BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

RED GRAPES, LLC,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent,

and

SHILOH WIHKSNE,
Intervenor-Respondent.

LUBA No. 2021-103

REBECCA PUSKAS,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent,

and

SHILOH WIHKSNE,
Intervenor-Respondent.

LUBA No. 2021-106

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Steve C. Morasch filed a petition for review and reply brief and argued on behalf of petitioner Red Grapes, LLC.

Rebecca Puskas filed a petition for review and reply brief and argued on behalf of themselves.

Nathan K. Boderman filed a response brief and argued on behalf of the county.

Shiloh Wihksne represented themselves.

ZAMUDIO, Board Chair; RUDD, Board Member, RYAN, Board Member, participated in the decision.

REMANDED 03/30/2022

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

Opinion by Zamudio.

NATURE OF THE DECISION

Petitioners appeal a hearings officer's decision approving a chiropractic and massage therapy clinic as a home occupation.

FACTS

The subject property is a 5.71-acre parcel zoned Rural Residential Farm Forest 5-acres (RRFF-5), is located outside of the West Linn Urban Growth Boundary and within the Metro Urban Growth Boundary. The property is improved with a single-family dwelling (the dwelling) and a sheep barn. The dwelling is located on top of a hill, with a long driveway connecting to Wisteria Road. A dilapidated structure is also located on the property 900 feet downhill from the dwelling, closer to Wisteria Road.[1]

Intervenor-respondent Shiloh Wihksne (intervenor), owner of the subject property and resident of the dwelling, intends to demolish the dilapidated structure and construct a new chiropractic clinic building (clinic building) in its place. Intervenor applied to the county for land use approval for a home occupation. Specifically, intervenor sought approval of a 1,500 square foot clinic building in which to operate their chiropractic practice and also offer massage therapy and "possibly small group (5-7 people) yoga classes." Record 178. The

[1] The dilapidated structure is the original residence for the property. The current dwelling is on a separate building site on the same parcel.

clinic would employ three to four people, including intervenor as a chiropractor, one to two massage therapists, and a receptionist. Record 4.

Intervenor submitted with their application a hand-drawn building floor plan showing a rectangular building with a reception area, a restroom, a storage room, two chiropractic rooms, one massage room, one massage/yoga room, and storage and maintenance areas. Record 192. Intervenor did not submit any building plans or exterior design plans. The proposed clinic building would be served by an existing driveway directly off Wisteria Road. The existing driveway formerly served the dilapidated structure and does not serve the dwelling. A separate septic system may be necessary, to avoid pumping waste uphill to the existing septic system serving the dwelling.

Clackamas County Zoning Ordinance (ZDO) 822.04 allows a Level Three Major Home Occupation in the RRFF-5 zone, subject to a number of standards and restrictions, including that the home occupation will generate no more than 30 vehicle trips per day and no more than five vehicles associated with the home occupation are allowed on the property at any time, including employee, customer, and delivery vehicles. In the application, intervenor proposed that the clinic would have three to four employees, would serve up to 20 patients per day for chiropractic care and massage therapy, and offer a yoga studio with class sizes of five to seven persons. Record 178-93. The application proposed a 12-vehicle parking lot. Record 192. In response to the question in the application form "What is the maximum number of vehicle trips the home occupation will generate

per day?" intervenor responded, "I could see up to 20 patients per day, therefore 20 trips." Record 185. However, under ZDO 822.02(G), a vehicle trip is counted one way, so that one patient visit would generate two trips (to and from the clinic) and, thus, 20 patients per day would generate 40 trips and the proposed use would violate the home occupation restrictions. After planning staff clarified for intervenor the trip calculation and parking limits, intervenor agreed to not allow the business to generate more than 30 vehicle trips (15 round trips) per day including employees, patients, and deliveries associated with the proposed home occupation business. In a revised site plan, intervenor proposed to provide only five vehicle parking spaces. Record 114. County staff approved the application.

Petitioners appealed the planning staff decision to the county hearings officer, arguing that the proposed clinic building did not qualify as an accessory building normally associated with primary uses allowed in the RRFF-5 zone under the applicable ZDO definitions, and that the record did not support compliance with the 30-vehicle trip maximum. The hearings officer conducted a hearing. At that hearing, intervenor stated that they could comply with the 30-vehicle trip limit by serving ten to twelve patients per day, and limiting employee numbers and deliveries. Audio Recording, Hearing Before the Clackamas County Hearings Officer, Sept 29, 2021, at 1:32:30-55 (comments of Shiloh Wihksne). On October 24, 2021, the hearings officer issued the county's final decision rejecting petitioners' arguments and approving the application with conditions. These appeals followed.

FIRST ASSIGNMENT OF ERROR (Red Grapes, LLC)

FIRST ASSIGNMENT OF ERROR (Puskas)

The first assignments of error in both petitions for review advance substantially similar arguments that the clinic building is not permitted under the applicable ZDO definitions. As noted, the RRFF-5 zone allows a "home occupation" subject to standards in ZDO chapter 822, which implement the standards at ORS 215.448.[2] ZDO Table 316-1. ZDO 202 defines "home occupation" as "an occupation or business activity that results in a product or service and is conducted, in whole or in part, in a dwelling unit, *an accessory building normally associated with primary uses allowed in the subject zoning district*, or both." (Emphasis added.) A level three major home occupation must be operated by a full-time resident of a dwelling unit on the tract on which the home occupation is located and must be conducted primarily in an accessory building. ZDO 822.04(A), (L)(1).[3] Petitioners argue that the hearings officer

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[2] We quote and discuss ORS 215.448 under the second assignment of error.

[3] ZDO 822.04(A) provides: "The operator shall reside full-time in a lawfully established dwelling unit on the tract on which the home occupation is located." The home occupation "operator" is "[t]he person who conducts the home occupation, has majority ownership interest in the home occupation, and is responsible for strategic decisions and day-to-day operations of the home occupation." ZDO 822.02(E).

ZDO 822.04(L)(1) provides, in part:

failed to adopt findings, supported by substantial evidence, that the proposed home occupation use will be conducted in "an accessory building normally associated with primary uses allowed" in the RRFF-5 zone.

Petitioners note that the ZDO 202 definition of "home occupation" includes another defined term, "accessory building." ZDO 202 defines "accessory building or use," as: "A subordinate building or use, the function of which is clearly incidental to that of the main building or use on the same lot."[4] It is undisputed that the dwelling is the "main building" and that residential use is the "main" and "primary" use on the subject property. Petitioners contend, and the county concedes that those definitions require intervenor to demonstrate and the county to find that the clinic building in which the home occupation will be

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> "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. * * * [F]or a level three major home occupation, a maximum of 1,500 square feet of accessory building floor space may be used for the home occupation. * * *"

"Incidental use" is "[t]he use of no more than 25 percent of the floor area of a building or 500 square feet, whichever is less." ZDO 822.02(D).

[4] ZDO 822.02(A) defines "Accessory Building Floor Space" for purposes of home occupation as "Any building floor space, other than a dwelling unit, that is used for the home occupation, including, but not limited to, an attached garage, detached garage, or pole building."

conducted is an accessory building that is "subordinate" and "clearly incidental" to the dwelling and residential use of the subject property.[5]

Petitioners contend that the hearings officer misunderstood and failed to squarely address their arguments below that the proposed clinic building does not qualify as an "accessory building" as defined in ZDO 202, because there is no evidence that the clinic building is "subordinate" and that its function is "clearly incidental" to the main building, the dwelling, and the primary use, residential. Relatedly, petitioners argue that the findings fail to explain why the proposed clinic building is one that is "normally associated with primary uses" allowed in the RRFF-5 zone.

For reasons explained below, we agree with petitioners that the hearings officer adopted inadequate findings explaining why the proposed clinic building is "subordinate" and "clearly incidental" to the dwelling, and hence qualifies as an "accessory building" as defined in ZDO 202. Further, we agree that hearings officer did not adequately explain why the clinic building is one that is "normally associated with primary uses" allowed in the RRFF-5 zone.

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[5] The county observes that petitioners do not dispute that the home occupation clinic *use* itself qualifies under the relevant standards and criteria. Response Brief 9. We observe that petitioners do not contend that the definition of "home occupation" and "accessory building and use" or any other criterion requires intervenor to establish that home occupation clinic *use* (as contrasted to the clinic building) must be "subordinate" and "clearly incidental" to the residential use. We express no opinion on that issue.

In the findings, the hearings officer notes that the terms "clearly incidental" and "subordinate" are not clear, and quotes dictionary definitions of those terms, but never attempts to articulate what those terms mean as applied to the facts in the present case. The findings state, in relevant part:

> "In reviewing this argument and related arguments made by the three appellants, and certain commentators opposed to this application, I note that the argument continues to conflate the accessory use with the accessory building. Further, I note that although the terms incidental and subordinate do not appear clear, in the context of land-use laws these terms have a well-established history. Treatises and legal dictionaries use the terms 'incidental' and 'subordinate' to define the concept of 'accessory' use in zoning laws. Black's Law Dictionary (9th ed 2009) defines 'incidental use' as '[l]and use that is dependent on or affiliated with the land's primary use' and defines 'accessory use' as '[a] use that is dependent on or pertains to a main use.'" Record 15.

In *Jacobs v. Clackamas County*, 73 Or LUBA 262 (2016), we concluded that, under an older version of the ZDO 822 home occupation standards requiring that the proposed building housing the home occupation must be "clearly subordinate" to the dwelling, the hearings officer must identify some features or elements of the two uses and buildings and compare them in some way, in order to support a conclusion that the home occupation use is "clearly subordinate" to the residential use. We stated in *Jacobs*:

> "The 'subordinate' language evokes a familiar land use distinction between primary and secondary (or accessory) uses, and seems to require evaluation of whether the residential use remains the primary use of the property, and whether the home occupation is no more than a secondary or subordinate use. That much seems without dispute. We disagree with the hearings officer that the relative size

> or portion of the property occupied by the residential use compared to the size or portion of the property occupied by the home occupation use is 'not * * * particularly relevant in determining whether 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.' 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." 73 Or LUBA at 283-84.

The county argues, without elaboration, that *Jacobs* is "of limited value in this appeal" because *Jacobs* concerned a code definition that has since been repealed. Response Brief 15 n 1. Based on our review of *Jacobs*, we assume that the county refers to the fact that *former* ZDO 822.02(D) defined "home occupation" as an occupation or business activity that, among other things, "is clearly subordinate to the residential use of the subject property."[6] The current

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[6] *Former* ZDO 822.02(D) defined "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

code does not expressly require that an applicant demonstrate that home occupation use itself is subordinate to the residential use of the subject property.

We agree with the county's observation that the issue presented in these appeals is distinct from the issue presented and resolved in *Jacobs* as quoted above. Our reasoning in *Jacobs* addressed the phrase "clearly subordinate" as applied to the home occupation *use* in relationship to the residential use of the subject property. Differently, these appeals concern the relationship between the clinic building and the dwelling. Specifically, these appeals concern application of the ZDO 202 definition of "accessory building" as used in the amended definition of "home occupation." Petitioners argue that the hearings officer's decision fails to apply the term "subordinate" and the phrase "clearly incidental" as used to define "accessory building" addressing the characteristics and function of the clinic building in relationship to the dwelling. While not precisely controlling, our discussion of the terms "subordinate" and "clearly" in *Jacobs* is instructive here.

The hearings officer's findings observe that a wide range of accessory buildings and home occupational uses of those buildings can potentially be

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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."

approved in a number of county zones, referring to ZDO Table 316-1 list of "Accessory Buildings and Uses, Customarily Permitted." The hearings officer concluded that the proposed clinic building is "similar" to some of those listed accessory buildings. The hearings officer found:

> "The County's original findings state the actual determining inquiry: '[R]egardless of the structure being new or existing the intent of this section is to determine if the proposed structure is acceptable as an accessory structure in the RRFF5 District.' Thus, the real point here is that property owners within the RRFF-5 zone can build structures on their property for use as garages or for storage, barns and work shops for farm or forestry uses, and many other structures that are customary. Table 316-1 in ZDO 316 provides that such accessory buildings and uses are permitted, providing a lengthy list of examples that includes many structures similar to that proposed by the applicant, such as: family child care homes; meeting facilities; parking areas; property management and maintenance offices; dance studios; exercise studios; self-service laundry facilities; shops; storage buildings/rooms; and many other things covering a broad range of accessory buildings and uses. The list is itself not exhaustive as there are many other accessory buildings and uses customarily permitted in the RRFF-5 zone that are similar to these and are also allowed, such as barns and horse arenas, chicken coops, hobby barns, etc. The applicant in fact has a sheep barn on her property, and many similar outbuildings are visible in the photographs of the area submitted by the County. These are all types of customarily permitted buildings normally associated with allowed uses in the RRFF-5 zone. I conclude that the building the applicant proposes to build for use as her home occupation chiropractic clinic falls within the meaning of buildings normally associated with uses permitted in the applicable zoning district." Record 16 (italics omitted).

The hearings officer's reliance on the ZDO Table 316-1 list of "Accessory Buildings and Uses, Customarily Permitted" is not a substitute for the analysis

required to determine whether the proposed clinic building qualifies as an "accessory building" to the dwelling on the property and is insufficient to explain whether the proposed clinic building is "normally associated" with the primary residential use or any other primary use allowed in the RRFF-5 zone. The use category of "Accessory Buildings and Uses, Customarily Permitted" is an entirely different use category from "Home Occupations." The former use category includes a lengthy list of accessory uses and buildings that are typically associated with a broad range of residential, commercial, and industrial uses allowed across six rural zones. That list includes a wide variety of accessory uses and buildings, linked to a wide range of primary residential, commercial, and industrial uses. That some of those accessory uses or buildings might seem "similar" in unspecified ways to the proposed clinic building does nothing to demonstrate that the proposed clinic building is subordinate and clearly incidental to intervenor's dwelling, or that it is the type of building "normally associated" with a dwelling.

The "subordinate" and "clearly incidental" restrictions are designed to prevent a home occupation commercial use from becoming a primary or predominant use of the subject property and thereby preserve the character of the zone consistent with the predominant uses permitted that that zone. To determine whether the proposed clinic building is a "subordinate building," which is "clearly incidental" to the main building, the dwelling, and the main, residential use, the hearings officer must compare those two structures and uses, and explain

how, given the relationship between the two, the clinic building is subordinate and clearly incidental to the dwelling and residential use.

In its response brief, the county acknowledges that a building must have some relationship to the dwelling to qualify as an "accessory building," but argues that the requisite relationship is established in the present case by evidence that (1) intervenor occupies the dwelling on the subject property and their residential use is the primary use of the property, (2) intervenor will operate the clinic business in the clinic building, (3) intervenor will be using the clinic building on a limited and part-time basis in a manner that supports her primary residential use of the property; (4) the clinic building is smaller than the dwelling, and (5) the clinic building is located on the same parcel as the dwelling. Response Brief 12-13.

In arguing that the clinic building lacks the requisite relationship to the dwelling, petitioners emphasize that the clinic building will be removed from the dwelling by topography, vegetation, and 900 feet of distance and will be served by its own driveway off Wisteria Road, will have its own parking area, and perhaps its own septic system.

The county disputes that the physical proximity of the clinic building to the dwelling is a consideration in determining whether the clinic building is an accessory building, citing *Landwatch Lane County v. Lane County*, 78 Or LUBA 272 (2018), which involved an art studio proposed as an accessory building to a dwelling in a forest zone. The art studio was located several hundred feet away

from the dwelling, along the driveway leading to the dwelling. The petitioner argued that to preserve forest lands the applicable state administrative rules should be read to require clustering of the art studio and the dwelling. LUBA declined to interpret the administrative rules to impose an implicit clustering requirement to preserve forest lands. The petitioner did not argue that clustering or closer physical proximity to the dwelling was necessary for the art studio to qualify as an accessory building to the dwelling, and LUBA did not address whether physical proximity to the dwelling is a consideration in determining whether a building is an "accessory building" under the applicable definitions. *Landwatch Lane County* does not assist the county.

We agree with petitioners that the locational relationship between the clinic building and the dwelling is a relevant consideration in determining whether the clinic building qualifies as an "accessory building" to the dwelling. We also agree that improvements associated with the clinic building should be considered in determining whether the clinic building qualifies as an "accessory building" to the dwelling. The identified improvements include separate access, parking areas, and septic system.

In its response brief, the county has identified other physical and functional characteristics that may be relevant considerations in determining whether the clinic building qualifies as an "accessory building" to the dwelling, including the relative duration and frequency occupation and use of the clinic building as compared to the dwelling, and relative size of the clinic building and associated

improvements as compared to the dwelling. Some of the factors that the county relies on to support the county's conclusion that the clinic building is an accessory building overlap with requirements for a level three major home occupation, including that the home occupation operator must be a full-time resident of a dwelling unit on the tract on which the home occupation is located and the home occupation use must be conducted primarily in an accessory building. ZDO 822.04(A), (L)(1). Those factors may still be relevant considerations in demonstrating whether the clinic building is accessory to the dwelling.

We agree with petitioners that the hearings officer's decision fails to identify, let along consider, any of those factors for determining whether the clinic building the clinic building is accessory to the dwelling. Table 316-1 lists home occupations as an accessory use allowed in the RRFF-5 zone, subject to ZDO 822. *See* Table 316-1 n 14 ("A use may be permitted as a home occupation, subject to Section 822, even if such use is also identified in another use listing in Table 316-1.").[7] The home occupation use category is listed in Table 316-1 separately from the "accessory buildings and uses, customarily permitted" use category in Table 316-1.

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[7] We note that Table 316-1 lists personal commercial services, such as beauty salons, and studio commercial services, such as dance studios, as prohibited uses in the RRFF-5 zone. Presumably, those commercial uses may be allowed as home occupations in the RRFF-5 zone.

As the term "home occupation" indicates, the home occupation use category applies to certain commercial uses of primary residences and associated accessory structures. A level one minor home occupation must be conducted primarily in a dwelling and employ only residents of the dwelling. ZDO 822.03(A), (B). A level two or three major home occupation must be operated by a full-time resident of a dwelling unit on the tract on which the home occupation is located and must be conducted primarily in an accessory building. ZDO 822.04(A), (L)(1). These non-residential uses must be associated with residential uses and are allowed in residential zones such as the RRFF-5 zone subject to standards designed to reduce the impacts of what would otherwise constitute a prohibited commercial use.

As relevant to these appeals, a level three home occupation is allowed only if it is primarily conducted within a building or buildings "normally associated with uses permitted" in the RRFF-5 zone. As we understand it, that restriction ensures that a structure that is used for a commercial home occupation can be easily converted back and used as an accessory building when the home occupation use ceases. For example, a detached garage may be used for a car detailing home occupation commercial use. When that home occupation ceases, the garage remains by design and function a structure that is normally associated with the residential use and that can easily be used in conjunction with the residential use. Differently, a specialized car wash structure may not allowed in the RRFF-5 zone if, when the car wash use ceases, that specialized structure

cannot easily be converted for a use normally associated with a dwelling. Similar to the "subordinate" and "clearly incidental" restrictions, the "normally associated" restriction is designed to preserve the character of the zone consistent with the predominant uses permitted that that zone.

In the RRFF-5 zone, primary uses include single-family dwelling residential use and farm and forest uses. Table 316-1. If the commercial use is to be conducted within an existing building, it is relatively easy to determine whether the existing building is an accessory building. Obvious examples are garages, sheds, or pole buildings.[8] Such buildings are "normally associated" with residential, farm, and forest uses. Importantly, such buildings can continue to function as accessory buildings for residential, farm, and forest uses, even if the home occupation use is later removed from them. It is more difficult to determine whether a newly constructed building that is designed and constructed to suit a commercial use is an accessory building.

Here, intervenor proposes to construct a new clinic building designed specifically to suit intervenor's home occupation. The county must determine whether the clinic building qualifies as an accessory building to the dwelling. *See 1000 Friends of Oregon v. Clackamas County*, 309 Or App 499, 483 P3d 706

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[8] ZDO 822.02(A) provides a definition of "Accessory Building Floor Space" for purposes of home occupation is "Any building floor space, other than a dwelling unit, that is used for the home occupation, including, but not limited to, an attached garage, detached garage, or pole building."

(2021) (rejecting LUBA's holding that internal renovations to an existing barn on farmland to allow the barn to be used for a home occupation "event center" changed the barn's accessory character, but affirming LUBA's conclusion that a proposed new restroom building sized to handle crowds of up to 300 people is not "normally associated" with a farm dwelling). We agree with petitioners that the appropriate inquiry in these appeals is whether the proposed clinic building, as designed, and given its relationship to the dwelling, will function as an accessory structure to the dwelling, even if the home occupation use is later removed or never established. Stated differently, a building that due to its design, placement or other physical characteristics cannot reasonably function as an accessory building to a dwelling is not one that is "normally associated" with the dwelling, and or one that is "subordinate" or "clearly incidental" to the dwelling. Such a building lacks the requisite relationship to the dwelling, and therefore cannot qualify as an accessory building. We agree with petitioners that the requirement that the home occupation be conducted in an accessory building is intended to prevent approval and use of a stand-alone commercial structure that would otherwise be prohibited in the RRFF-5 zone.

As explained above, the hearings officer failed to adopt adequate findings addressing whether the clinic building is "subordinate" and "clearly incidental" to the dwelling and is a type of building that is "normally associated" with uses permitted in the RRFF-5 zone. Instead of applying the applicable definitions, and relevant considerations under those definitions, the hearings officer relied almost

entirely on reference to a list of accessory buildings and uses under a fundamentally different, and much broader, use category. Under that approach, so long as the proposed building is in some way "similar" to one or more of the accessory buildings in that list, it therefore qualifies as an "accessory building" for purposes of the home occupation standards. Given the breadth of that list, and the elastic limitation of mere "similarity," virtually any structure used for a home occupation could qualify as accessory to a dwelling, no matter its relationship, or lack thereof, to the residential use or other primary use allowed in the RRFF-5 zone. We agree with petitioners that remand is necessary to adopt adequate findings that focus on the applicable definitions and considerations required to determine whether the clinic building qualifies as an accessory building.[9]

The first assignment of error (Red Grapes LLC) and first assignment of error (Puskas) are sustained.

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[9] Petitioner Puskas argues that the record does not contain sufficient evidence and detail about the type, style, character, and size of the clinic building to permit the county to determine whether the clinic building is a type of building "normally associated with primary uses" in the RRFF-5 zone. Puskas Petition for Review 19. We remand based on inadequate findings and do not address that substantial evidence challenge because the county will likely adopt new findings on remand.

SECOND ASSIGNMENT OF ERROR (Puskas)

ORS 215.448 authorizes counties to approve home occupations in any county zone, subject to certain standards mostly directed at home occupations in resource zones. ORS 215.448 provides:

> "(1) The governing body of a county or its designate may allow, subject to the approval of the governing body or its designate, the establishment of a home occupation and the parking of vehicles in any zone. However, in 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:
>
> > "(a) It shall be operated by a resident or employee of a resident of the property on which the business is located;
> >
> > "(b) It shall employ on the site no more than five full-time or part-time persons;
> >
> > "(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; and
> >
> > "(d) It shall not unreasonably interfere with other uses permitted in the zone in which the property is located.
>
> "(2) The governing body of the county or its designate may establish additional reasonable conditions of approval for the establishment of a home occupation under subsection (1) of this section.
>
> "(3) Nothing in this section authorizes the governing body or its designate to permit construction of any structure that would not otherwise be allowed in the zone in which the home occupation is

to be established.

"(4) The existence of home occupations shall not be used as justification for a zone change."

Petitioner Puskas argues that the proposed clinic building is a structure that is not "allowed in the zone in which the home occupation is to be established," for all the reasons argued under the first assignments of error. Accordingly, petitioner argues that the county's decision not only violates the applicable ZDO standards but also violates ORS 215.448(3).

The county responds that the arguments under Puskas' second assignment of error are wholly derivative of the Puskas' first and urges us to deny the former based on the county's responses to the latter. In their reply brief, Puskas agrees that their arguments under ORS 215.448(3) are derivative of their arguments based on the ZDO.

We sustained petitioners' first assignments of error and required remand to adopt more adequate findings addressing the applicable ZDO standards. That basis for remand does not lead to the conclusion that the proposed clinic building necessarily violates the applicable ZDO standards, or cannot be approved based on more adequate findings addressing the local standards. Accordingly, it would be premature for us to address petitioner's arguments based on ORS 215.448(3) and those arguments provide no independent basis for reversal or remand.

The second assignment of error (Puskas) is denied.

SECOND ASSIGNMENT OF ERROR (Red Grapes, LLC)

As noted, ZDO 822.04(L)(2) limits a level three major home occupation to a maximum of 30 vehicle trips per day. ZDO 822.02(G) defines "vehicle trip" to include any vehicular movement to or from the property, including trips involving vehicles used in the home occupation, delivery vehicles associated with the home occupation, and customer vehicles. Intervenor originally proposed to comply with the 30-trip limit by limiting business to 20 patients per day, plus three to four employees, and yoga classes involving five to seven people. At the hearing intervenor testified that they could comply with ZDO 822.04(L)(2) by seeing ten to twelve patients per day, and by having only one employee, a massage therapist. Intervenor described the yoga class as a "wish list" item, but did not withdraw that proposal. Intervenor stated that they would minimize vendor deliveries by personally shopping for supplies offsite.

Based on intervenor's testimony, the hearings officer found that the proposed home occupation can comply with ZDO 822.04(L)(2) by imposition of a condition of approval. The hearings officer's findings state:

> "The applicant originally indicated she could see up to twenty patients per day, assuming this meant twenty vehicle trips. County staff pointed out this mistake, and the applicant agreed to reduce the vehicle trips to no more than 30 vehicle trips per day (15 round trips) and correctly count employees (including herself, if she drives to the proposed site), patients, and any delivery vehicles associated with the home occupation. Applicant suggested she could create a schedule to see 10-12 patients per day and take her last appointment by 12:30 pm to be done charting by 2:00 pm, essentially working the hours her children attend school. A schedule of 10-12 patients

per day, with a chiropractor and 1-2 other employees on-site on a given day, can stay within these requirements.

"* * * * *

"As discussed, the schedule suggested by the applicant at the hearing can meet these requirements. I note that the County included as a Condition of Approval a statement that: 'The level three major home occupation shall not generate more than 30 vehicle trips per day (15 round trips).' I find that modifying this Condition of Approval is warranted in order to ensure that this criterion is met. Specifically, by adding the following additional requirement to this Condition of Approval: 'Upon request by County staff, the applicant shall provide the appointment calendar for both the chiropractor business and yoga classes.'" Record 17-18.

The approval includes Condition k, which provides: "The level three major home occupation shall not generate more than 30 vehicle trips per day (15 round trips). Upon request by County staff, the applicant shall provide the appointment calendar for both the chiropractor business and yoga classes." Record 21.

Petitioner Red Grapes, LLC, argues that the findings are inadequate and not supported by substantial evidence, and that Condition k is insufficient to ensure compliance with ZDO 822.04(L)(2). Petitioner notes that intervenor initially proposed a more intensive scale of business that violated ZDO 822.04(L)(2), and at no point modified the application or accepted any formal restrictions on the number of patients, employees, or deliveries necessary to comply with the 30-trip standard. Instead, petitioner argues, intervenor provided only verbal assurances that the business operation could be scaled back to comply with the 30-trip maximum. Petitioner contends that unsupported assurances by

the applicant do not constitute substantial evidence of compliance with approval criteria, citing *Pekarek v. Wallowa County*, 33 Or LUBA 225 (1997), and *Wuester v. Clackamas County*, 25 Or LUBA 425 (1993).

Both *Wuester* and *Pekarek* involved evidence of a technical or documentary nature (compliance with noise standards and code-required scale drawings showing building height and roof pitch, respectively). Not surprisingly, we held that the applicants' bare verbal assurances that the development will comply with noise, and height and roof pitch standards, in the absence of a noise study or scaled drawings or any other evidence, were not substantial evidence to support of finding of compliance with the applicable standards.

In *Culligan v. Washington County*, we explained that

> "an applicant's promise or statement regarding the proposed development is not an adequate substitute for a condition of approval that is necessary to ensure compliance with applicable approval criteria, even if that promise or statement occurs in the application narrative. However, where the promise or statement is embodied or found on the face of the plan that the decision approves, and any subsequent approvals or permits must be consistent with that approved plan, we see no need for a specific condition of approval to that effect." 57 Or LUBA 395, 401-02 (2008).

Here, petitioner argues that the hearings official approved the unmodified application that requested approval for intervenor to see up to 20 patients per day and that service level would exceed the trip cap for a level three home occupation. Petitioner argues that intervenor's testimony combined with the condition of approval are insufficient to ensure that the trip cap in ZDO 822.04(L)(2) is

satisfied. Petitioner also suggests that a traffic study is necessary to determine how many trips the clinic business will generate.

The ZDO does not require a traffic study for a home occupation, and the question of how many trips will be generated is a matter of the intensity of the home occupation use, which is largely if not entirely within intervenor's control. Intervenor described at the hearing how their business would manage patient and employee numbers to ensure compliance with the 30-trip maximum, and that testimony is competent evidence from a knowledgeable source. Intervenor proposed to reduce vendor delivery trips by personally shopping offsite for business supplies. Petitioner argues that this proposal is insufficient, and fails to account for other types of deliveries or services, such as mail delivery, garbage pickup, landscaping work, etc. However, garbage and landscaping services vehicles do not deliver anything, and are not "delivery vehicles associated with the home occupation" for purposes of ZDO 822.02(G). Petitioner has not demonstrated that the existing findings and evidence regarding delivery vehicles are insufficient to support the decision.

Petitioner speculates that intervenor will not in fact limit the number of employees and clients as proposed, or that the home occupation use will generate more than 30 trips per day in other ways. That is possible. However, the hearings officer was not required to eliminate, via findings and conditions, the possibility that an applicant may at some future point violate a code requirement and a condition of approval imposed to ensure that requirement is met. If the record

establishes by substantial evidence that the applicant can comply with code requirements, the hearings officer may, as they did here, adopt explanatory findings to that effect and impose reasonable conditions designed to promote that end. If it turns out that intervenor will not or cannot comply with ZDO 822.04(L)(2) and Condition k, then the county has code enforcement authority. The hearings officer made potential enforcement easier by imposing Condition k, which not only limits trip generation to 30 trips per day, but also requires that "[u]pon request by County staff, the applicant shall provide the appointment calendar for both the chiropractor business and yoga classes." Record 21.

Petitioner argues that the latter condition is insufficient, for two reasons. The first is that Condition k includes no requirement for county staff to monitor the situation, but leaves it up to staff to choose when and if to request the appointment calendar, without provision for members of the public to request a hearing. The second is that the appointment calendar reflects only chiropractic appointments and yoga classes, and will not record other vehicular trips to and from the clinic, including from massage therapy clients, intervenor, employee(s), and any deliveries from the postal service, etc.

We disagree with petitioner that Condition k is insufficient for either reason. While the hearings officer could have required intervenor to submit the appointment calendar to county staff on a periodic basis, the hearings officer apparently felt that step was unnecessary. Instead, the hearings officer relied upon the code enforcement process, which typically begins with receipt of a complaint

about a code or permit violation, followed by county staff investigation of the complaint. Condition k is intended to aid that investigative process. Petitioner has not demonstrated that the hearings officer was required to create an entirely new process for investigating alleged code violations involving constant monitoring and public hearings.

The fact that the appointment calendar will not reflect all of the vehicular trips generated by the clinic business does not render Condition k insufficient. County staff are presumably capable of investigating how many vehicular trips a business generates on a given day, using a variety of techniques. The appointment calendar simplifies that task but does not appear to use to be intended to reflect all vehicular trips associated with the clinic. With respect to massage therapy clients, intervenor stated below that approximately 80 to 85 percent of their clients seek both chiropractic care and massage therapy, suggesting that a subset of clients seek only one or the other. Petitioner interprets Condition k to not apply to appointments for massage therapy without chiropractic care. However, it seems relatively clear that the hearings officer understood intervenor's "chiropractic business" to encompass both chiropractic care and massage therapy, and assumed that the appointment calendar would reflect both. Petitioner identifies no reason to believe that the appointment calendar would not include appointments for massage therapy.

With respect to non-client trips, intervenor stated that they intend to walk to the clinic from the dwelling. Petitioner speculates that intervenor would

sometimes choose to drive to the clinic, especially in inclement weather, but offers no basis for that speculation. However, that circumstance, like how many clients are scheduled per day, the number of employees, and whether to schedule yoga classes, is fully within intervenor's control. On days with a light client schedule, intervenor may well choose to drive to the clinic, or conduct yoga classes, without concern for exceeding the 30-trip maximum. As discussed above, intervenor proposes to reduce vendor deliveries by shopping for business supplies offsite. Other than speculating that intervenor will not succeed as proposed in managing their business to comply with the 30-trip maximum, petitioner offers no basis to conclude that Condition k is insufficient to ensure compliance with ZDO 822.04(L)(2).

The second assignment of error (Red Grapes, LLC) is denied.

The county's decision is remanded.