BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROBIN JACOBS, DIANA PARTIN,
SUZANNE PILAND, MARILYN SULLIVAN
and CHRISTINA MEDLYN,
Petitioners,

vs.

CLACKAMAS COUNTY,
Respondent,

and

MARK FRITCH, NAMESTE' INC.,
dba MARK FRITCH LOG HOMES,
DICK STEINER, LLOYD MUSSER and MOUNT
HOOD CULTURAL CENTER AND MUSEUM,
Intervenors-Respondents.

LUBA No. 2015-099

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Jennifer R. Schwartz, Portland, filed the petition for review and argued on behalf of petitioners.

No appearance by Clackamas County.

Andrew H. Stamp, Lake Oswego, filed the response brief and argued on behalf of intervenors-respondents.

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

1
2 REMANDED 05/05/2016
3
4 You are entitled to judicial review of this Order. Judicial review is
5 governed by the provisions of ORS 197.850.

1 Opinion by Bassham.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a hearings officer's decision approving a conditional
4 use permit for a permanent facility for the primary processing of forest
5 products, and a home occupation permit, to allow a log home manufacturing
6 operation on a five-acre parcel zoned for forest use.

7 **FACTS**

8 Intervenor-respondent Mark Fritch owns a log home manufacturing
9 business ("Mark Fritch Log Homes") that is currently based on a five-acre
10 parcel zoned Timber (TBR). The five-acre parcel is currently developed with a
11 manufactured dwelling, and a 1700-square-foot shop building. The property is
12 located across a county road from a rural residential zoned area, but is
13 otherwise bordered by other lands zoned TBR.

14 In 2012, Fritch applied to the county for a conditional use permit for a
15 permanent facility for the primary processing of forest products (primary
16 processing facility). A county hearings officer ultimately denied that
17 application, on the grounds that some components of the proposed operation
18 exceeded the permissible scope of "primary" processing of forest products.
19 LUBA affirmed that decision. *Fritch v. Clackamas County*, 68 Or LUBA 184
20 (2013), *aff'd* 260 Or App 767 (2014). In our decision in *Fritch*, we described
21 the operation proposed in the 2012 application:

22 "The application proposes a series of operations on the subject
23 property. First, raw logs are transported onto the site and stacked

1 for processing. The bark of each log is peeled by hand, and
2 chemical fungicides are applied at some point to prevent rot or
3 insect damage. The logs are scribed, cut and notched with
4 chainsaws and hand tools according to a custom home design
5 prepared by petitioner. Some logs are also milled using a portable
6 saw mill. The logs are then assembled with a crane on a level
7 framework to form the exterior walls of the custom home, which
8 can be one or two stories in height. Weight is added to the walls to
9 compress the logs evenly, and any necessary shaping or
10 adjustments are made to ensure the structure is level and to
11 account for settling. Then the walls are disassembled, the logs
12 loaded on a truck and shipped to the construction site. At the
13 construction site the walls are reassembled, a roof is constructed,
14 and stairs, railings, doors, windows added according to the design.
15 The operations on the subject property typically take several
16 months for each custom log home." 68 Or LUBA at 186.

17 The hearings officer held, and LUBA affirmed, that only the initial steps of the
18 operation, specifically the de-barking and milling of the raw logs, fell within
19 the scope of the "primary" processing of forest products. Subsequent steps,
20 such as notching the log ends to form interlocking timber wall components,
21 partial construction of the log home, and other actions performed on the
22 property to produce the components of a log home, are secondary or tertiary
23 processing operations not allowed as part of a primary processing facility.

24 In 2014, Fritch filed applications for two permits to authorize a modified
25 version of the log home manufacturing business on the property. The most
26 significant modification was to eliminate partial pre-assembly of the log home
27 walls on the site. The remaining activities associated with the business would
28 be authorized under two permits, which would each authorize only a portion of
29 the operations on the property.

1 The first permit is a conditional use permit (CUP) for a primary
2 processing facility that as relevant here includes what the parties refer to as the
3 "primary" processing of raw logs. We understand "primary" processing to
4 include the following: (1) trucking raw logs onto the site, and offloading,
5 stacking and storing the logs, (2) peeling the bark off the logs, and smoothing
6 irregularities using handtools or chainsaw, and (3) sawmilling large logs to
7 produce smaller logs, boards and similar pieces of wood. Large processed logs
8 intended for use in constructing the walls of log homes would be transported by
9 truck to the off-site location where the home is to be built. Smaller processed
10 logs and pieces of wood intended for "secondary" processing, described below,
11 would be moved to an indoor workshop for further processing.
12 The second permit is for a Level Three Major Home Occupation,
13 pursuant to standards at Zoning and Development Ordinance (ZDO) 822,
14 which implements the standards at ORS 215.448. As discussed below, under
15 ZDO 822 a home occupation is a business use that is subject to several
16 restrictions, including requirements that the business be conducted within the
17 dwelling or accessory structure, with no external evidence of the home
18 occupation, and be clearly subordinate to residential use of the property. In the
19 present case, Fritch proposed that "secondary" processing and other aspects of
20 Mark Fritch Log Homes conducted on the subject property that could not be
21 approved as the primary processing of forest products would be conducted
22 pursuant to the home occupation permit, and would occur largely within a

2,048-square-foot addition to the shop building. Specifically, the activities authorized under the home occupation permit would include:

1. Office functions for the business, including home design.
2. Recycling, reusing and repurposing building materials.
3. Building timber frame structures for log homes.
4. Secondary processing of wood products for log homes (e.g. stairs, railings, windows, etc.)
5. Log and timber frame architectural accent work.
6. Storage of tools, equipment and vehicles needed in logging operations.
7. Maintenance and repair of home occupation tools, equipment and vehicles. Record Vol. 2, 414.

The two applications were consolidated for review, and a hearings officer conducted an evidentiary hearing at which petitioners and others appeared in opposition. On November 24, 2015, the hearings officer issued a decision approving both applications. The decision approves an exception to a ZDO standard limiting the home occupation to 1500 square feet of the accessory structure, and authorized using up to 3000 square feet of the accessory structure, as expanded by the 2,048-square-foot addition. In this opinion, we sometimes refer to the portions of the expanded accessory structure used home occupation activities as the "workshop."

On appeal, petitioners do not challenge the findings approving the CUP for the primary processing facility, only the findings approving the home occupation permit. The petition for review includes a prefatory "Argument"

1 section, and five assignments of error challenging approval of the home
2 occupation permit.

3 **FIRST, THIRD AND FOURTH ASSIGNMENTS OF ERROR**

4 ORS 215.448(1)(c) provides that a home occupation "shall be operated
5 substantially in" either the dwelling or other buildings normally associated with
6 uses permitted in the zone in which the property is located.[1] The county has
7 apparently chosen to regulate home occupations more stringently in this regard
8 than the statute. ZDO 822.05(D) limits use of the dwelling for a home
9 occupation to "incidental" use, and limits use of space within an accessory
10 space to 1500 square feet.[2] With respect to home occupation activities *outside*

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[1] Last amended in 1995, ORS 215.448(1) provides, in relevant part:

> "* * * [I]n an exclusive farm use zone, forest zone or a mixed farm and forest zone that allows residential uses, the following standards apply to the home occupation:
>
> "* * * * *
>
> "(c) It shall be operated substantially in:
>
> "(A) The dwelling; or
>
> "(B) Other buildings normally associated with uses permitted in the zone in which the property is located; * * *"

[2] ZDO 822.05(D) provides, as relevant:

> "Building Space: The home occupation may be conducted in a dwelling unit, but—except in the case of a bed and breakfast homestay—is limited to incidental use thereof. A maximum of

1 the dwelling or accessory structure, ZDO 822.05(H) prohibits "external
2 evidence of the home occupation, except as specifically allowed by [ZDO]
3 822.05."[3] The only specific exceptions to the prohibition on external evidence
4 of the home occupation that are listed in ZDO 822.05 are business signs and
5 parking of up to five vehicles. ZDO 822.05(I) and 822.05(K). Thus, under
6 ZDO 822.05, the home occupation must occur entirely within the dwelling or
7 an accessory structure, with exceptions for signs and limited vehicle use.
8 Under the first assignment of error, petitioners argue that the hearings
9 officer failed to address the statutory requirement that a home occupation be
10 operated "substantially" in a dwelling or accessory structure, and the record
11 lacks substantial evidence to support any such finding. Under the third
12 assignment of error, petitioners argue that the hearings officer misconstrued the
13 ZDO 822.05(H) prohibition on "external evidence" of the home occupation,
14 and adopted inadequate findings that are not supported by substantial evidence
15 to demonstrate compliance with that standard. Finally, under the fourth

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> 1,500 square feet of accessory space may be used for the home occupation. * * *"

[3] ZDO 822.05(H) provides:

> "Storage and Display: No outside storage, display of goods or merchandise visible from outside an enclosed building space, or external evidence of the home occupation shall occur, except as specifically allowed by Subsection 822.05. Notwithstanding this provision, business logos flush-mounted on vehicles used in the daily operations of the home occupation are allowed."

1 assignment of error, petitioners contend that the hearings officer misconstrued
2 the vehicle limits imposed by ZDO 822.05(K), and adopted inadequate findings
3 that are not supported by substantial evidence to demonstrate compliance with
4 that standard.

5 Because the first, third and fourth assignments of error involve similar
6 arguments, we address them together. The legal theory common to all three
7 assignments of error is articulated in the prefatory "Argument" section of the
8 Petition for Review that precedes the assignments of error. Intervenors respond
9 to that legal theory in a similar prefatory section of the response brief. We
10 consider both sets of prefatory arguments, as well as the arguments under and
11 in response to these three assignments of error.

12 The common legal theory underpinning the first, third and fourth
13 assignments of error is that the hearings officer erred in allowing the applicant
14 to artificially segment an otherwise unitary business operation into two
15 separate operations, subject to two different discretionary permits, in order to
16 avoid limitations required to comply with the applicable permit approval
17 requirements. According to petitioners, the business activities of Mark Fritch
18 Log Homes conducted on the subject property, viewed as a whole, exceed the
19 scope of what is permitted as the primary processing of forest products and do
20 not comply with the limitations imposed by statute and the ZDO on home
21 occupations. Citing to *Holsheimer v. Columbia County*, 28 Or LUBA 279
22 (1994), *aff'd* 133 Or App 126, 890 P2d 447 (1995), petitioners argue that

1 where an overall business operation cannot be allowed as a home occupation,
2 and the applicant proposes to segment the business operation into parts in order
3 to fit within the home occupation limits, "there must be substance behind the
4 separation of the business operation into parts." 28 Or LUBA at 283.
5 Petitioners argue that there is no actual substance dividing many of the
6 "primary" processing activities from the "secondary" processing and other
7 activities authorized under the home occupation. For example, as discussed
8 below, petitioners argue that some of the equipment and vehicles authorized as
9 part of the primary processing component are also used as part of the secondary
10 home occupation component, but the county did not include use of that
11 equipment or those vehicles within the scope of the home occupation, or
12 evaluate their use under the home occupation standards.

13 Petitioners' argument challenges a basic premise underpinning the
14 application and intervenors' defense of the decision, namely, that any activity
15 or use of equipment that is authorized under the primary processing permit is
16 thereby fully exempt from evaluation under the home occupation permit
17 standards, even if the activity or use of equipment supports both the primary
18 processing and home occupation segments of the business.[4]

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[4] That premise is evident in a passage from the staff report:

> "The applicant states that there will be no outdoor storage of goods or equipment for materials or equipment *solely* associated with the home occupation. There will be some equipment that will be used for both the home occupation and conditional use. In that

1 Intervenors cite no authority supporting that premise, and it seems
2 contrary to what little authority exists. As noted, petitioners cite to *Holsheimer*
3 for the proposition that a home occupation business cannot be segmented into
4 parts in order to avoid the home occupation criteria unless there is "substance"
5 to the segmentation. *Holsheimer* involved an application for a paving company
6 home occupation. The scope of the proposed home occupation permit included
7 only office functions in the dwelling, and the storage of vehicles and equipment
8 associated with the business in an accessory structure. The scope of the
9 application did not include any other elements of the business, including daily
10 dispatch of the vehicles and equipment to and from job sites, or paving
11 operations off-site. The then-applicable version of ORS 215.448 limited home
12 occupations to uses that occurred within the dwelling or accessory structure.
13 LUBA held:

14 "We see no reason why, in the abstract, a particular business
15 operation could not be viewed as having separate and distinct
16 parts. Moreover, so long as those parts of the business operation
17 actually are carried out as separate and distinct parts, we see no
18 reason why one or more of the parts of the business operation
19 could not be allowed as a home occupation, provided any part of
20 the business operation approved as a home occupation complies
21 with the requirements of ORS 215.448(1). However, where the
22 overall business operation is one that clearly could not be allowed
23 as a home occupation, there must be substance behind the

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situation staff has determined that as long as the equipment is addressed under the conditional use application (case file ZO 295-14-C) that equipment will not be subject to the home occupation criterion. * * *" Record Vol.2, 57 (emphasis added).

> separation of business operation into parts. Otherwise, viewing the business as being composed of more than one part is simply a fiction created to avoid a statutory limitation on home occupations." 28 Or LUBA at 282-83 (footnote omitted).

LUBA agreed with the applicant that the office functions could be viewed as separate and distinct activities from the use and storage of equipment and vehicles used to conduct paving operations. However, LUBA concluded that the proposed storage of equipment and vehicles as a home occupation could not be separated from the other elements of the paving business. Because the home occupation viewed as a totality involved use of vehicles and equipment outside the dwelling or accessory structure, it did not qualify as a home occupation and the LUBA majority accordingly reversed the decision. A concurrence would have limited the analysis only to activities that occur on the subject property. The Court of Appeals affirmed, but on the narrower grounds identified in the concurrence, that the dispatch of vehicles and equipment to and from the subject property are part of the business operations conducted on the property, and such activities in themselves were sufficient to disqualify the use as a home occupation under ORS 215.448(1) as the statute was then written.

As the parties note, in 1995 the legislature amended ORS 215.448 as it reads currently to provide that a home occupation need only operate "substantially" within the dwelling or accessory structure, and to expressly allow outdoors parking of vehicles associated with the home occupation. Under ORS 215.448 as amended, it is possible that the paving operation at

1 issue in *Holsheimer* would qualify as a home occupation today. For that
2 reason, intervenors argue that *Holsheimer* is no longer good law. However, as
3 discussed above, the county has chosen to implement ORS 215.448 more
4 stringently than the statute, and has prohibited any external evidence of the
5 home occupation, with the exception of signage and parking limited to five
6 vehicles.[5] The restrictions in ZDO 822.05 with respect to outdoor aspects of
7 the home occupation are almost as strict as ORS 215.448 (1993). Thus, our
8 analysis in *Holsheimer* remains relevant to the present case.[6]

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[5] ZDO 822.05(K)(2) provides:

> "The maximum number of vehicles that are associated with the home occupation and located on the subject property shall not exceed five at any time, including, but not limited to, employee vehicles, customer/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."

[6] For the same reason, *Ott v. Lake County*, 54 Or LUBA 502 (2007), a case the parties also discuss, is not particularly relevant, even though the facts are much closer to the present case. *Ott* also involved a log home manufacturing facility proposed as a home occupation. The county approved the operation as a home occupation, but LUBA rejected the county's conclusion that the log home manufacturing facility, which included a great deal of outdoor milling and assembly, was conducted "substantially" in the dwelling or accessory structure. In the present case, as discussed below, the ORS 215.448(1)(c) requirement that the home occupation be conducted "substantially in" the dwelling or accessory structure plays no role, and hence *Ott* is not particularly helpful. In addition, the applicant in *Ott* did not attempt to segment the log home manufacturing business, and seek approvals under two permits, as the applicant does in the present case.

Intervenors also argue that *Holsheimer* is distinguishable because that case did not involve approval of a second permit to authorize the outdoor or other activities that would exceed the restrictions allowed a home occupation. That is correct, but we do not believe that that difference renders *Holsheimer* inapplicable. In both cases, the applicant is attempting to segment an otherwise unitary business operation into two portions, one subject to home occupation standards and the other that is not subject to home occupation standards, in order to avoid application of those standards. In both cases, the central question is what kind of activities associated with the business can be properly excluded from the scope of the home occupation standards. As we held in *Holsheimer*, the boundaries of activities in a business operation that are excluded from the scope of home occupation standards must be drawn to reflect "substance" rather than a fiction designed to avoid the home occupation standards.

In answering that question, it seems to us that if an activity, such as the use of equipment or a vehicle, directly supports both the home occupation portion of the business and the portion of the business that is authorized under a different permit (or that requires no permit), then the activity must also comply with the applicable home occupation standards. Intervenors note that it is common for applicants with complex development proposals to seek multiple permits, and for different permits to address and approve separate components of the development. For example, intervenors argue that if

applicant seeks conditional use permits for both a church and a school, the church is not subject to the standards applicable to a school, and vice versa. That may be generally true, but we believe it to be equally true that approval of one permit cannot be used to circumvent the otherwise applicable standards of the other permit.

In our view, where an applicant seeks approval of a unitary or closely related use or uses pursuant to two permits, and one of those permits is a home occupation permit, the requirements of both permits apply to any components of the use or uses that are shared or overlap. Assuming that principle also applied to the example of the church and school cited by intervenors, a question we need not decide here, any shared facilities, such as a parking lot, would have to satisfy the parking standards of both permits, or if cumulative use is not an issue, the parking lot must satisfy the more rigorous set of standards. The applicant would not be able to avoid the more rigorous set of standards for a shared facility or activity by satisfying the lesser set of standards.

The potential for artificially segmenting a business into parts to circumvent standards through a multiple-permit scenario is more pronounced when one of the permits is a home occupation permit. Conditional use permits generally approve a particular type of use, a church, a school, a facility for the primary processing of forest products, etc. The scope of such uses is usually based on the use category itself rather than the conditional use standards that

1 apply. A home occupation permit, by contrast, is not as use-specific; it
2 authorizes any business use of residential property, if the business operation
3 fits within the specific limits that constrain the scope of the home occupation.
4 As a practical matter, the limits that apply to a home occupation are what *define*
5 the home occupation as a use category. As a consequence, there is greater
6 potential for artificially segmenting a proposal to avoid the limits of one permit
7 when pairing a home occupation permit with a conventional conditional use
8 permit than when pairing two conditional use permits.

9 Further, under the ZDO, home occupations are, by definition, never a
10 primary use at all, but must be secondary and subordinate to the primary
11 residential use of the property. Under the ZDO, home occupations must be
12 located substantially (or in this case, almost entirely) within dwellings and
13 other allowed accessory structures, which means that it will frequently be the
14 case that home occupation activities and residential activities permitted
15 outright will share the same space or equipment. But even in that
16 circumstance, the home occupation limits and standards will apply to any
17 portion of the residential space, equipment or vehicle that is used by the home
18 occupation, even if the space, equipment or vehicle is also sometimes used for
19 residential activities permitted outright. By the same token, we believe that the
20 ZDO home occupation limits and standards apply to any space, equipment or
21 vehicle that is used by the home occupation, even if the space, equipment or
22 vehicle is also used under an approved conditional use permit, such as a permit

for a facility for the primary processing of forest products. If, in particular circumstances, the same activity is subject to two different permit approval standards, we believe that the more restrictive ZDO standard should control.[7]

The central question is what activities are properly viewed as part of the home occupation, as distinct from activities that are exclusively allowed as residential or other permitted or conditionally permitted activities. That task is more difficult when the other conditionally permitted activity is a component of the same business that the home occupation serves, as in the present case. In *Holsheimer* we had little difficulty in concluding that administrative and bookkeeping functions of the paving business were separate and distinct from other components of the paving business, and could easily be approved as part of a home occupation. Aside from that relatively bright line, however, it is difficult, and may be impossible in particular cases, to distinguish between multiple steps in an otherwise unitary but multi-step business operation, at least where the different steps of the business share some space, equipment, employees, and vehicles.

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[7] That view is consistent with ZDO 102.04, which provides:

> "The provisions of this Ordinance shall be held to be minimum requirements. Where this Ordinance imposes a greater restriction than is imposed by other provisions of law, rules, regulations, resolutions, easements, covenants, or other agreements between parties, the provisions of this Ordinance shall control."

As applied to the present case, we believe that the primary processing facility standards and limits apply to and govern only those business activities *exclusively* associated with primary processing of forest products. All other components of the business operation for Mark Fritch Log Homes that occur on the property must be authorized under the home occupation permit, subject to the home occupation standards and limits.

With that preamble, we turn to the specific arguments under the first, third and fourth assignments of error.

A. First Assignment of Error: "Substantially in" the Accessory Structure

As noted, ORS 215.448(1)(c) limits home occupations to those that are operated "substantially in" the dwelling or accessory structure. Petitioners argue first that the county erred in failing to adopt findings regarding whether the proposed home occupation is conducted substantially in the 2,080-square-foot addition to the accessory structure to be constructed to house the home occupation.

Petitioners' findings challenge, as stated, provides no basis for reversal or remand. As explained, the county has implemented ORS 215.448(1) in a manner that is more restrictive than the statute with respect to home occupation activities conducted outside the dwelling or accessory structure. Petitioners do not argue that the county lacked authority under ORS 215.448(1) to impose more restrictive requirements, or explain what purpose would be served by evaluating whether the proposed home occupation activities comply with the

less restrictive "substantially in" standard. Intervenors do not rely upon ORS 215.448(1)(c) to support their application, in the event the ZDO 822.05(H) prohibition on "external evidence" of the home occupation does not apply or is not met. Petitioners have not established that the hearings officer was obligated to adopt findings addressing compliance with the "substantially in" requirement.

Accordingly, the first assignment of error is denied. However, in resolving the third and fourth assignments of error we will consider the parties' arguments under the first assignment of error regarding whether home occupation activities are conducted outside the accessory structure in violation of ZDO 822.05 requirements.

B. Third Assignment of Error: External Evidence of the Home Occupation

ZDO 822.05(H) provides:

> "Storage and Display: No outside storage, display of goods or merchandise visible from outside an enclosed building space, or external evidence of the home occupation shall occur, except as specifically allowed by Subsection 822.05. Notwithstanding this provision, business logos flush-mounted on vehicles used in the daily operations of the home occupation are allowed."

1 As noted, other provisions of ZDO 822.05 allow business signs and parking of
2 up to five vehicles associated with the home occupation. Otherwise, no
3 external evidence of the home occupation is generally allowed.[8]

4 To comply with the no "external evidence" limitation, the applicant
5 characterized all or nearly all business activities that occur outdoors as part of
6 the primary processing component of the business, and most business activities
7 that occur indoors as part of the secondary processing or home occupation
8 component. Planning staff and the hearings officer accepted this distinction
9 between outdoor processing and indoor processing.[9] Under that apparent view,

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[8] *Watts v. Clackamas County*, 51 Or LUBA 166, 183 (2006), discusses an implicit exception to a former version of the "external evidence" limitation, for vehicles that enter and exit the property, *e.g.*, customer or delivery vehicles. In the present case, we do not understand petitioners to argue that customer or delivery vehicles entering or exiting the property should be considered under the no "external evidence" limitation (at least vehicles that comply with the five-vehicle limitation imposed by ZDO 822.05(K)). As discussed below, petitioners do argue that any vehicles or pieces of equipment that are used to conduct *operations* on the subject property as part of the home occupation, *e.g.*, a forklift carrying logs from the outdoor processing area to the workshop, must be evaluated under the no "external evidence" limitation.

[9] The hearings officer stated:

> "Once the primary processing of logs is finished some of the logs may be brought inside for secondary processing as part of the [home occupation] use. Once the logs are brought inside, however, they are no longer part of the CUP activity, they will not return to the CUP activity for any reason, and they will be taken to the eventual home site for construction. I do not see any reason there cannot be two activities on the same property conducting different

not until a log passes through the door of the workshop is it considered part of the home occupation use. Similarly, the use of equipment, for example the forklift that is used to transport smaller logs from the sawmill to the workshop, is considered part of the primary processing component until it passes through the door of the workshop, at which point that activity presumably becomes part of the home occupation use. Further, as we understand it, both the primary and secondary processing operations will use many of the same tools, e.g., chainsaws, which will be used both indoors and outdoors, and carried back and forth as needed. For that matter, there does not appear to be any dispute that employees will move back and forth between the outdoor primary processing area and the indoor workshop, as needed for particular tasks. The problem is that these outdoor activities appear to be as closely related to the home occupation component of the business operation as the primary processing component, and at the very least would seem to constitute shared activities between the two components. Accordingly, we believe that such outdoor activities must be evaluated under the home occupation standards and limits, including the prohibition on external evidence of the home occupation.

As explained in *Holsheimer*, there must be "substance" to the proposed segmentation of a business operation, in order to treat some part of a unitary business operation as a home occupation, and to treat the remainder of the

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activities, even if some of those activities would not be permissible under the other permit." Record Vol. 1, 7-8.

business operation on the property as something else, not subject to home occupation limits and standards. In the present case, the proposed segmentation, between activities conducted outside the workshop versus activities conducted inside the workshop, appears to be a highly artificial division, drawn entirely to avoid the limitations of ZDO 822.05(H) rather than to represent actual, substantive differences in business operations.

Petitioners go further, and argue that at least those outdoor processing operations that produce smaller logs or boards for further indoor processing are shared activities that must therefore be subject to the home occupation standards and limits. For example, we understand petitioners to argue that outdoor operations such peeling or milling of smaller logs, to produce timbers or boards that are then taken indoors for secondary processing to produce the parts for stairs, windows, trusses, architectural details, etc., must be evaluated as part of the home occupation use.

This argument presents a much closer question. Petitioners are correct that the sequence of steps that begins with small raw logs and eventually produces the pieces for stairs or a window frame is a fairly seamless sequence. On the other hand, the distinction between primary processing and secondary processing is not an artificial distinction created by the applicant in this case, as is the outdoor/indoor distinction, but a distinction embedded into at least one of the use categories at issue. We do not understand petitioners to dispute that peeling and milling the larger raw logs that are then shipped to the construction

site for further processing and assembly are properly viewed as activities exclusively governed by the primary processing permit and not subject to the home occupation permit. If the smaller raw logs were similarly peeled and milled, and also shipped to the construction site for further processing and assembly, and either there were no home occupation use at all or one that was limited to office functions, the process of peeling and milling the smaller raw logs and shipping them off-site would be viewed as part of the primary processing facility, not the home occupation. Similarly, if there were a conditional use allowed in the TBR for secondary processing, we think that primary processing of logs intended for secondary processing on the property—limited strictly to primary processing—would be viewed as subject only to the standards applicable to primary processing, not as a shared or joint activity subject to the standards for both permits. For those reasons, we disagree with petitioners that the process of peeling and milling the smaller raw logs is a shared activity between the two permits, or an activity that must be evaluated under the home occupation standards and limits.

The findings addressing ZDO 822.05(H) are brief, and essentially rely on the indoor/outdoor distinction to conclude that all outdoor activities are authorized under the primary processing permit, and are therefore not subject to the no external evidence limitation.[10] The findings do agree, in a footnote, that

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[10] The findings addressing ZDO 822.05(H) state, in relevant part:

1 any shared equipment must be stored indoors, in order to comply with the
2 indoor storage requirements of ZDO 822.05(H). However, the findings do not
3 appear to recognize that shared *use* of equipment is also subject to the no
4 "external evidence" prohibition. As explained, if some equipment or activity,
5 for example, *e.g.,* tools or the forklift, are used outdoors in partial support of
6 the home occupation, then that shared activity or use of equipment must be
7 evaluated under the no "external evidence" prohibition, even if the activity or
8 equipment usage is also authorized under the primary processing permit.

9 We leave open the possibility that on remand the applicant or county can
10 articulate some actual, substantive distinction between different components of

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> "Opponents argue that multiple parts of the [home occupation] will be located outside the accessory structure. Again, opponents conflate the proposed [primary processing] use with the proposed [home occupation] use. * * * Opponents argue that the raw logs and portable mill will be visible. Both the logs and the mill are part of the [primary processing] CUP use not the [home occupation] use. Therefore, they may be located outside. Opponents also argue that finished products will be stored outside. Opponents are correct that finished products may not be stored outside, but [the applicant] does not propose to store any finished products outside. Any finished products of the [home occupation] will be taken directly from the accessory structure offsite. ZDO 822.05(H) is satisfied." Record Vol. 1, 21 (footnote omitted).

In a footnote, the hearings officer added:

> "The staff report states that equipment that is used for both the CUP and [home occupation] uses may be stored outside, but that is incorrect. Any equipment that is used for the [home occupation] must be stored inside, even if it is also used for the CUP." *Id.*

1 the business operation that would allow the county to exclude all outdoor
2 activities and processing from the scope of the home occupation limits and
3 standards. However, the present record and decision do not provide a basis to
4 avoid application of the home occupation limits and standards to at least some
5 outdoor activities.

6 The third assignment of error is sustained.

7 **C. Fourth Assignment of Error: Vehicles**

8 ZDO 822.05(K) limits the maximum number of vehicles associated with
9 the home occupation located on the subject property at any one time to five
10 vehicles, including no more than one vehicle in excess of 11,000 pounds.[11]

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[11] ZDO 822.05(K) provides:

> "Parking: Parking associated with the home occupation shall be regulated as follows:
>
> "1. Vehicles associated with the home occupation shall not be stored, parked, or repaired on public rights-of-way.
>
> "2. The maximum number of vehicles that are associated with the home occupation and located on the subject property shall not exceed five at any time, including, but not limited to, employee vehicles, customer/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.
>
> "3. 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.

1 ZDO 822.02(D) defines "vehicle" to include any motorized or non-motorized
2 "transportation equipment intended for use on public roads and associated with
3 the home occupation[.]"[12]

4 The applicant argued that only one vehicle is exclusively associated with
5 the home occupation, a one-ton flatbed truck used to haul finished interior
6 woodwork from the workshop to the construction site. According to the
7 applicant, all other vehicles used or stored on the site, including a Peterbilt
8 dump truck, a GMC crewcab truck, trailers, up to four employee vehicles,
9 customer vehicles, delivery vehicles, etc., would not be subject to ZDO
10 822.05(K) because they would be associated with the primary processing

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> "4. Parking spaces needed for employees or customers/clients of the home occupation shall be provided in defined areas of the subject property. Such areas shall be accessible, usable, designed, and surfaced for parking. Parking for the home occupation may be required to comply with Americans with Disabilities Act requirements, as determined by the County Building Codes Division."

[12] ZDO 822.02(D) defines "vehicle" as:

> "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 a 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."

1 facility or other uses allowed in the TBR zone. The hearings officer rejected
2 that approach, stating that "only a total of five vehicles may be on site at once
3 associated with the [home occupation] regardless of whether the vehicles are
4 also used with the CUP. Just because vehicles may be used for the CUP does
5 not mean that they do not count towards the five vehicle limit for the [home
6 occupation]." Record Vol.1, 22. However, the hearings officer found that,
7 "[w]hile it may cause some logistical problems, [the applicant] can keep the
8 number of vehicles on site associated with the [home occupation] limited to
9 five or less." *Id.* at 22. The hearings officer imposed a condition limiting to
10 five the number of vehicles associated with the home occupation that can be
11 present on the property at any one time. Record Vol. 1, 36.

12 Petitioners argue that the hearings officer's findings regarding
13 compliance with the five-vehicle limit are inadequate and not supported by
14 substantial evidence. We generally agree. The hearings officer correctly
15 rejected the applicant's initial position that only vehicles exclusively associated
16 with the home occupation are subject to the five-vehicle limit. Any vehicles
17 used or stored on-site that are used in part or whole for the home occupation
18 business count toward the five-vehicle limit, and the 11,000 pound gross
19 vehicle weight limit. However, the hearings officer did not attempt to
20 determine which and how many vehicles are used as part of the home
21 occupation business, or how many exceed 11,000 pounds in weight. Instead,
22 the hearings officer concluded, with no analysis or discussion, that it is possible

1 for the applicant to keep the number of vehicles on site at any given time
2 associated with the home occupation within the five-vehicle limit. As we
3 understand the facts and applicable law, that possibility may be more
4 theoretical than real, and at a minimum additional findings are necessary to
5 explain how the applicant can reasonably be expected to comply with ZDO
6 822.05(K).
7 It is important to recognize that the scope of the home occupation is
8 open-ended when it comes to the various activities that comprise Mark Fritch
9 Log Homes, and is not limited to the secondary processing of timber within the
10 workshop, or the use of the one-ton truck used to transport such processed
11 timber to construction sites, as intervenors appear to argue. As relevant here,
12 the primary processing conditional use permit authorizes only the primary
13 processing of forest products, and only vehicles that are exclusively associated
14 with the primary processing operation or other uses allowed in the TBR zone
15 can be excluded from evaluation under ZDO 822.05(K). The home occupation
16 permit authorizes all other components of the business known as Mark Fritch
17 Log Homes that occur on the subject property. Mark Fritch Log Homes is in
18 the business of designing, selling and constructing log homes. Any vehicle
19 storage or use associated with that larger business, and not exclusively
20 associated with the primary processing permit or some other permitted use, is
21 subject to ZDO 822.05(K). For example, if the GMC crewcab truck or other
22 truck is used to transport tools or employees to construction sites, that vehicle

1 is subject to ZDO 822.05(K), and its on-site parking, storage or use is counted
2 against the five-vehicle limit, even if that truck is also used as part of the
3 primary processing facility. Similarly, if the Peterbilt dump truck is used to
4 transport rock or soil or similar construction materials to construction sites, it is
5 part of the home occupation use even if it has other uses not associated with the
6 home occupation.[13] Any trailers used to transport equipment, tools or supplies
7 to construction sites are part of the home occupation use. Parking of vehicles
8 associated with the four projected employees, delivery trucks, subcontractor
9 vehicles, customers' vehicles, bookkeeper's vehicle, etc., are all subject to
10 ZDO 822.05(K), unless the hearings officer can find that the employees,
11 deliveries, etc. are exclusively associated with the primary processing facility
12 or have no association with the home occupation business.

13 Under these circumstances, we do not believe the hearings officer can
14 simply find that the applicant "can" comply with the five-vehicle limitation at
15 ZDO 822.05(K), and impose a condition requiring compliance with that

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[13] Petitioners note that both the GMC crewcab and the Peterbilt dump truck have business logos on them advertising the business "Mark Fritch Log Homes," and argue that this indicates that the two trucks are used as part of the home occupation use. Intervenors argue that the two trucks are associated only with the primary processing facility, but that argument appears to be based on the assertions made under the applicant's initial position, rejected by the hearings officer, that vehicles authorized under the CUP are not subject to home occupation limits, even if the vehicles are also used in construction or other activities associated with the home occupation. If there is evidence in the record that the two trucks are used *exclusively* for the primary processing facility or other uses permitted in the TBR zone, intervenors do not cite it.

limitation. The findings must identify which vehicles will be associated with the home occupation, in whole or in part, and provide some explanation, supported by substantial evidence, for why the hearings officer believes it is reasonable to expect the home occupation will comply with ZDO 822.05(K), along with any conditions necessary to ensure compliance.

Finally, with respect to the ZDO 822.05(K) limit of only one vehicle that exceeds 11,000 pounds, petitioners argue that at least two vehicles typically stored on the site exceed that limit, but argue that the findings do not address the limit at all. Petitioners are correct that the findings do not address compliance with the weight limit. Intervenors argue that the two oversize vehicles identified by petitioners, the Peterbilt dump truck and a large tractor, are associated with the primary processing facility and therefore not subject to ZDO 822.05(K). However, the evidence cited to us on that point appears to be based on the position, which the hearings officer rejected, that only vehicles exclusively associated with the home occupation count toward the ZDO 822.05(K) limits. There are no findings, and no evidence cited to us, regarding whether the truck and tractor are also used as part of the larger business enterprise authorized under the home occupation permit. Remand is necessary to consider that question.

The fourth assignment of error is sustained.

1 **SECOND ASSIGNMENT OF ERROR**

2 ZDO 822.02(D) defines a home occupation as an occupation or business 3 activity that, among other things, "is clearly subordinate to the residential use 4 of the subject property."[14] The hearings officer concluded that, "[w]hile it is a 5 reasonably close call, I agree with [the applicant] that the proposed [home 6 occupation] is clearly subordinate to the residential use of the property." 7 Record Vol. 1, 18. Petitioners challenge that conclusion, arguing that in 8 conducting the comparison required under the "clearly subordinate" test, the 9 hearings officer considered only a portion of the activities on the property that 10 constitute the home occupation.

11 Initially, intervenors argue that the "clearly subordinate" language in the 12 ZDO 822.02(D) definition of home occupation is not an independent approval 13 standard that can be applied to potentially deny a home occupation that 14 otherwise complies with the approval standards set out in ZDO 822.05.

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[14] ZDO 822.02(D) defines a 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 unit and/or an accessory building normally associated with primary uses allowed in the underlying zoning district; is conducted by at least one resident of the dwelling unit; 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 six times in a calendar year or operate in excess of 24 total days in a calendar year."

1 Intervenors argue that if a home occupation satisfies the approval standards in
2 ZDO 822.05, the home occupation is thereby "clearly subordinate" to the
3 residential use of the property. We understand intervenors to argue that, even
4 if the hearings officer committed error in applying the "clearly subordinate"
5 language, any error is harmless error, because that language is not an applicable
6 approval standard.

7 We disagree with intervenors that the hearings officer was not required
8 to consider whether the proposed home occupation met the definition of "home
9 occupation" at ZDO 822.02(D). While not an approval standard in the usual
10 sense, ZDO 822.02(D) includes language that clearly operates to distinguish
11 business operations that can be approved under the standards at ZDO 822.05
12 and those that cannot. Some of that language has echoes in the approval
13 standards at ZDO 822.05; some do not. For example, the last sentence of ZDO
14 822.02(D) includes prohibitions and limitations on what commercial activities
15 can occur as part of a home occupation. *See* n 14. Those prohibitions and
16 limitations have no counterpart in the approval standards at ZDO 822.05, but
17 there is no doubt that the county could deny in whole or part a proposed
18 business operation that violated those prohibitions or limitations, because in
19 that case the proposed business would not qualify as a "home occupation." We
20 conclude that the county has chosen to allow only home occupations that are
21 "clearly subordinate" to the residential use, and to place that requirement in the
22 code definition of home occupation.

1 Turning to the merits, petitioners argue that the hearings officer's
2 findings regarding the "clearly subordinate" test are inadequate and not
3 supported by substantial evidence. We generally agree. The two-paragraph
4 findings do not set out an express interpretation or explanation for what the
5 hearings officer believes the "clearly subordinate" test means or how it should
6 be applied. The first paragraph of the findings reject arguments that the
7 relatively large size of the accessory structure used for the home occupation
8 (3,000 square feet) compared to the manufactured dwelling is determinative,
9 concluding that the disparity in size is not "particularly relevant[.]" Record
10 Vol. 1, 18. The second paragraph characterizes the home occupation as
11 consisting of office functions and some secondary processing of forest products
12 inside the accessory structure. The hearings officer noted that a large part of
13 the log home business is assembling the logs into a home, which will no longer
14 occur on the site. Because the scope of secondary processing is significantly
15 reduced from what had occurred previously on the property, the hearings
16 officer concluded that, while a reasonably close call, the home occupation is
17 clearly subordinate to the residential use.
18 Petitioners first argue that, in conducting a comparison of the home
19 occupation and residential uses, the hearings officer erred in considering only
20 the office functions and secondary processing within the workshop, rather than
21 the full range of activities on the property associated with the home occupation.
22 Petitioners contend that, even if the primary processing facility is excluded

1 from the comparison, the footprint and scope of the home occupation on the
2 subject property is greater than the activities within the workshop. For the
3 reasons discussed under the third and fourth assignments of error, we agree
4 with petitioners that the scope of the home occupation includes more than the
5 activities occurring inside the workshop, but also includes or potentially
6 includes a wider range of outdoor activities, including vehicle parking and
7 usage. In determining whether the home occupation is "clearly subordinate" to
8 the residential use, the hearings officer must consider the full scope of the
9 home occupation.

10 Second, petitioners argue that the hearings officer erred in assigning
11 significance to the fact that assembly of log home walls that formerly occurred
12 on the subject property will now occur off-site. According to petitioners, the
13 "clearly subordinate" test is not concerned with the size or scope of secondary
14 activities that formerly occurred on the site relative to the size or scope of
15 secondary activities now proposed for the site. We agree with petitioners.
16 However the "clearly subordinate" test is applied, it is concerned with a
17 comparison of the residential use and the home occupation use as proposed.
18 Off-site activities that formerly were part of processing operations on the
19 property have no role in that comparison.

20 Petitioners also argue the "clearly subordinate" test means that the home
21 occupation must be small-scale and unobtrusive compared to the residential
22 use. Petitioners argue that even if the primary processing component of the

1 business is not considered, no reasonable person could conclude that the home
2 occupation business conducted on the property is “subordinate” to the
3 residential use, much less “clearly” subordinate.
4 The latter is framed as a substantial evidence argument, but embedded
5 within it is a fundamental dispute about the meaning and application of the
6 “clearly subordinate” test. Because the decision must be remanded for
7 additional findings and perhaps additional evidence, it would be premature to
8 resolve the evidentiary dispute. However, the evidence cannot be evaluated
9 without some articulation and understanding of what the “clearly subordinate”
10 test requires. The hearings officer offered no interpretation or explanation of
11 that language, other than to conclude that relative size of the manufactured
12 dwelling and the accessory structure is not a particularly relevant consideration,
13 but without stating what considerations are relevant.
14 The “subordinate” language evokes a familiar land use distinction
15 between primary and secondary (or accessory) uses, and seems to require
16 evaluation of whether the residential use remains the primary use of the
17 property, and whether the home occupation is no more than a secondary or
18 subordinate use. That much seems without dispute. We disagree with the
19 hearings officer that the relative size or portion of the property occupied by the
20 residential use compared to the size or portion of the property occupied by the
21 home occupation use is “not * * * particularly relevant in determining whether
22 the [home occupation] is clearly subordinate to the residential use[,]” although

we agree that a comparison based *solely* on square footage would be reductive and incomplete. There must be some features or elements of the two uses that must be compared in order to determine which is the primary use and which is the subordinate use, and on remand the hearings officer should attempt to articulate what features or elements should be used to make that determination.

Whatever features or elements are used to make that comparison, the ultimate determination must give effect to the adverb "clearly" that qualifies "subordinate."[15] Whatever the adverb "clearly" adds to the test, at a minimum it lifts the evidentiary bar. It is not sufficient for the home occupation to be subordinate to the primary residential use, it must be "clearly" subordinate, whatever that means.

On remand, the hearings officer should identify what features or considerations are relevant to conducting the comparison between the residential and home occupation use of the property, and provide any necessary interpretation or explanation of the phrase "clearly subordinate" to support a conclusion that the home occupation is or is not "clearly subordinate" to the residential use.

The second assignment of error is sustained.

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[15] The ZDO does not define "clearly subordinate" or "clearly." The most relevant dictionary definition of the adverb "clearly" suggests that it means "without doubt or question[.]" *Webster's Third New Int'l Dictionary* 420 (unabridged ed 2002).

FIFTH ASSIGNMENT OF ERROR

ZDO 822.05(F) provides:

> "Vibration, Glare, Fumes, and Odors: The home occupation shall not create vibration, glare, fumes, or odors detectable to normal sensory perception off the subject property. Vehicles entering or exiting the subject property shall be exempt from this standard, but idling vehicles shall not."

Petitioners argue that the hearings officer's findings regarding fumes from vehicles and equipment are inadequate, misconstrue the applicable law, and are not based on substantial evidence.

The hearings officer found that for purposes of ZDO 822.05(F) the only equipment associated with the home occupation that would emit fumes would be the one-ton flatbed truck. The hearings officer rejected the opponents' assertions that they can detect diesel fumes at the property line, noting that the opponents' testimony is based on the former unmodified version of the business. The hearings officer also cited a test conducted by the applicant to satisfy a CUP standard, in which the applicant lined up three idling trucks 120 feet from the edge of the property and asked neighbors to walk from the property edge toward the idling vehicles to determine at what distance downwind the fumes could be detected. The answers ranged from 50 to 80 feet under the conditions of that test. Record Vol. 1, 11-12. The hearings officer also relied on this test for purposes of ZDO 822.05(F), stating that under the test fumes "could not be detected more than 60 feet away from the trucks." Record Vol. 1, 21. At the applicant's suggestion, the hearings officer imposed

1 a condition of approval limiting idling times for vehicles and equipment
2 associated with the home occupation to 10 minutes and prohibiting idling
3 within 60 feet of the property line.

4 Petitioners argue that the fume test is not substantial evidence supporting
5 a finding that diesel fumes from vehicles and equipment associated with the
6 home occupation will not be detectable at the property line. Intervenors
7 respond, and we agree, that while there is conflicting evidence on this point, a
8 reasonable decision-maker could rely upon the fume test, combined with the
9 condition of approval, to conclude that fumes from idling vehicles associated
10 with the home occupation would not be detectable at the property line. While
11 the fume test is not particularly compelling, the countervailing evidence that
12 petitioners cite is mostly anecdotal.

13 Petitioners also argue that the hearings officer erred in limiting the
14 analysis only to the one-ton flatbed truck, without considering fumes from the
15 forklift and any other vehicles and equipment that may be used on the property
16 as part of the home occupation. While fumes from vehicles entering or leaving
17 the property are not counted for purposes of ZDO 822.05(F), petitioners argue
18 that the hearings officer ignored fumes from vehicles and equipment traversing
19 the property as part of home occupation activities. However, the only piece of
20 equipment that petitioners clearly identify that is associated with the home
21 occupation and that would traverse the property (as opposed to enter or leave
22 it) is the forklift. If there are other vehicles or equipment associated with the

home occupation that traverse the property, petitioners have not identified them.

On the other hand, the fume test and the condition of approval address only *idling* vehicles. There is apparently no evidence in the record addressing fumes from the forklift or limiting the operation of the forklift as it moves over the property delivering small logs to the workshop, which we held above is an activity that is subject to home occupation limits and standards. If the forklift is operated near the property line, there may well be fumes that are detectable at the property line. Remand is necessary to consider that question, or impose additional conditions sufficient to ensure compliance with ZDO 822.05(F).

The fifth assignment of error is sustained, in part.

The county's decision is remanded.