

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 BASE ENTERPRISES, INC.,

5 *Petitioner,*

6
7 vs.

8
9 CLACKAMAS COUNTY,

10 *Respondent.*

11
12 LUBA No. 2000-035

13
14 FINAL OPINION

15 AND ORDER

16
17 Appeal from Clackamas County.

18
19 Edward H. Trompke, Lake Oswego, filed the petition for review and argued on behalf
20 of petitioner. With him on the brief was Tarlow, Jordan & Schrader.

21
22 Michael E. Judd, Assistant County Counsel, Oregon City, filed the response brief and
23 argued on behalf of respondent.

24
25 HOLSTUN, Board Member; BASSHAM, Board Chair; BRIGGS, Board Member,
26 participated in the decision.

27
28 AFFIRMED

09/06/2000

29
30 You are entitled to judicial review of this Order. Judicial review is governed by the
31 provisions of ORS 197.850.

1

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county decision denying an application for a home occupation
4 permit.

5 **FACTS**

6 The subject property is zoned Urban Low Density Residential (R-10). The property
7 is improved with a single-family dwelling and a detached 1,200 square foot accessory
8 structure, which is located behind the residence. Petitioner Base Enterprises, Inc. owns the
9 subject property. Joseph Zamani (Zamani), petitioner’s agent, currently operates a heating,
10 ventilation and air conditioning (HVAC) installation and repair business in the accessory
11 structure. The HVAC business is potentially allowable in the R-10 zone under the
12 Clackamas County Zoning and Development Ordinance (ZDO), as a home occupation.¹
13 Approval of a home occupation permit requires that the county find the home occupation will
14 satisfy certain approval criteria that are set out in the ZDO.

15 **A. The First Application**

16 The county planning director denied Zamani’s first application for a home occupation
17 permit. Zamani appealed the planning director’s decision to the county land use hearings
18 officer, who also denied the application. The hearings officer first concluded that Zamani
19 did not adequately demonstrate that he was among the persons authorized to submit an
20 application for a home occupation permit for the subject property.² Notwithstanding his

¹The disputed HVAC business already exists and petitioner is seeking approval of a home occupation permit to allow the business to continue to operate on the subject property.

²The disputed application is an “administrative action” under the ZDO. ZDO 1301.03(A) provides:

“An administrative action, unless otherwise specifically provided for by [the ZDO], may only be initiated by order of the Board of County Commissioners, or a majority of the whole Planning Commission or by the petition of *the owner, contract purchaser, option holder, or agent of the owner*, of the property in question.” (Emphasis added.)

1 conclusion that Zamani failed to demonstrate that he was authorized to submit the
2 application under ZDO 1301.03(A), the hearings officer nevertheless considered whether the
3 application satisfied relevant ZDO requirements and determined that it violated a number of
4 substantive requirements.³ On August 31, 1999, the hearings officer rejected the appeal and
5 sustained the planning director's denial of the application. The hearings officer's decision
6 was not appealed.

7 **B. The Second Application**

8 Approximately two months later, on October 27, 1999, Zamani submitted a second
9 application. The second application was also denied by the planning director. The planning
10 director's second decision was appealed to the county land use hearings officer, who rejected
11 the appeal and sustained the planning director's second decision denying the application.
12 The hearings officer's February 25, 2000 decision specifies three reasons for his decision.
13 First, the hearings officer concluded that because the subject property is owned by a
14 corporation, rather than a natural person, it is ineligible for a home occupation permit.
15 Second, the hearings officer concluded the second application was barred by ZDO provisions
16 that generally prohibit resubmitting the same application or a substantially similar
17 application within two years after an application for an administrative action is denied.
18 Third, the hearings officer found that the application violated the same accessory structure
19 limits and home occupation approval criteria that the first permit application had been found
20 to violate. This appeal followed.

Zamani entered into the record a letter, which was signed by the president of Base Enterprises, Inc. and stated that Zamani is authorized to operate his HVAC business on the subject property. Record 453. However, the letter did not expressly state that Zamani was the owner's agent for purposes of the home occupation permit application. The hearings officer found that that letter established that Zamani was not the "owner." The hearings officer also found the letter was not adequate to establish that Zamani was the "contract purchaser, option holder, or agent of the owner." Record 453-54.

³The hearings officer concluded that the application violated (1) ZDO requirements that limit use of accessory structures for home occupations and (2) a number of the approval criteria that must be satisfied to approve an application for a home occupation.

1 **INTRODUCTION**

2 Before turning to petitioner’s assignments of error challenging the second hearings
3 officer’s decision, we note that petitioner assigns error to only the second reason for denial.⁴
4 Petitioner does not assign error to the hearings officer’s first and third reasons for denying
5 the second application. We therefore do not consider those aspects of the second hearings
6 officer’s decision.

7 Petitioner’s arguments in this appeal are directed entirely at the manner in which the
8 first and second hearings officers proceeded in the first and second local appeals. We
9 understand petitioner to argue that in both appeals the hearings officer adopted certain
10 findings that had the legal effect of establishing that there was no valid application before the
11 county. The legal consequence of those findings, according to petitioner, is that the county
12 lost jurisdiction to consider those applications further. Specifically, petitioner contends the
13 county lost jurisdiction to deny those applications. Although the question is not presented in
14 this appeal, and petitioner never expressly says so, we assume petitioner takes the position
15 that if it is correct in these arguments, it would be free to submit a third application without
16 complying with the ZDO limit on resubmitting the same application or a substantially similar
17 application within two years after it is denied.⁵

18 **SECOND ASSIGNMENT OF ERROR**

19 As previously noted, the hearings officer found that the second application
20 constituted the same or a substantially similar application as the first application. The

⁴As explained below, petitioner also assigns error to a separate basis for denial that we conclude is not expressed in the challenged decision.

⁵ZDO 1305.02(E) provides:

“Refiling: If an application for an administrative action identified under Subsection 1301.01(A), is denied, an applicant may refile for consideration of the same or substantially similar application only if [two years have passed since the first application was denied or the planning director finds that certain specified circumstances render the reasons for the original denial invalid].”

1 hearings officer also found that none of the circumstances in ZDO 1305.02(E) that would
2 permit the second application to be filed less than two years after the first application was
3 denied apply in this case. *See* n 5. Petitioner does not challenge either of these findings.
4 Nevertheless, petitioner argues the hearings officer erred in finding the second application
5 violated ZDO 1305.02(E).

6 Petitioner argues the hearings officer erred by viewing the first application as having
7 been denied. As explained below, petitioner argues the county lost jurisdiction over the first
8 application *before* it was denied. If the first application was not denied, then ZDO
9 1305.02(E) does not apply to limit the time within which the second application could be
10 submitted. This is so, petitioner argues, because the required referent under ZDO
11 1305.02(E)—an initial permit denial—is missing. Therefore, petitioner argues, the county
12 erred in denying the second application based on ZDO 1305.02(E).

13 According to petitioner the ZDO 1301.03(A) requirement that the application be
14 submitted by “the owner, contract purchaser, option holder, or agent of the owner, of the
15 property in question” is a jurisdictional requirement. Petitioner argues that when the first
16 hearings officer found that the first application was not submitted by one of the persons who
17 is permitted to do so under ZDO 1301.03(A), he thereby lost jurisdiction to render a decision
18 on the merits concerning the first permit application. Therefore, petitioner argues, the first
19 hearings officer’s purported decision on the merits and denial of the permit application is of
20 no force or effect. From this conclusion, petitioner reasons that the first application should
21 not be viewed as having been “denied,” within the meaning of ZDO 1305.02(E), and the
22 hearings officer therefore erred in relying on ZDO 1305.02(E) as a basis for denying the
23 second application.

24 Petitioner’s second assignment of error is based on a faulty premise. Petitioner
25 assumes, but does not establish, that the ZDO 1301.03(A) limitation on persons who may
26 submit an application for an administrative action is a “jurisdictional” requirement. It may

1 be that if ZDO 1301.03(A) expressly stated that its limitations are “jurisdictional” we would
2 be required to treat it as a jurisdictional requirement. *See Breivogel v. Washington County*,
3 114 Or App 55, 58-59, 834 P2d 473 (1992) (county code made signature on local appeal
4 document a jurisdictional requirement). However, unlike the code language at issue in
5 *Breivogel*, ZDO 1301.03(A) does not state that its limitations on who may submit an
6 application are “jurisdictional.” ZDO 1301.03(A) does not state that the county lacks
7 authority to consider an application for an administrative action that is submitted by someone
8 who does not prove he or she is among the persons listed in ZDO 1301.03(A).

9 The first hearings officer presumably could have terminated his review, and
10 determined that the first application should be dismissed, once he determined that Zamani
11 was not among those authorized to submit the application under ZDO 1301.03(A). However,
12 that does not mean the hearings officer was legally compelled to do so. We do not agree
13 with petitioner that the county lacked jurisdiction to deny the first application or that it erred
14 by denying the second application because it is substantially similar to the first application.

15 The second assignment of error is denied.

16 **FIRST ASSIGNMENT OF ERROR**

17 Petitioner argues that the hearings officer found that the *second* application was
18 submitted by someone other than those who are permitted to do so under ZDO 1301.03(A).
19 *See* n 2. Having found that to be the case, petitioner argues, the county lacked jurisdiction to
20 consider the application further; and the hearings officer should have “dismiss[ed] the matter
21 entirely,” or remanded the matter to the planning director to correct this jurisdictional defect.
22 Petition for Review 3.

23 We have already rejected petitioner’s underlying legal theory that ZDO 1301.03(A)
24 imposes a jurisdictional requirement. For that reason alone the first assignment of error must
25 be denied. In addition, petitioner’s first assignment of error is based on a misreading of the
26 hearings officer’s decision. Petitioner apparently reads the second hearings officer’s decision

1 to find that Zamani again failed to establish that he is one of the persons who is permitted
2 under ZDO 1301.03(A) to submit an application for a home occupation permit. Petitioner's
3 misreading of the hearings officer's findings is apparently based on the following language
4 in the second hearings officer's decision:

5 "Acting merely with the permission of the owner does not satisfy ZDO
6 1301.03(A). That is what the appellant did last time, and [the first hearings
7 officer] found that authorization letter to be insufficient and dismissed on that
8 basis. That decision was not appealed by Mr. Zamani and so it is now law of
9 the case and *res judicata*. Acting as an agent of the owner, permits the filing
10 of an application on behalf of the principal, the owner, but that owner is not
11 eligible for a home occupation permit. For those reasons the appeal is once
12 again dismissed. * * *" Record 5.

13 The intended meaning or significance of the first three sentences quoted above is
14 unclear. However, when the last two sentences in the above-quoted paragraph are read in
15 context with the balance of this part of the hearings officer's decision, it is clear that the
16 hearings officer expressly found that Zamani did establish that he is petitioner's agent for the
17 second application. This part of the hearings officer's decision is addressing a very different
18 question: whether property owned by a corporation can qualify for a home occupation
19 permit. The hearings officer explains:

20 "*Base Enterprises, Inc., has designated an agent to file an application on its*
21 *behalf for a home occupation permit in a dwelling; thus Mr. Zamani is an*
22 *agent of Base Enterprises, Inc. for the purpose of this application. The*
23 *permit, if issued, would be issued for the benefit of the principal, not its agent.*
24 *This raises a new question: Can a corporation be an applicant for a home*
25 *occupation, since it can neither occupy a dwelling (residential) nor be a*
26 *member of a family (person)? Another way of asking this question is, can an*
27 *agent acting on behalf of the corporation obtain a permit that the corporation*
28 *could not obtain for itself and is that result consistent with [the] intent and*
29 *purpose of the home occupation ordinance?" Record 4 (emphasis added).*

30 The second hearings officer did not find that Zamani failed to establish that he was
31 authorized to submit the second application under ZDO 1301.03(A). Because petitioner's
32 first assignment of error is based on (1) an incorrect view that ZDO 1301.03(A) imposes

1 jurisdictional requirements and (2) a misreading of the hearings officer's decision, it is
2 denied.⁶

3 The county's decision is affirmed.

⁶We also note that petitioner assigns significance to a statement in the "FINDINGS" section of the hearings officer's decision that "the appeal is once again dismissed." Record 5. We understand petitioner to suggest that if its local appeal was dismissed, continuing to consider the appeal on the merits is error. The Hearings officer's statement that the appeal was being dismissed must be read in context with the balance of the decision. The "FINDINGS" section of the hearings officer's decision is followed by sections that are labeled "CONCLUSION" and "DECISION." The "DECISION" section of the decision states that "[t]he Hearings Officer *rejects* the appeal and sustains the Planning Director's Denial * * *." Record 15 (emphasis added). Identical language appears in the first hearings officer's decision. Record 465. Petitioner's first and second appeals were rejected on their merits; neither appeal was dismissed.