BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CAMPBELL MUNN,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent,

and

HAROLD SUTTON and VIVIAN A. SUTTON,
Intervenors-Respondent.

LUBA No. 99-159

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Timothy A. Vanagas, Gresham, filed the petition for review and argued on behalf of petitioner.

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

Harlan E. Levy, Oregon City, filed the response brief and argued on behalf of intervenors-respondent. With him on the brief was Hibbard, Caldwell and Schultz.

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

AFFIRMED 1/28/2000

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioner appeals a decision by a county hearings officer to deny an application for a home occupation permit.

MOTION TO INTERVENE

Harold Sutton and Vivian A. Sutton move to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

MOTION TO SUPPLEMENT RECORD

On January 24, 2000, four days after oral argument, petitioner moved to supplement the record before LUBA with evidence demonstrating that the title to a certain vehicle was modified by the Oregon Department of Motor Vehicles to show a lower gross vehicle weight (GVW) than was shown in prior proceedings before the county. Petitioner concedes that this document was not placed before the local decision maker, or otherwise incorporated into the record below.

Except for circumstances not present here, our review is limited to the record before the local decision maker. OAR 661-010-0025; OAR 661-010-0045. Petitioner's motion to supplement the record is denied.

FACTS

The subject property is a 5.79-acre parcel located in the county's Rural Residential Farm Forest 5 (RRFF 5) zone. An excavating business owned by Robert Montgomery and Montgomery Development Company is being operated on the subject property. Montgomery individually also holds a one-percent interest in the subject property. Montgomery himself does not live on the property. His cousin, an employee of the excavating business, lives in a dwelling on the subject parcel. Petitioner, who with his wife holds 99 percent interest in the subject property, seeks to legalize the excavating business by obtaining a home occupation permit.

This is petitioner's second application for a home occupation permit for an excavating business on the subject property. In 1998, petitioner and his wife applied for a home occupation permit pursuant to Clackamas County Zoning and Development Ordinance (ZDO) 822.05.[1] The county planning director denied the initial application because the

[1]The ZDO differentiates between "major" and "minor" home occupations. The subject application is considered a "major" home occupation, regulated by ZDO 822.05. To obtain a major home occupation permit in the RRFF zone, the applicant must comply with the following criteria:

> "A. Participants: The home occupation shall be operated by a member of the family residing in the residence.
>
> "B. Employees: There shall be no more than five (5) full or part-time employees * * *.
>
> "C. Access: The subject property must have frontage on, and direct access from, a constructed public, County, or State road, or take access on an exclusive road or easement serving only the subject property. * * *
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> "D. Accessory Space: In addition to the residence, up to 1,000 square feet of accessory building space may be used for the home occupation. * * *
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> "E. Character: The character and residential/farm function of the buildings and property shall be maintained by the appropriate use of colors, materials, design, construction, lighting and landscaping.
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> "F. Noise: A home occupation shall not create noise which, measured off the property, exceeds 60 dba between the hours of 8:00 a.m. and 6:00 p.m. A home occupation shall not create noise which is detectable to normal sensory perception off the property between the hours of 6:00 p.m. and 8:00 a.m. * * *
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> "G. Equipment and Process Restrictions: No home occupation shall create vibration, glare, fumes, odors, or electrical interference detectable to normal sensory perception off the property.* * *
>
> "H. Outside Storage: No outside storage, display of goods or merchandise, or external evidence of a home occupation shall occur except as permitted in this section.
>
> "I. Signs: One (1) sign, not exceeding eight (8) square feet per side and six (6) feet in height, may be located on the property on which the home occupation is located. * * *
>
> "J. Traffic: A home occupation shall not generate more than a total of fifteen (15) trips to and from the property in one day.
>
> "K. Parking:
>
> "1. No vehicle associated with a home occupation shall be stored, parked, or repaired on public rights-of-way.

applicants failed to demonstrate compliance with ZDO 822.05(A), (C), (H) and (K). Specifically, the planning director found that the applicants failed to show that the business was being operated by the owner of the business, or a member of the owner's family, who resided on the property. In addition, the applicants failed to demonstrate that the number and GVW of the vehicles to be parked on the property would comply with the county code. Finally, the planning director found that the applicants failed to show that no outside storage, display of goods or merchandise, or external evidence of the home occupation would occur. The applicants appealed the planning director's decision to the county hearings officer, who affirmed the planning director's decision, and also found that the application failed to comply with other relevant provisions of the code. The applicants then appealed the hearings officer's decision to LUBA. The appeal was later dismissed.

ZDO 1303.11 provides that, with some exceptions, if an application for a land use permit is denied, a new application for the same or substantially similar use on the same property may not be submitted until two years after the date of the first denial. In this case, the hearings officer's first decision was final on October 9, 1998. Thus, according to the

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"2. The maximum number of vehicles which are associated with a home occupation and located on the property shall not exceed a total of five (5) at any time, including: employee vehicles; client vehicles; and vehicles to be repaired. * * *

"* * * * *

"4. No more than one (1) of the five (5) total vehicles permitted to be stored, parked, or repaired on the property shall exceed 11,000 pounds gross vehicle weight. * * *

"L. Hazards: If a use is intended which alters the occupancy classification of the existing structure as specified by the original building permit * * *then the structure must be made to conform with the State of Oregon Structural Codes and the requirements of the State Fire Marshal or the local fire district. * * *

"M. The use will not interfere with existing uses on nearby land or with other uses permitted in the zone in which the property is located."

provisions of the code, the applicants were precluded from filing a substantially similar application for the home occupation until October 9, 2000.

On April 7, 1999, petitioner applied for a new permit for a home occupation. The application again requested a permit for an excavating business. In the second application, petitioner contended that his new application varied from the initial application to such an extent that it was more properly categorized as a separate application, and therefore, he was entitled to file the new application without regard to the two-year filing deadline. In his application, petitioner showed that between late 1998 and early 1999, he transferred one percent ownership of the subject property to Robert Montgomery. By doing so, petitioner claimed that he satisfied the code requirement that a person who owned the business also be the resident operator of the business, or have a family member reside on the property who also operates the business. The application explained that Montgomery's excavation business is operated principally by the cousin who resides on the subject property. In addition, the application corrected an error regarding the GVW of one of the vehicles. The change in GVW means that the new application satisfies the county requirements that limit the number of vehicles weighing over 11,000 pounds.

The planning director denied the second application on two bases. First, the planning director determined that the application was not substantially different from the first application, and therefore, petitioner filed his new application prematurely by filing prior to the expiration of the two-year deadline. Second, the planning director decided that, even if the application was timely, the evidence submitted with the second application failed to demonstrate that the application complies with the requirements for a home occupation.

Petitioner appealed the planning director's decision to the county hearings officer. The hearings officer upheld both bases for the planning director's decision. In addition, the hearings officer determined that as a consequence of filing his application prior to the two-year refiling date, the two-year refiling prohibition was extended to two years from the date

of the hearings officer's decision on the second application. Therefore, the hearings officer extended the two-year refiling date to September 11, 2001.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

ZDO 1303.11 provides that where an application for a planning director action is denied by the county, an applicant must wait two years from the date the application is denied to "refile for consideration of the same or substantially similar application." The question presented in this assignment of error is whether the hearings officer erred in deciding that the disputed application is the same as or substantially similar to the application that was denied on October 9, 1998.[2]

Petitioner argues that he provided sufficient evidence to demonstrate that the second application is different from the first to such an extent that he is not bound by the two-year limitation on refiling. In this assignment of error, petitioner repeats the arguments he made below: that the change in ownership is a critical change, because it establishes the relationship between the resident/operator of the business and the business owner and partial owner of subject property. Petitioner also points to evidence in the record to show that a new access to the property has been established. According to petitioner, the new access will limit the interference between the business and neighboring residences.

Respondent argues that the hearings officer concluded that change in application as used in the ordinance refers to a change in the nature of the proposed land use, or a change in facts to such an extent that the application now complies with the relevant provisions of the ordinance. Respondent argues that even if the changes were as substantial as petitioner claims they are, the application still does not comply with the relevant provisions of the code.

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[2]ZDO 1303.11(A) provides that the same or substantially similar application may be refiled less than two years after it is denied in certain circumstances that are specified in ZDO 1303.11(A)(2)(a)-(e). The hearings officer found the circumstances specified in ZDO 1303.11(A)(2)(a)-(e) do not exist in this case, and petitioner does not assign error to that aspect of the hearings officer's decision.

Intervenors argue that petitioner challenges neither the findings the county made, nor the evidence on which the county based its decision that the application is similar to petitioner's first application. Intervenors argue that petitioner's challenge is merely an attack on the conclusion that the county made. Intervenors contend that the findings the county adopted and the conclusions it made are reasonable and supported by substantial evidence in the record. Therefore, according to intervenors, we must affirm the county's findings, even if we might reach a different conclusion from the evidence presented.

The hearings officer's findings considered the evidence petitioner presented to show that the second application differed from the first, including the change in ownership, the clarification of the role of Montgomery's cousin in the operation of the excavation business, the site improvements and the correction to the GVW of one of the vehicles. After reviewing the evidence, the hearings officer found two bases to conclude that the subject application was "the same or substantially similar" to the prior application. First, the findings demonstrate that the hearings officer interpreted "the same or substantially similar" to mean that the applicant had to show not only that the evidentiary facts supporting the application were different from the initial application, but that the *nature* of the proposed home occupation was different as well. In this case, the nature of the proposed home occupation was, and remains, an excavation business. Petitioner does not challenge that interpretation. Second, the hearings officer determined that the evidence presented by petitioner in support of the second application was not so great as to elevate it to the status of a "new" application.

The findings of the hearings officer adequately explain why, as interpreted, he believed that the second application for the excavation business is the same or substantially similar to the first application, and those findings are supported by substantial evidence.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that he met all of the requirements for a home occupation, and therefore, the county erred by denying the application on its merits. Petitioner argues that he provided evidence to demonstrate that a resident of the subject property manages important aspects of the business and is related to one of the property owners. Petitioner contends that, contrary to the hearings officer's conclusions, this is sufficient to demonstrate that ZDO 822.05(A) is satisfied. *See* n 1 (setting out the provisions of ZDO 822.05). Petitioner also argues that he satisfied ZDO 822.05(E) by landscaping the property and installing a new access to ensure the proposed use would be consistent with the residential/farm function of the property. Petitioner further argues that he satisfied ZDO 822.05(K) by providing evidence to show that, of the vehicles used in conjunction with the excavation business, only one would exceed the 11,000-pound GVW limitation. Finally, petitioner argues that he complied with ZDO 822.05(M) by providing evidence to show that similar industrial activities were occurring on property within two miles of the subject parcel.

Respondent and intervenors argue that (1) petitioner's evidence does not demonstrate compliance with the relevant criteria and (2) petitioner does not assign error to the hearings officer's findings that petitioner failed to demonstrate compliance with other relevant criteria, namely, ZDO 822.05(C), (D), (F), (H) and (L). For these reasons, respondent and intervenors argue that this assignment of error must be denied.

We must sustain a denial of an application for land use approval unless the petitioner successfully challenges all of the bases for denial. *Baughman v. Marion County*, 17 Or LUBA 632, 636 (1989). When a petitioner challenges the evidentiary basis for a denial, he must demonstrate that he carried his evidentiary burden as a matter of law. *Texaco, Inc. v. King City*, 15 Or LUBA 198, 206 (1987); *Joy v. City of Talent*, 15 Or LUBA 115, 120 (1986).

Here, petitioner fails to demonstrate compliance with ZDO 822.05(M) as a matter of law. The criterion requires that "the use will not interfere with existing uses on nearby land or with other uses permitted in the zone in which the property is located." Petitioner's evidence refers to industrial uses within a two-mile radius that are located within industrial zones. This evidence is insufficient to support a conclusion that, as a matter of law, the use will not interfere with existing residential and farm uses on nearby property, or that it will not interfere with other uses permitted in the RRFF 5 zone. We therefore reject petitioner's substantial evidence challenge. We also agree with the county and intervenors that petitioner fails to challenge the hearings officer's findings of noncompliance with ZDO 822.05(C), (D), (F), (H) and (L).

Because we sustain these two bases for denial, we need not address petitioner's other challenges to the hearings officer's determinations with regard to ZDO 822.05(A), (E), and (K).

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that, even if the county's decision may be affirmed with regard to the first and second assignments of error, the hearings officer exceeded his authority by extending the two-year filing deadline from October 9, 2000, until September 11, 2001. Intervenor responds that the hearings officer properly addressed this issue, because petitioner's attorney asked the hearings officer to review the merits of the application.

The county agrees with petitioner that the issue of resubmittal deadlines may be properly left to the time when petitioner or other applicants submit another application to the county. However, the county argues that even if we agree with petitioner's assignment of error, it provides no basis for reversal or remand.

The hearings officer determined that notwithstanding his conclusion that the second application was the same or similar to the application that was denied on October 9, 1998,

and therefore was barred by ZDO 1303.11, he nevertheless would review the disputed application on the merits. Having done so, he stated "the two-year refiling period will now be extended until no sooner than two years from the date of this decision (or until September 11, 2001)." Record 18.

We understand this statement of the hearings officer to take the position that, because the applicants' April 7, 1999 application was reviewed on the merits and denied, that application could not be resubmitted within two years of the September 11, 1999 decision denying petitioner's local appeal and affirming the planning director's denial of that application. So understood, this statement of the hearings officer, while unnecessary, appears to be an accurate statement of the consequence of the county's consideration and denial of the April 7, 1999 application on the merits. Therefore, it provides no basis for reversal or remand.

The third assignment of error is denied.

The county's decision is affirmed.