BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LESLIE WATTS and LAURA J. STRATTON,
Petitioners,

vs.

CLACKAMAS COUNTY,
Respondent.

LUBA No. 2005-126

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Sean Munger, Beaverton, filed the petition for review and argued on behalf of petitioners.

Michael E. Judd, Assistant County Counsel, Oregon City, filed the response brief and argued on behalf of respondent.

DAVIES, Board Chair; BASSHAM, Board Member; HOLSTUN, Board Member, participated in the decision.

REMANDED 01/26/2006

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

Opinion by Davies.

NATURE OF THE DECISION

Petitioners appeal the county's approval of an application for a home occupation.

FACTS

The subject property is 2.38 acres and is zoned Rural Residential Farm/Forest, 5-acre minimum (RRFF5). It currently contains a dwelling and a small shed. *See* Figure A (artist's rendition). On January 13, 2005, the applicant submitted an application for a home occupation permit to legalize an existing business on the subject property. The business is a construction company, and the applicant uses the subject property for the storage of construction vehicles, construction equipment and machines. The applicant resides on the property and employs four employees. The employees arrive and leave the site between the hours of 7:00 a.m. and 8:00 p.m., and all loading and unloading of equipment occurs between 8:00 a.m. and 6:00 p.m.

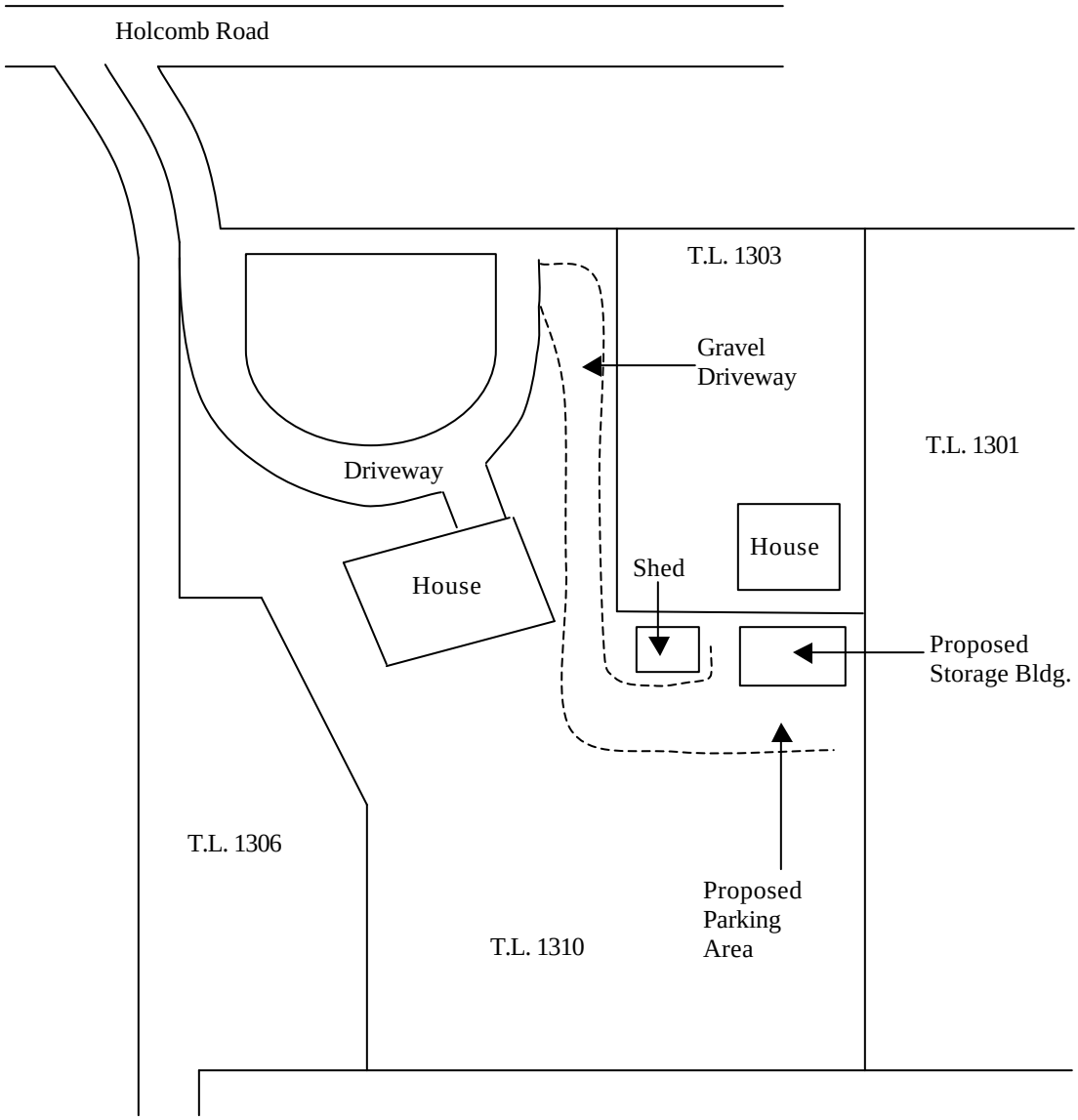
Under his existing business, the applicant stores plywood sheeting, forms and some equipment outside. The application proposes the construction of a new 1,500 square foot accessory structure where all materials and equipment will be stored.

On April 11, 2005, the county planning staff denied the application because the number of vehicles parked on the property exceeded the maximum allowed by the home occupation criteria and "because the applicant failed to provide written permission from the owners of all properties served by the private road that provides access to the site."[1] Record 1. The applicant appealed the denial to the county hearings officer. A public hearing was held on June 9, 2005, and the hearings officer issued his final decision reversing the planning staff and approving the application on August 2, 2005.

This appeal followed.

[1] The facts relevant to the access issue are set forth in detail in the discussion under section E. below.

Figure A



FIRST ASSIGNMENT OF ERROR

A. Home Occupation Definition

Petitioners argue that the county erred in approving the subject application because the proposed use is not a "home occupation" within the meaning of Clackamas County Zoning and

Development Ordinance (ZDO) 822.02(A).[2] They argue that the applicant does not conduct business on site, but merely uses the subject property as a storage yard for construction materials and as a parking lot for construction vehicles. The county responds that the issue was waived because it was not raised below. ORS 197.835(3); ORS 197.763(1).[3] We need not decide the waiver issue because, even if it was raised, we agree with the county that the proposed use is a "home occupation" pursuant to ZDO 822.02(A). Petitioners argue that the proposed use is not a "home occupation" because the proposed business is not normally associated with any of the primary uses allowed in the zone. However, as the county points out, such a showing is not required. The definition of "home occupation" requires only that the *dwelling* or *accessory building* in which the business will be conducted is a *building* that is normally associated with the primary uses allowed in the zone, not that the use itself be normally associated with uses allowed in the zone. The primary uses allowed in the RRFF5 zone include rural residential, general farm uses, propagation or harvesting of a forest product and public or private parks. ZDO 309.03. The

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[2] ZDO 822.02(A) defines "home occupation" as follows:

> "An occupation or business activity which results in a product or service; is conducted, in whole or in part, in a dwelling and/or an accessory building normally associated with primary uses allowed in the underlying zoning district; is conducted by at least one family member occupying the dwelling; and is clearly subordinate to the residential use of the subject property. Home occupations do not include garage sales, yard sales, holiday bazaars, or home parties which are held for the purpose of the sale or distribution of goods or services unless such sales and/or parties are held more than 6 times in a calendar year or operate in excess of 24 total days in a calendar year."

[3] ORS 197.835(3) provides that LUBA's scope of review is limited to:

> "Issues * * * raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable."

ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

existing business and the business as proposed will be conducted in the existing single-family dwelling, an existing shed and the proposed 1,500 square foot accessory structure. Petitioners do not argue that the buildings are not normally associated with the primary uses allowed in the zone, and it appears to us that they are. We agree with the county that storage sheds are commonly associated with rural residential, farm and forest uses and conclude that the proposed use satisfies the definition of "home occupation" set forth in ZDO 822.02(A).

B. Purpose Statement

Petitioners next argue that the proposed use "frustrates" the goals set forth in the purpose section of the home occupation provisions, as spelled out in ZDO 822.01.[4] Petitioners challenge the county's findings, arguing that they do not address this purpose provision of the code. The county argues that those purposes do not constitute applicable approval criteria.

The hearings officer informed petitioners below that the purpose section does not set forth approval criteria. Other than to argue that the challenged approval is offensive to the spirit of the provisions of ZDO 822.01, they do not explain why it must be addressed or why the hearings

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[4] ZDO 822.01, entitled "Purpose," provides:

"This section is adopted to:

"A. Encourage economic development in the county by promoting home occupations;

"B. Reduce vehicle miles traveled by providing opportunities for people to work from their homes;

"C. Recognize the differences between residential communities, and provide standards for home occupations consistent with these differences;

"D. Ensure the compatibility of home occupations with other uses permitted in the underlying zoning district;

"E. Maintain and preserve the character of the community and residential neighborhoods; and

"F. Mitigate noise, traffic and other possible negative effects of home occupations."

officer erred in concluding that it does not provide applicable approval criteria. *Rowan v. Clackamas County*, 19 Or LUBA 163 (1990) (whether comprehensive plan goals and policies or zoning ordinance purpose sections are approval standards for conditional use approval in a particular instance, depends upon an examination of the relevant plan and code provisions).

We agree with the county that the purposes set forth in ZDO 822.01 do not constitute approval criteria that are directly applicable to the subject home occupation request. Accordingly, the county's failure to adopt findings addressing that provision does not provide a basis for reversal or remand.

This assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

ZDO 822.05 provides the applicable criteria for approval of a Level 3 Major Home Occupation (hereafter home occupation).[5] We address in turn each of petitioners' arguments challenging the county's findings of compliance with those criteria.

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[5] ZDO 822.05(A) provides:

"Level 3 Major Home Occupations shall comply with the following standards:

"1. Location: Any property where a minimum of 50 percent of abutting properties are greater than 2 acres in size.

"2. Operator: The operator of a Level 3 Major Home Occupation shall reside in a dwelling on the subject property.

"3. Employees: There shall be no more than five full- or part-time employees.

"4. Accessory Space: In addition to the incidental use of the dwelling, a maximum of 1,500 square feet of accessory space may be used for a Level 3 Major Home Occupation. In the case of a bed and breakfast homestay, use of the dwelling is not required to be limited to incidental use.

"5. Noise: Between 8:00 a.m. and 6:00 p.m., a Level 3 Major Home Occupation shall not create noise that, when measured off the subject property, exceeds the greater of 60 dba or the ambient noise level. Between 6:00 p.m. and 8:00 a.m., a home occupation shall not create noise that is detectable to normal sensory perception off the subject property. Noise generated by passenger vehicles exiting or entering the subject property shall be exempt from these standards. These off-the-property noise standards shall not apply to public rights-of-way and railroad rights-of-way.

"6. Equipment and Process Restrictions: A Level 3 Major Home Occupation shall not create vibration, glare, fumes or odors detectable to normal sensory perception off the subject property. A Level 3 Major Home Occupation shall not create visual or audible electrical interference in any radio, television, or other electronic device off the subject property or cause fluctuations in line voltage off the subject property.

"7. Outside Storage: No outside storage, display of goods or merchandise or external evidence of a Level 3 Major Home Occupation shall occur except as specifically allowed by this subsection.

"8. Signs: Signs shall be permitted pursuant to Section 1010.

"9. Traffic: A Level 3 Major Home Occupation shall not generate more than 30 vehicle trips per day.

"10. Parking:

"a. No vehicle associated with a Level 3 Major Home Occupation shall be stored, parked or repaired on public rights-of-way.

"b. The maximum number of vehicles that are associated with a Level 3 Major Home Occupation and located on the subject property shall not exceed five at any time, including, but not limited to, employee vehicles, client vehicles and vehicles to be repaired. Vehicles to be repaired shall be located within an enclosed building or in an area not visible from off the subject property.

"c. No more than one of the five vehicles permitted to be located on the subject property at one time shall exceed a gross vehicle weight of 11,000 pounds.

"d. Parking spaces needed for employees or clients of a Level 3 Major Home Occupation shall be provided in defined areas of the subject property. Such areas shall be accessible, usable, designed and surfaced for parking.

"11. Hazards: If a Level 3 Major Home Occupation use will alter the occupancy classification of an existing structure as determined by the building official, then the structure shall be made to conform with the State of Oregon Structural Specialty Code and/or One and Two Family Dwelling Code and the requirements of the State Fire Marshal or the local fire district. However, in no case shall:

"a. A use be allowed that requires a structure to be upgraded or built to more restrictive requirements than an H-4 or H-5 occupancy, except incidental painting in conjunction with an H-4 or H-5 use; or

"b. Hazardous materials be used or stored on the subject property in quantities not typical of those normally associated with primary uses allowed in the underlying zoning district.

"12. Access: The subject property must have frontage on, and direct access from, a constructed public, county, or state road, or take access on an exclusive road or easement serving only the subject property. If property takes access via a private road or easement which also serves other properties, evidence must be provided by the applicant, in the form of a petition, that all other property owners whose property

A. ZDO 822.05(A)(5)

ZDO 822.05(A)(5) governs the permissible level of noise generated by a home occupation. Petitioners argue that the hearings officer's findings are not supported by substantial evidence, that the hearings officer failed to consider the noise generated by traverse vehicles, and that he applied the wrong noise measurement criteria in deciding what sources of noise to measure and how to measure them.[6]

The county argues that the hearings officer did not limit his consideration of noise to particular activities, as petitioners' latter two arguments seem to suggest.[7] The hearings officer specifically found that all noise sources associated with the business should be operating during any noise measurements that are taken. Record 11. We therefore agree with the county that the hearings officer does not exclude from consideration any noise sources that he was required to consider.

Petitioners next contend that the hearings officer applied the wrong noise measurement standard. The hearings officer adopted a standard based on an averaging time.[8] He determined

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> access is affected agree to allow the specific home occupation described in the application. Such evidence shall include any conditions stipulated in the agreement."

[6] By "traverse traffic" or "traverse vehicles," we understand petitioners to refer to traffic that is crossing the subject property from the access point at the northwest corner of the property and traveling along the existing driveway along the north side of the property and along the existing gravel driveway running north/south along the northeast boundary of the property. *See* Figure A.

[7] All parties appear to concede that noise generated by passenger vehicles exiting or entering the property are exempt from this provision. *See* n 5. We understand petitioners' argument regarding traverse vehicles to relate to noise generated by non-passenger vehicles and noise generated by passenger vehicles apart from noise generated while exiting or entering the property.

[8] The challenged findings provide, in relevant part:

> "ZDO 822.05.A(5) also does not include an averaging time, and the applicant did not propose one. Typically noise limits are stated in terms of a given sound pressure level which is equaled or exceeded a stated percentage of the time. (OAR 340-035-0015(59)). For instance, L_{10} is the noise level that can be equaled or exceeded only 10% of the time, or for 6 minutes in any hour. The hearings officer finds that any evaluation of noise levels from business activities on the site should be based on an L_{40} averaging time. This discounts the spikes of peak noise a machine or vehicle engine produces periodically or for short periods, but it does not allow excessive noise levels to predominate any hour. Therefore the L_{40} noise level should not exceed 60 dBA." Record 11.

that the noise level could not exceed 60 dBA more than 10% of the time. That standard was apparently adopted from a definition of "statistical noise level" found in an Oregon Administrative Rule (OAR) regarding noise regulation standards.[9] OAR 340-035-0015(59).[10] We do not understand the hearings officer to have adopted that standard because he believed that the administrative rule provided a statewide baseline, as petitioners assert. In any event, the rationale for the hearings officer's decision to import that definition as a standard in this case is irrelevant. The fact is that he relied on that provision to apply an averaging time noise standard for purposes of his analysis of compliance with ZDO 822.05(A)(5).

Petitioners argue that ZDO 822.05(A)(5) prohibits "*any* business activity on the property that generates *any* noise above 60 dBA, at *any* time (excepting the ingress and egress of passenger vehicles)." Petition for Review 21 (emphasis in original). The L_{10} standard, they contend, allows noise spikes, where ZDO 822.05(A)(5) does not. As the challenged decision explains, the adopted standard would allow noise level spikes in excess of 60 dBA when, for instance, a machine or vehicle engine starts up. According to petitioners, the absolute prohibition found in the county approval standard is only equaled by L_{MAX}.

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[9] Petitioners provide the following explanation of the L_{10} standard:

> "OAR 340-035-0015(59) may not provide the standard for this case, but it is certainly helpful in explaining what the L descriptor means. The sound level descriptor L_{XX} is the sound level exceeded X percent of the time. Thus, the Hearings Officer is correct than an L_{10} standard means that 60 dBA may be equaled or exceeded 10% of the time, or 6 minutes in any hour. Conversely, an L_{50} standard would permit 60 dBA to be equaled or exceeded 10% of the time—due to the averaging of sound magnitude a radio could drone at 61 dBA for nearly half an hour and not violate a 60 dBA standard when measured at L_{50}. The lower the L number, the more stringent the standard is, until one gets to L_{MAX} which is the most restrictive standard—an absolute prohibition on exceeding the stated sound level at any time. * * *" Petition for Review 21 n 14.

[10] Located in the definition section of the Department of Environmental Qualities' noise regulations is the following definition of "statistical noise level":

> "the noise level which is equalled or exceeded a stated percentage of the time. An L_{10} = 65 dBA implies that in any hour of the day 65 dBA can be equalled or exceeded only 10% of the time, or for 6 minutes." OAR 340-035-0015(59).

We agree with petitioners that the county standard is an exceedingly strict prohibition. The county standard prohibits any noise that, when measured off the subject property, exceeds 60 dBA or the ambient noise level, whichever is greater. Although the hearings officer's decision allows noise spikes, the county provision does not appear to.[11] If there is another way of interpreting the applicable code language, the hearings officer does not provide that explanation; he merely adopts the L_{10} averaging standard. We agree with petitioners that that standard is inconsistent with the applicable noise criterion set forth in ZDO 822.05(A)(5).

Accordingly, this subassignment of error is sustained.[12]

B. ZDO 822.05(A)(6)

1. Diesel Fumes

ZDO 822.05(A)(6) provides that a major home occupation "shall not create vibration, glare, fumes or odors detectable to normal sensory perception off the subject property." The hearings officer concluded that it is feasible to comply with this criterion with the following conditions: (1) relocate the parking area for diesel vehicles away from abutting properties,[13] and (2) limit the idling time to no more than 10 minutes for any diesel vehicle.[14]

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[11] Regarding home occupations, it might very well be that the county chose to impose a very strict standard with regard to noises generated by businesses located in rural residential neighborhoods.

[12] Because we sustain this subassignment of error on this basis, we need not address petitioners' arguments that the hearings officer's reliance on the proposed accessory structure to mitigate noise above the 60 dBA level is not supported by substantial evidence.

[13] The applicant proposed to relocate the parking area, which is currently located on the northern side of the property, just south of one of petitioners' houses, to the south of the proposed accessory structure. *See* Figure A.

[14] The hearings officer found:

> "* * * it is feasible for the home occupation to comply with ZDO 822.05(A)(6), provided the applicant relocates the parking area for the diesel vehicles away from abutting properties as proposed and limits idling time to no more than 10 minutes for any diesel vehicle in order to ensure that the use does not generate diesel fumes on adjacent properties. A condition of approval is warranted to that effect. The applicant's business does not include any other activities that are likely to create significant vibration, glare, fumes, odors, or electrical interference." Record 12.

Petitioners argue, again, that the hearings officer ignored traffic from vehicles traveling to and from the parking area despite evidence in the record that such traverse of vehicles, and not merely the starting, idling and maneuvering of vehicles, was a significant source of the fumes of which they complained. The county contends that the applicant responded to the concern regarding fumes by proposing to move the parking to the south of the proposed building, away from the house located on tax lot 1303, which is currently located in very close proximity to the existing parking area. *See* Figure A. It asserts that a planning staff memorandum concludes that "by limiting idling time and providing a sufficient buffer (building and space), fumes/odors can be eliminated." Record 64. Respondent' Brief 8 (citing *Ankarberg v. Clackamas County*, 41 Or LUBA 504, 512 (2002) (planning staff decision "may constitute substantial evidence in the absence of evidence that would raise questions concerning its evidentiary value"). It is the county's position that that statement in the staff report constitutes substantial evidence supporting the hearings officer's finding of compliance with ZDO 822.05(A)(6).

We do not see that *Ankarberg* is dispositive here. First, as petitioners assert, there is absolutely nothing in the record to support the statement in the staff report that fumes and odors will be eliminated by limiting idling time and creating a buffer by siting the proposed building between the existing dwelling on tax lot 1303 and the applicant's parking area. *See* Figure A. The quoted excerpt from the staff report is merely a conclusory statement unsupported by any evidence; it is not itself evidence.

Second, petitioners assert, and we agree, that the standard regarding fumes, like the noise standard discussed above, is an unqualified prohibition; *i.e.*, no fumes may be detectable "to normal sensory perception off the subject property." It is applicant's burden to establish that this approval criterion is satisfied. *Strawn v. City of Albany*, 20 Or LUBA 344, 350 (1990). The challenged decision does not require a study, either before or after the construction of the accessory structure, to determine whether fumes are detectable off of the property. More importantly, the conditions imposed by the hearings officer fail to address the potential fumes generated from vehicles traversing

the property from Holcomb Road to the parking area via the gravel driveway that is proposed to be within several yards of petitioners' property.

Accordingly, the hearings officer's conclusion that it is feasible for the proposed home occupation to comply with ZDO 822.05(A)(6) is not supported by substantial evidence.

This subassignment of error is sustained.

2. Dust Mitigation

Petitioners argue that the hearings officer's condition regarding dust mitigation once again ignores traverse vehicles and is unworkable.[15] The county points out that dust is not one of the items listed or addressed by ZDO 822.05(A)(6). The hearings officer imposed a condition related to dust for the benefit of the neighbors, but the condition does not relate to an applicable approval criterion and therefore, it cannot provide a basis for reversal or remand. We agree with the county.

This subassignment of error is denied in part and sustained in part.

C. ZDO 822.05(A)(7)

ZDO 822.05(A)(7) provides:

> "Outside Storage: No outside storage, display of goods or merchandise or external evidence of a Level 3 Major Home Occupation shall occur except as specifically allowed by this subsection."

Petitioners challenge in various respects the hearings officer's conclusion that this approval criterion is satisfied with the conditions requiring the applicant to store all business-related material and equipment and a "forms trailer" in the proposed accessory structure.[16]

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[15] Condition 16 provides:

> "The applicant shall control dust on the site when needed by paving, watering or applying other liquids approved for that purpose to the driveway and vehicle maneuvering areas onsite." Record 22.

[16] The hearings officer's findings provide, in relevant part:

> "There is no dispute that the applicant's current business operation do not comply with ZDO 822.05.A(7). The applicant is storing a variety of construction material, including plywood, lumber and miscellaneous tools and equipment on the site in locations clearly visible from

The county argues that this issue was not raised below. We disagree. It is clear from the record that the issue of external evidence was central to the opponents' objections to the proposed use.[17]

The hearings officer concluded that the "forms trailer" constitutes external evidence of the home occupation "because it is clearly related to his construction business and inconsistent with normal rural residential activities." Record 12. He therefore required the applicant to store the forms trailer within the proposed building. He concluded that a skid steer loader, a track hoe, an

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abutting properties. See Exhibits 6, 10 and 16. However the applicant proposed to modify the use to comply with this criterion by constructing a 1500-square foot accessory building on the site and storing all of his business related materials and one or more of his business trailers inside the building.

"a. The hearings officer finds that the applicant's 'forms trailer' shown in photos #1, #2 and #3 of Exhibit 16 is 'external evidence of [the home occupation]', because it is clearly related this construction business and inconsistent with normal rural residential activities. Therefore the applicant should be required to store the forms trailer within the proposed building. A condition of approval is warranted to that effect.

"b. The hearings officer further finds that the applicant's 'skid steer' loader shown in Exhibit 6, the track hoe shown in Exhibit 19, the enclosed trailer shown in photo 4 of Exhibit 16 and in Exhibit 19 and the dump truck shown in Exhibits 6, photos 1, 2 and 3 of Exhibit 16 and Exhibit 19 are not 'external evidence of [the home occupation].' They do not include any prominent graphics or other significant features advertising the applicant's business use. These vehicles are consistent with normal rural residential activities. The track hoe, skid steer loader and mini-dump truck are similar to farm equipment normally use in the rural area. The enclosed trailer is similar to a recreational vehicle. Therefore the applicant should be allowed to store these vehicles inside or outside the proposed building, subject to the parking limitations of ZDO 822.05.A(10)." Record 12-13.

[17] A letter dated March 25, 2005, from one of the opponents' attorney provides:

"There are no less than nine large commercial and industrial vehicles parked and moved about outside on the property, which exceed the maximum weight and number of vehicles that can be permitted. The applicant maintains and repairs the vehicles outside on the property. Large vehicles come and go regularly before 8:00 a.m. and after 6:00 p.m. Large vehicles start-ups are very noisy, and produce fumes and vibration detectable to Ms. Stratton on her adjoining property." Record 79.

Although it appears the above testimony related to a different criterion, it also addresses the external evidence issue. Specifically with regard to ZDO 822.05(A)(7), a letter dated March 14, 2005 from an opponent provides:

"Mr. Henkel has an illegal outside storage building, which he uses for his equipment and has a fairly large area where he dumps trash. This is not within the scope or the standards of a level 3 home occupation." Record 81.

enclosed trailer and a dump truck do not constitute external evidence of the home occupation based, at least in part, on the fact that they do not include prominent graphics advertising the business and are thus consistent with normal rural residential activities. He explained that the track hoe, skid steer loader and mini-dump truck are similar to farm equipment used in rural areas, and that the enclosed trailer is similar to a recreational vehicle.

Petitioners argue, first, that the hearings officer applied the wrong standard in identifying which vehicles qualified as external evidence of the home occupation. They argue that the question is not whether a particular piece of equipment is consistent with normal rural residential activities. Rather, the question is whether any particular characteristic of the proposed use is external evidence of the proposed use; *e.g.*, whether the skid steer loader is evidence of a home occupation on this property. According to petitioners, the fact that similar vehicles might be parked on other properties with rural residential or farm uses is irrelevant to the determination. We tend to agree with petitioners that the determination of what constitutes external evidence may not turn solely on whether the vehicles are necessarily consistent with normal rural residential activities; *e.g.*, some vehicles that are similar to those used in farming operations may, under certain circumstances, make it obvious that a home occupation is in operation on the property.

We need not determine whether the hearings officer applied the wrong standard in this respect, however, because petitioners argue, and we agree, that the hearings officer's ultimate conclusion that these other vehicles do not constitute external evidence is not supported by substantial evidence. Petitioners challenge the hearings officer's decision distinguishing the above described vehicles, which he concluded were not external evidence, from the forms trailer, which he concluded was. The other vehicles were distinguishable from the forms trailer because "[t]hey do not include any prominent graphics or other significant features advertising the applicant's business use." Record 12. Petitioners argue that this finding is not supported by substantial evidence because the photographs of these other vehicles indicate that nearly all of them display a business

logo and telephone number. The county does not respond to this argument. Accordingly, on remand, the county must address this apparent inconsistency.

Finally, petitioners argue that the hearings officer's decision that allowed the forms trailer to traverse the property on its way to the proposed storage building violates ZDO 822.05(A)(7), which precludes external evidence of the home occupation *at any time*. The hearings officer determined that the forms trailer is external evidence of the home occupation. Accordingly, even allowing the forms trailer to traverse the property is a violation of the code.

The county relies almost exclusively on its argument that the issue was not raised, and therefore offers little assistance in response to this argument. However, at oral argument, the county argued that the hearings officer provided a reasonable interpretation of ZDO 822.05(A)(7) in determining that the applicant could take the forms trailer on and off the property so long as it was stored out of view. We agree that the hearings officer's interpretation is a reasonable reading of the code.

ZDO 822.05(A)(7) is labeled "Outside Storage," and is aimed primarily at regulating outside storage of materials and/or goods. It is difficult to see how *any* home occupation would qualify under petitioners' strict interpretation of this code provision. For instance, there is external evidence of a home occupation with any business that accommodates customers. The regular comings and goings of customers is external evidence of a home occupation under petitioners' proposed interpretation. Accordingly, we agree with the county that the hearings officer's determination that permitting the forms trailer to traverse the property to enter and exit the proposed accessory structure is not inconsistent with ZDO 822.05(A)(7).

This subassignment of error is denied in part and sustained in part.

D. ZDO 822.05(A)(10)

ZDO 822.05(A)(10)(b) limits the number of vehicles associated with the home occupation to five. Of those five, only one may exceed 11,000 pounds gross vehicle weight. ZDO 822.05(A)(10)(c). In determining whether the proposed use satisfied the limit on the number of

vehicles, the hearings officer concluded that a trailer plus skid steer loader, a trailer plus track hoe, or a truck plus a trailer, all qualify as one "vehicle." ZDO 822.02(F).[18] Consequently, he determined that if those combined vehicles remain together while on-site, they qualify as only one combined vehicle, and that as combined, the applicant will be able to modify his business use to comply with the maximum vehicle limitation.

Petitioners argue, first, that the hearings officer erred in allowing the forms trailer to be present on the property at all.[19] They assert that the vehicle limitation in ZDO 822.05(A)(10)(b) applies only to vehicles that are not otherwise prohibited under ZDO 822.05(A)(7) as external evidence of the home occupation. They assert that the forms trailer constitutes external evidence of the home occupation, is prohibited from being present on the property at all times, and that the hearings officer therefore erred in allowing it to be stored in the proposed building.

As explained above, the hearings officer made a reasonable interpretation of ZDO 822.05(A)(7) in allowing the forms trailer to traverse the property on its way to the structure. For the same reasons we provided above, we conclude that the hearings officer did not err in imposing a condition that the forms trailer be located in the proposed structure while on site, thus allowing it to traverse the property on its way there.

With regard to the 11,000 pound limit, the hearings officer found that only the dump truck exceeded 11,000 pounds gross vehicle weight. Petitioners argue that the hearings officer failed to

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[18] ZDO 822.02(F) defines "vehicle" as follows:

> "Any motorized or non-motorized transportation equipment intended for use on public roads and associated with the home occupation, including, but not limited to, a car, van, pickup, motorcycle, truck, detached trailer or a truck tractor with no more than one trailer. An exception may be made for a detached trailer or trailers, which may be categorized as equipment if stored within an enclosed building approved for this use through the home occupation permit. Accessory space utilized for storage of a trailer shall be included in the calculation of total accessory space approved for the home occupation."

[19] The specific finding petitioners challenge provides:

> "The hearings officer finds that the 'forms trailer' must be stored inside the building when it is on the site, based on the above discussion regarding ZDO 822.05.A(7)." Record 14.

consider whether the "compound vehicles" that it determined qualify as a single "vehicle" would exceed the 11,000 pound limit set forth in ZDO 822.05(A)(10)(c).[20] The county argues that this issue was not raised. However, as petitioners explain, the hearings officer's interpretation that vehicles could be combined did not appear until the final decision. Accordingly, petitioners could not have raised this issue below, and waiver therefore does not apply.

We agree with petitioners that the hearings officer's conclusion that only one vehicle exceeds the 11,000 pound limit fails to consider his interpretation regarding combined vehicles. Such combined vehicles may well exceed the weight limit, which would result in more than one vehicle in excess of the weight limit, in violation of ZDO 822.05(A)(10(c). Accordingly, the challenged finding is not supported by substantial evidence.

This subassignment of error is sustained in part and denied in part.

E. ZDO 822.05(A)(12)

The applicant's property is a flag lot, with the pole extending from the western portion of the property to the north to Holcomb Road, a county road. *See* Figure A. The property to the west of the subject property is a flag lot as well, tax lot 1306, with the pole extending to the north, directly to the west of the applicant's pole. Petitioners own properties, tax lots 1301 and 1303, located to the east of the subject property. Access to all four properties is currently via a private roadway, Timberdark Lane, which runs south from Holcomb Road. An easement that currently provides access to tax lots 1310, 1303 and 1301 runs east/west from the bottom of the pole of tax lot 1306 along the northern 30 feet of those properties. The easement crosses the base of the pole to the applicant's property. The traveled roadway for the north/south portion of Timberdark Lane from

[20] The findings simply provide:

> "The hearings officer finds that the application complies with ZDO 822.05(A)(10)(c), because only one of his vehicles, the mini-dump truck, exceeds a gross vehicle weight of 11,000 pounds." Record 15.

Holcomb Road is currently located on the pole section of tax lot 1306, directly west of the applicant's pole.

Although quoted earlier, we quote ZDO 822.05(A)(12) in full here:

> "Access: The subject property must have frontage on, and direct access from, a constructed public, county, or state road, or take access on an exclusive road or easement serving only the subject property. If property takes access via a private road or easement which also serves other properties, evidence must be provided by the applicant, in the form of a petition, that all other property owners whose property access is affected agree to allow the specific home occupation described in the application. Such evidence shall include any conditions stipulated in the agreement."

The hearings officer concluded that applicant could satisfy the requirements of ZDO 822.05(A)(12) by constructing a private driveway exclusively across the flagpole portion of his own lot to Holcomb Road. The findings provide:

> "a. The hearings officer finds that the applicant can modify the use to comply with this criterion by constructing a new driveway within the 'flagpole' portion of the site exclusively to serve the site. The new driveway will ensure that the site has 'frontage on, and direct access from, a constructed public, county, or state road,' Holcomb Road. The new road will serve the site exclusively. It will not serve any other properties. Therefore, applicant is not required to obtain permission from other property owners to use the proposed new driveway.
>
> "b. The hearings officer finds that the fact that the proposed driveway must cross the east-west portion of the existing shared driveway is irrelevant. The applicant's home occupation will not 'take access' from the existing shared driveway. It will merely cross it at a ninety-degree angle at one location on the applicant's property." Record 15-16.

Petitioners focus on paragraph "b" quoted above and argue that the hearings officer misapplied ZDO 822.05(A)(12) in concluding that the applicant did not "take access" from the private road located on petitioners' property. They challenge the findings quoted above, arguing that there is no distinction between the terms "crossing" and "taking access."

Petitioners begin their argument with the text and context of the provision. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611, 859 P2d 1143 (1993). They quote the dictionary

definition of the term "access:" "permission, liberty or ability to enter, approach, communicate with, or pass to and from," or "freedom or ability to obtain or make use of." Webster's Ninth New Collegiate Dictionary, Merriam-Webster, Inc. 1986. They argue:

> "To 'cross' a road, one must, by definition, have access to it. There is no basis in the plain meaning of the word 'access'—and certainly none in ZDO 822.05(A)(12)—to characterize 'crossing at a 90-degree angle' as a separate action entirely unrelated to 'access.' The Hearings Officer's interpretation is clearly wrong." Petition for Review 35.

As the county points out, petitioners focus on the wrong section of the hearings officer's decision. The county's analysis is correct:

> "Petitioners argument focuses on paragraph 16(b) of the hearings officer's decision * * *, where he briefly discusses the issue of 'taking access' versus 'crossing'. The real key to his decision, however, is paragraph 16(a). The applicant's property has frontage on, and will have direct access from, Holcomb Road. The new driveway will run solely over the applicant's property. Therefore, the ZDO 822.05(A)(12) access requirement is met. The fact the new driveway at one point crosses the easement used by petitioners, where that easement lies on the applicant's property, is, as the hearings officer stated, irrelevant." Respondent's Brief 11 (citations omitted).

The applicant will access his property directly onto Holcomb Road via a roadway over the pole portion of his own property. The fact that his access will cross an easement that burdens his property does not change the fact, as the county explains, that the subject property has frontage on and direct access from a county road, Holcomb Road.[21] Accordingly, the hearings officer did not err in concluding that ZDO 822.05(A)(12) is satisfied.

This subassignment of error is denied.

The county's decision is remanded.

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[21] To the extent petitioners' takings argument under the Oregon and United States Constitutions is not resolved by our disposition of this subassignment of error, we reject it without further discussion.