

NATURE OF THE DECISION

Petitioner appeals a decision of the county hearings officer approving a home occupation permit.

FACTS

The subject property is an approximately 5.79-acre parcel zoned Rural Residential Farm Forest 5-acre Minimum, which contains an existing dwelling and an existing outbuilding. The property is accessed from Neibur Road, a public road. The partition plat that created the subject property and two other parcels depicts a 20-foot wide access and utility easement running along the subject property's eastern boundary, terminating at the two parcels directly to the north of the subject property. Record 59. Petitioner is the owner of one of those parcels.

Intervenor applied for a home occupation permit to construct an additional outbuilding to be used as an office and equipment storage. The planning director approved the application, and petitioner appealed. The hearings officer affirmed the planning director's decision, subject to conditions of approval. This appeal followed.

ASSIGNMENT OF ERROR

A. Background

The 20-foot wide driveway access easement described above is shown on the partition plat as running along the subject property's eastern boundary. However, a part of the driveway was built outside the easement as shown on the plat. Rather, the driveway connects with Neibur Road on the subject property a short distance west of the platted easement and travels in a northeasterly direction, eventually connecting to and traveling across the access easement as shown on the plat.¹

¹ The difference in the location of the as-built driveway and the access easement shown on the plat led to litigation among petitioner, the owner of the other parcel to the north of the subject property, and intervenor.

1 **B. Assignment of Error**

2 Petitioner argues that the hearings officer misconstrued the provisions of Clackamas
3 County Zoning Development Ordinance (ZDO) 822.05(A)(12) in approving the application.

4 That section provides:

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

13 Petitioner argues that intervenor’s property is accessed over the access easement, and
14 because that access easement also serves other properties, the owners of those properties
15 must agree to allow the home occupation, as required by the second sentence of ZDO
16 822.05(A)(12).

17 Intervenor’s application proposed to construct a new access road from the existing
18 driveway on the subject property (before that existing driveway reaches the platted easement)
19 through the center of the property to the new outbuilding. The hearings officer found in
20 relevant part:

21 “The Hearings Officer concludes that there is substantial evidence in the
22 record to support a finding that *the applicants can provide access from the*
23 *proposed shop building to S. Neibur Road without using the access easement.*
24 The property includes more than five acres, and while it may be that
25 construction of the access road will require cuts and fills, the evidence shows
26 that it is feasible to construct such an access. A condition of approval is
27 imposed to assure such access is constructed and maintained in accordance
28 with applicable fire safety standards.” Record 5 (emphasis added).

That litigation resulted in a decision by the circuit court in favor of intervenor in this appeal. Record 51. That decision is currently on appeal to the Oregon Court of Appeals.

1 The hearings officer also imposed a condition of approval to ensure that the new building
2 would be accessed directly from Neibur Road and would not provide access over the access
3 easement.²

4 Respondent maintains that the hearings officer correctly found that the standards of
5 ZDO 822.05(A)(12) were met. We agree. Under the first sentence of ZDO 822.05(A)(12), if
6 a property directly fronts and takes access directly from a public road, then the second
7 sentence of that section does not apply. The property directly fronts and has direct access
8 from Neibur Road and thus, the requirements of the first sentence are met.

9 Petitioner's assignment of error is premised on his contention that the second
10 sentence of ZDO 822.05(A)(12) applies. However, petitioner is incorrect. The fact that
11 intervenor's driveway that is located entirely on his property is also used by others pursuant
12 to an easement, either as a result of a platted access easement or a prescriptive easement,
13 does not mean that intervenor's access to his own property is "via a private road or
14 easement."

15 The hearings officer found that substantial evidence in the record supported a finding
16 that intervenor could provide access from the proposed building directly to Neibur Road
17 without using the access easement. That finding is adequate to show compliance with the
18 requirements of the first sentence of ZDO 822.05(A)(12), because the subject property has
19 "frontage on, and direct access from, a constructed public * * * road" - Neibur Road.

20 The assignment of error is denied.

21 The county's decision is affirmed.

² The hearings officer imposed a condition of approval, which provides in relevant part:

"The applicants shall build a new access drive to be used in conjunction with the home occupation within 60 days of this permit issuance. The new access drive shall provide exclusive access from the site to S Neibur Road. The home occupation shall use this new access exclusively. Access for the home occupation from the shared access easement is prohibited. * * *." Record 6.