



**NATURE OF THE DECISION**

Petitioners appeal a city hearings official decision concerning a proposed home occupation.

**FACTS**

Intervenor, the applicant below, is a chiropractor who practices out of his existing home near the city’s central business district. Intervenor is building a new home in a residential area in a different location in the city. When questions were raised about intervenor’s plans to see patients in his new home and to operate an internet business in his home offering “nutritional products and services,” intervenor sought a code interpretation from the planning director regarding the propriety of his proposed home occupation.<sup>1</sup> Record 96. Intervenor clarified in letters to the city that he planned to see fewer than five clients per day. Record 100. Intervenor’s internet business receives shipments about once a week and intervenor “drop[s] items off to UPS a few times a week.” Record 94.

The city allows home occupations but they must meet the standards set out at EC 9.5350.<sup>2</sup> The planning director concluded that intervenor’s proposed home occupation would not comply

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<sup>1</sup> Intervenor’s initial building plans showed a clinic and parking for patients in front of the house. The clinic was later shown on intervenor’s plans as a family room and the parking in front was eliminated.

<sup>2</sup> EC 9.5350 provides:

“Home Occupation Standards. Except for garage sales lasting no more than 3 consecutive days no more than 3 times in a year, and day care facilities, which are exempt, home occupations in all residential zones shall be subject to the following standards:

- “(1) The home occupation shall be incidental to the dwelling’s residential use.
- “(2) There shall be no more than 1 non-illuminated sign permitted per each home occupation with a maximum limit of 2 signs per dwelling, consisting of a maximum of 1½ square feet in surface area per sign. The sign shall be attached to the dwelling or home occupation structure.
- “(3) There shall be no activity or display, other than the allowed sign, that will indicate from the exterior of the building that the property is being used for any purpose other than a dwelling.

1 with two of those standards, EC 9.5350(3) and (5). With regard to EC 9.5350(3), the planning  
2 director concluded that because clients would be coming to and from the dwelling and because the  
3 proposed dwelling would have three front doors, it violated the proscription in EC 9.5350(3)  
4 against “activity or display \* \* \* that will indicate from the exterior of the building that the property  
5 is being used for any purpose other than a dwelling.” With regard to EC 9.5350(5), the planning  
6 director found the proposal would violate that standard because it would “generate excessive  
7 traffic.” In reaching that conclusion, the planning director noted that the street serving the proposed  
8 dwelling “ends at the subject property, and is largely unimproved at this point.” Record 34. The  
9 planning director concluded that the “up to five daily clients will generate excessive traffic  
10 considering the existing character of the street.” *Id.*

11 Intervenor appealed the planning director’s decision to the hearings official. The hearings  
12 official concluded that the coming and going of approximately five clients and the home’s three front

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- “(4) There shall be no display of materials visible from the street or outside storage other than plant materials.
  - “(5) The home occupation shall not generate excessive traffic, on-street parking, glare, heat, electromagnetic interference or other emissions that are perceptible beyond the home occupation property. There shall not be regular freight truck delivery more than twice a week.
  - “(6) The home occupation shall not result in any structural alterations or additions to the dwelling that will change its primary use as a dwelling.
  - “(7) The dwelling shall not be used as headquarters for the assembly of workers for instruction or other purposes, including dispatch to other locations.
  - “(8) There shall be a limit of 1 business vehicle per home occupation. In connection with home occupations, a business vehicle is any vehicle that is used in the conduct of the home occupation, or which has the name or logo under which the home occupation activity is conducted, painted or otherwise exhibited on the vehicle.
  - “(9) Other than dwelling residents, there shall be a maximum of 2 employees per dwelling.
  - “(10) Parking shall be provided as required in conjunction with the dwelling.
  - “(11) A resident of the dwelling shall be employed in the home occupation.
  - “(12) There shall be no motor vehicle or motorcycle repair except to vehicles owned by persons residing on the property.”

1 doors did not support a conclusion that the proposed home occupation would violate EC  
2 9.5350(3), “[o]n its face, as the [intervenor] has proposed his home occupation use, there is no  
3 indication that the use will include any activity or display to indicate from [the] exterior of the  
4 building that the property is being used for any purposes other than a dwelling, in violation of EC  
5 9.5350(3).” Record 11.

6 The hearings official also concluded that the small amount of traffic that would be generated  
7 by approximately five clients, during business hours when nearby adult residents would likely be at  
8 work and children would be at school, was not excessive. The hearings official concluded that  
9 “[o]n its face, and as it is proposed, there is no indication that [intervenor’s] home occupation will  
10 generate excessive traffic, in violation of EC 9.5350(5).” Record 13.

11 This appeal followed.

12 **INTRODUCTION**

13 An initial problem in this appeal is the parties’ disagreement about what issues the city’s  
14 decision decides or should have decided. That disagreement can be attributed to ambiguous  
15 language in both the planning director’s decision and the hearings official’s decision. Because a  
16 common understanding of what the challenged decision decides and what the challenged decision  
17 does not decide is necessary to resolve petitioners’ assignments of error, we turn to that question  
18 first.

19 Petitioners refer to the city’s decision in this matter as a “Home Occupation Permit.”  
20 Petition for Review 3. Petitioners understand the city’s decision to authorize intervenor to operate  
21 his proposed home occupation. While there is language in the planning director’s decision and the  
22 hearings official’s decision that lends some support to petitioners’ view of the city’s decision, if those  
23 decisions are viewed in their entirety and in context, it is reasonably clear that both decisions are  
24 much more limited.

1 We do not agree entirely with intervenor’s characterization of the challenged decisions.<sup>3</sup>  
2 However, for the reasons explained below, we conclude that the planning director’s decision  
3 decides *only* that the proposed home occupation would violate EC 9.5350(3) and (5) and that the  
4 hearings official’s decision decides *only* that the proposed home occupation would *not* violate EC  
5 9.5350(3) or (5).<sup>4</sup> Importantly, neither decision decides whether intervenor’s proposed home  
6 occupation would comply with EC 9.5350(1), (2), (4) or (6) through (12).

7 **A. The Planning Director’s Decision**

8 The planning director’s decision was issued in response to intervenor’s “Land Use Code  
9 and Decision Interpretation Request.”<sup>5</sup> Record 82. The planning director’s August 18, 2003  
10 decision includes the following interpretation:

11 ‘Interpretation

12 “The Home Occupation standards in the Eugene Code do not list permitted uses,  
13 and exclude only automobile repair. Long standing City policy is to inform citizens

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<sup>3</sup> For example, intervenor describes the planning director’s and hearings official’s decisions as “advisory” and “nonbinding.” Intervenor’s Brief at 11. However, that description is hard to reconcile with the challenged decision and the procedure that the city followed in this matter to reach that decision. That procedure led to what is essentially a declaratory ruling by the planning director, an appeal of that declaratory ruling to the hearing official, a contested case hearing before the hearings official and a final hearings official decision that included a notice of right to appeal that decision to LUBA and this appeal. It is doubtful that an “advisory” and “nonbinding” city decision would qualify as a “final” city decision, and LUBA only has review jurisdiction over “final” city decisions. ORS 197.015(10)(a); *Hemstreet v. Seaside Improvement Comm.*, 16 Or LUBA 748, 752, *aff’d* 93 Or App 73, 761 P2d 533 (1988); *CBH Company v. City of Tualatin*, 16 Or LUBA 399, 405 n 7 (1988). Because no party moves to dismiss this appeal, and because intervenor’s suggestion that the city’s decision is “advisory” and “nonbinding” is undeveloped and does not appear to be meritorious, we do not consider that suggestion further.

<sup>4</sup> Moreover, those decisions are based on assumed facts and, as far as we can tell, neither decision would necessarily be the same if the assumed facts were different.

<sup>5</sup> EC 9.0040(1) provides:

“The planning director is authorized to interpret this land use code and decisions issued pursuant to this land use code. Requests for interpretations shall be submitted on a written form approved by the city manager and accompanied by a fee established pursuant to EC Chapter 2. Within 10 days of receipt of the written request, the planning director shall make a written interpretation and mail or deliver a copy to the party requesting the interpretation. Appeals of these interpretations shall be heard by a hearings official in the manner set out in EC 9.7600 - 9.7635.”

1 that Home Occupations are permitted as long as the code standards are met. No  
2 permit is required, and the City does enforcement on a complaint basis. Land use  
3 enforcement history has shown that different neighborhoods have varying tolerances  
4 for impacts of home occupations depending on the neighborhood character and the  
5 characteristics of the home occupation. City staff believe[s] the following standards  
6 are applicable to this request.” Record 92.

7 As previously noted, the planning director then identified EC 9.5350(3) and (5) and concluded that  
8 the proposed home occupation would violate those standards. Importantly, the planning director  
9 did not identify any of the other home occupation standards at EC 9.5350(1) through (12), and the  
10 planning director did not consider whether the proposed home occupation would comply with those  
11 standards. While the above-quoted statement that “City staff believe the following standards are  
12 applicable to this request” could be read to suggest that city staff believed the other home  
13 occupation standards were inapplicable or that the proposed home occupation complied with those  
14 standards, we do not understand the planning director’s decision to consider whether the proposed  
15 home occupation would comply with those other home occupation standards. We read the  
16 planning director’s decision simply to identify two standards that the proposed home occupation  
17 violates, without expressing any position on whether the other home occupation standards in EC  
18 9.5350 might also be violated.

## 19 **B. The Hearings Official’s Decision**

20 The hearings official’s decision is a little more ambiguous. It notes the limited nature of the  
21 planning director’s decision:

22 “The Planning Director determined that [intervenor’s] proposed home occupation  
23 will not satisfy EC 9.5350(3) and EC 9.5350(5). The Planning Director’s  
24 interpretation did not address the other Home Occupation Standards set forth in EC  
25 9.5350, and did not otherwise determine [whether] those standards would be  
26 violated by the proposed home occupation. Thus, [the proposed home  
27 occupation’s] compliance with those standards is not at issue here. Rather,  
28 [intervenor] challenges the Planning Director’s interpretation of EC 9.5350(3) and  
29 (5), and the [Planning Director’s] findings that the proposed [home occupation] will  
30 not satisfy those two standards. \* \* \*” Record 31.

1 As previously noted, the hearings official then considered the planning director’s findings that the  
2 proposed home occupation would violate EC 9.5350(3) and (5), and the hearings official adopted  
3 contrary findings, *i.e.*, that the home occupation as proposed would not violate EC 9.5350(3) or  
4 (5). The hearings official’s decision concludes as follows:

5 “The Planning Director’s interpretation that the proposed home occupation will not  
6 satisfy the home occupation standards of EC 9.5350(3) and (5) misinterprets the  
7 use proposed and misconstrues the requirements of the relevant standards. The  
8 [Planning Director’s] interpretation is reversed. *As it has been described, and on*  
9 *its face, the proposed home occupation does not violate the Home Occupation*  
10 *standards of EC 9.5350.”* Record 36 (emphasis added).

11 The emphasized final sentence of the hearings official’s decision can be read to conclude  
12 that the proposed home occupation satisfies all twelve of the EC 9.5350 home occupation  
13 standards. However, if that sentence is viewed in context with the rest of the hearings official’s  
14 decision and the planning director decision that the hearings official was reviewing, it is clear that the  
15 only two standards that either the planning director or the hearings official considered were EC  
16 9.5350(3) and (5). Neither the planning director nor the hearings official ever considered whether  
17 the proposed home occupation might violate the other EC 9.5350 home occupation standards, and  
18 we do not read the final sentence of the hearings official’s decision to conclude that the proposed  
19 home occupation would comply with those other standards.

20 In summary, the city decision that is before us in this appeal finds that intervenor’s home  
21 occupation, as proposed, would comply with EC 9.5350(3) and (5). That decision does not  
22 consider whether intervenor’s home occupation would comply with EC 9.5350(1), (2), (4) and (6)  
23 through (12), and therefore adopts no final city decision regarding whether the proposed home  
24 occupation would comply with those standards.

25 **FIRST AND SECOND ASSIGNMENT OF ERROR**

26 In their first assignment of error, petitioners allege that because intervenor’s proposed home  
27 includes a total of 3,000 square feet and intervenor’s proposed home occupation will occupy  
28 approximately 600 square feet of that total, the proposed home occupation will not be “be

1 incidental to the dwelling’s residential use,” as required by EC 9.5350(1). In their second  
2 assignment of error, petitioners allege that certain improvements incorporated into intervenor’s new  
3 home to accommodate the home occupation violate EC 9.5350(6), which prohibits “any structural  
4 alterations or additions to the dwelling that will change its primary use as a dwelling.”

5 As we have already explained, the hearings official’s decision does not determine whether  
6 the proposed home occupation would comply with the standards set out at EC 9.5350(1) and (6).  
7 If petitioners’ argument is that the hearings official was *required* to render a complete adjudication  
8 concerning whether the proposed home occupation complies with the twelve home occupation  
9 standards in EC 9.5350, they cite no authority for that proposition. While we see no reason why  
10 the planning director could not have rendered a more complete adjudication concerning intervenor’s  
11 proposed home occupation, and considered whether the proposed home occupation would comply  
12 with all twelve of the EC 9.5359 standards, he did not do so. Both the planning director’s and the  
13 hearings official’s decisions were limited to considering whether the proposed home occupation  
14 would violate EC 9.5350(3) and (5). Petitioners’ desire for a more complete adjudication by the  
15 hearings official in this proceeding does not mean the hearings official erred in failing to provide that  
16 more complete adjudication.

17 The first and second assignments of error are denied.

### 18 **THIRD ASSIGNMENT OF ERROR**

19 In their third assignment of error, petitioners allege that the hearings official erred in  
20 concluding that the proposed home occupation would not violate the prohibition in EC 9.5350(5)  
21 that “[t]he home occupation shall not generate excessive traffic.” According to petitioners, the  
22 hearings official failed to take into account that Adams Street, which will provide the only street  
23 access to intervenor’s new home, is an unimproved, steep, dead-end road that lacks sidewalks and  
24 is not maintained by the city. Viewed with that reality in mind, petitioners contend that the planning  
25 director was correct in concluding that the patients that will travel by automobile to intervenor’s  
26 home will constitute “excessive traffic” that unreasonably threatens the children who live on the



1 street, and the hearings official's contrary conclusion is erroneous and lacks adequate evidentiary  
2 support.

3 The relevant part of the hearings official's decision is as follows:

4 "As [intervenor's] attorney concluded:

5 "[Intervenor's] proposed home occupation generates an  
6 insignificant amount of traffic that will occur on weekdays and  
7 during normal business hours. Many of the residents will be at  
8 work and school-age children will be at school. In the absence of  
9 any objective standards, the addition of 8 [average daily trips]  
10 (generated by an average of 3-4 patients per day) is  
11 inconsequential, especially when spread out over a 9-10 hour day.  
12 These trips are not likely to occur during [morning and evening]  
13 peak drive time \* \* \*. To label this amount of traffic as 'excessive'  
14 is simply not supportable or reasonable. Staff does not provide any  
15 objective finding or information for making this determination.'

16 "Obviously, the term 'excessive' is subjective and subject to interpretation based on  
17 individual circumstances. However, to find that any traffic would constitute  
18 excessive traffic is not consistent with the overall home occupation development  
19 standards or with this particular standard, which by definition contemplates some  
20 level of traffic. Absent some exigent circumstances and explanation not present in  
21 this record, a minimal number of 6-10 vehicle trips over a 9-10 hour period during  
22 non-peak weekday times is not 'excessive.'" Record 36.

23 The parties do not identify evidence that clearly establishes how much existing traffic there is  
24 on Adams Street. Neither the planning director's nor the hearings officer's decision discuss the  
25 level of existing traffic on Adams Street. However, it is reasonably clear from the record that  
26 Adams Street is a relatively short, steep, unimproved, dead-end street that serves a relatively small  
27 number of existing residences. The hearings official ultimately concluded that adding approximately  
28 eight client trips (four daily trips to and from intervenor's home) over the course of a normal

1 business day would not constitute excessive traffic.<sup>6</sup> We cannot say that the hearings official erred  
2 in that conclusion or that the factors cited by petitioners render that conclusion unreasonable.

3 The third assignment of error is denied.

4 The city's decision is affirmed.

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<sup>6</sup> An additional potential consideration, not cited by the hearings official, is the fact that intervenor's property is made up of several lots and presumably could be developed with several houses that would likely generate even more traffic than the proposed one home and home occupation.