petitioners under
26 this assignment of error.

1 The fourth assignment of error is sustained.

2 **FIFTH AND SIXTH ASSIGNMENTS OF ERROR**

3 Under these assignment of error, petitioners argue
4 certain findings adopted by the county are not supported by
5 substantial evidence.

6 Petitioners first challenge a county finding that the
7 circuit court's decree places no restrictions on the
8 intervenors' use of the access easement. Petitioners argue
9 that under the court's decree, the intervenors' use of the
10 easement may not interfere with petitioners' use of the
11 easement.

12 We do not see how the challenged finding is essential
13 to the county's decision. We read the challenged finding as
14 expressing the view that nothing in the court's decree
15 necessarily would prevent approval of a B&B on the subject
16 property. Such appears to be the case. Assuming the county
17 was required to adopt findings addressing the adequacy of
18 the access to the subject property, we have already
19 explained that the county did so. Petitioners make no
20 attempt to challenge those findings and do not explain how
21 the proposed use will interfere with their use of the
22 easement. The unchallenged findings explain why the county
23 believes the easement is adequate to accommodate the needs
24 of both the intervenors and petitioners. We therefore
25 reject this aspect of petitioners' substantial evidence
26 challenge.

1 Petitioners' remaining challenges to the findings are
2 based on the failure of those findings to address the
3 distinction between the easement and the roadway which is
4 generally, but not totally, located on the easement. For
5 the reasons explained earlier we do not fault the county's
6 decision on this point. Again, to the extent findings on
7 the adequacy of access to the subject property are required,
8 the findings adopted by the county are adequate and
9 supported by substantial evidence.

10 Finally, petitioners repeat their challenge to the
11 adequacy of the evidentiary support for the county's
12 findings concerning required permits for the main house
13 where the B&B is to be located. We have already sustained
14 this challenge under the fourth assignment of error and
15 therefore do not consider the arguments further under these
16 assignments of error.

17 The fifth and sixth assignments of error are denied.

18 The county's decision is remanded.