BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TONY HENKEL,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent.

LUBA No. 2007-215

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Andrew H. Stamp, Lake Oswego, filed the petition for review and argued on behalf of petitioner.

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

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

REMANDED 04/28/2008

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

Opinion by Ryan.

NATURE OF THE DECISION

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

FACTS

Petitioner submitted an application to allow his construction contracting business to be operated as a home occupation. The subject property is 2.39 acres and is zoned Rural Residential Farm Forest 5-Acre Minimum (RRFF-5). A residence and outbuilding are currently sited on the subject property. The proposed use is not allowed in the RRFF-5 zone without a home occupation permit.

In 2005, petitioner applied for a home occupation permit for his business (2005 application), which had been operating from the property without a permit. The 2005 application proposed to headquarter the business on the subject property. The 2005 application proposed that petitioner's four employees would arrive at the subject property each morning, and leave their personal vehicles and transfer to business vehicles to drive to job sites. The employees would then return to the subject property in the evening to pick up their personal vehicles. In addition to petitioner's personal pick-up truck, the 2005 application proposed to store seven construction business vehicles and pieces of heavy equipment on the subject property that could be driven to job sites when appropriate. The 2005 application proposed unlimited hours of operation.

The county planning director denied the 2005 application, and petitioner appealed the decision to the county land use hearings officer. The hearings officer overturned the planning director's decision and approved the 2005 application with conditions. Neighbors appealed the hearings officer's decision to LUBA, and we remanded the county's decision. *Watts v. Clackamas County*, 51 Or LUBA 166 (2006). After LUBA remanded the decision,

in July 2006, the hearings officer denied the application. That denial was not appealed to LUBA.

In 2007, petitioner submitted a new application for a home occupation permit (2007 application), that led to the decision challenged in this appeal. The 2007 application seeks a home occupation permit for petitioner's construction contracting business. The 2007 application, however, proposes that instead of having his employees meet at the subject property before going to the job sites, the employees will either meet at an off-site location or at the job site. The 2007 application proposes to store only two of the seven construction business vehicles and heavy equipment on the subject property, as well as petitioner's personal pick up truck. The other five construction business vehicles and equipment will be stored at an off-site location. The 2007 application prohibits the movement of construction vehicles and equipment between 8:00 A.M and 6:00 P.M.

County planning staff denied the 2007 application, and petitioner appealed to the hearings officer. The hearings officer affirmed the planning staff's denial of the permit because she concluded that the 2007 application constituted the filing of the "same or substantially similar" application less than two years after the 2005 application was denied, which is prohibited by county ordinances. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the county misconstrued the applicable law when it found that the 2007 application is "substantially similar" to the 2005 application. Clackamas County Zoning Development Ordinance (ZDO) 1305.02(H) provides that "if an application for an administrative action is denied, an applicant may [not] refile for consideration * * * the same or substantially similar application" "until two years after final denial [of the] application * * *."

The issue before us is whether the hearings officer's interpretation of "the same or substantially similar" represents a misconstruction of the applicable law. We review the

hearings officer's interpretation to determine whether that interpretation is correct, and we are not required to give the hearings officer's interpretation any particular deference. *Gage v. City of Portland*, 133 Or App 346, 349-50, 891 P2d 1331 (1995). In reviewing such an interpretation, we consider both the text and context of the ordinance at issue. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-12, 859 P2d 1143 (1993); *Beaver State Sand and Gravel v. Douglas County*, 43 Or LUBA 140, 143-44, (2002), *aff'd* 187 Or App 241, 65 P3d 1123 (2003).

The hearings officer determined that the 2007 application is substantially similar to the 2005 application because the 2007 application proposes to store some of the same equipment as proposed in 2005, and the 2007 application proposes a construction contracting business as a home occupation, as did the 2005 application.[1] The hearings officer relied on two prior LUBA decisions that involved the same Clackamas County ordinance, *Munn v. Clackamas County*, 37 Or LUBA 621 (2000) and *Roozenboom v. Clackamas County*, 24 Or LUBA 433 (1993). The hearings officer explained why she concluded the two applications were substantially similar, based on those cases:

> "This application is closer to the facts described in *Roozenboom* than in *Munn*. Here, the applicant and the opponents agree that the proposal comes under the umbrella of 'construction contracting' although the scope of the use (including the number and types of vehicles to be stored on site, the use of the property as a gathering place for employees, and the hours of operation) is more circumscribed. The hearings officer concludes that as the standard is applied

[1] The hearings officer's findings state:

> "The applicant argues that although the proposal involves a construction business, the application is substantially different from the initial proposal because (1) fewer employees will be traveling to and from the site on a daily basis; (2) only two pieces of equipment (on trailers) will be stored on the site; (3) an alternative location has been procured to store the equipment in the event the equipment cannot be returned to the site before 6 p.m. in the evening; and (4) the changes in the scope of the activity have minimized the impact of the proposed use. * * *" Record 6.

> in *Roozenboom*, this proposal is substantially similar to the first application because it proposes to store some of the same equipment, and will be operated in substantially the same manner as the prior business." Record 6.

In *Munn,*the applicants filed an application for a permit for an excavation business. The application was denied for three reasons: (1) confusion regarding the owner of the business; (2) too many proposed vehicles; and (3) external evidence that adverse impacts of the home occupation were not adequately mitigated. The applicants then filed a second application that contained only two minor changes. The second application clarified the ownership issue and explained that the initial application contained an error describing the proposed vehicles. The applicant did not reduce the scale or intensity of the proposed home occupation. The hearings officer determined that the second application was the same or substantially similar to the first application by interpreting the county's ordinance to require a showing that the physical or operational characteristics of the home occupation proposed in second application were different and that the nature of the two proposals was different. *Id*. at 627-28.

In *Roozenboom*, the applicant sought a home occupation permit for an automobile repair business, and the application was denied. The applicant then purchased the adjacent parcel, and proposed another auto repair business with some changes.[2] LUBA applied the deferential standard of review that was required under *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992) and affirmed the county's decision, concluding that "both applications

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[2] In Roozenboom, the hearings officer provided the following description of the changes in the second application:

> "The issue raised is whether this application is the same or substantially similar to the application [denied in 1991]. There are some changes in the business proposed in this application. The auto repair portion of the business is now conducted on a different parcel [the subject parcel], adjoining the previous location. Since the former denial, [petitioner] has purchased the subject [parcel], constructed an approximately 500 square foot utility building which serves as the repair shop and he has erected a fence and a gate. But the use requested remains the same. Relocating the business next door into a different repair shop does not substantially change the nature of the application. The application is for the same use, or at least a substantially similar use, as that previously denied [by the 1991 decision]."

by petitioners have been for essentially the same thing, viz, the permission to conduct an automobile repair business as a home occupation." *Id*. at 436.[3] After our decision in *Roozenboom*, the Supreme Court clarified in *Gage v. City of Portland*, 319 Or 308, 317, 877 P2d 1187 (1994) that an interpretation of a land use ordinance by a hearings officer is not entitled to the deferential standard of review required under *Clark*.

We believe there are two notable differences between the present case and *Roozenboom*. First, as noted, *Roozenboom* predated the Supreme Court's decision in *Gage*, and thus the hearings officer's interpretation of the county's ordinance was given deference that it is not required now. Under the deferential standard of review under *Clark* that LUBA applied at the time, we would only have overturned the hearings officer's interpretation had it been "clearly wrong." *Goose Hollows Foothills League v. City of Portland*, 117 Or App 211, 843 P2d 992 (1992). Second, and more importantly, in *Roozenboom*, the proposed home occupation was essentially the same in intensity and scope as the initial application; the main difference was that it was proposed to be located on an adjacent parcel. In the present case, the proposed home occupation in the 2007 application is significantly reduced in scope and intensity from that proposed in the 2005 application.

One other case deserves mention. Although the hearings officer did not discuss the case, the parties cite *Wal-Mart Stores, Inc. v. City of Oregon City*, 50 Or LUBA 87 (2005), *rev'd and remanded*, 204 Or App 359, 129 P3d 702 (2006), in which the Court of Appeals reversed our decision that considered an Oregon City ordinance that also prohibited filing the same or a substantially similar application within a specified period of time after an initial application had been denied. Wal-Mart originally filed an application to develop a large store that the city denied. Wal-Mart then filed another application that the city rejected, for

[3] Although the ZDO provision at issue in *Roozenboom* is numbered differently than it is now, the language is identical.

several reasons. One of those reasons was that the city concluded the second application was the same or substantially similar to the first application. The city interpreted the applicable section of the Oregon City Municipal Code (OCMC) and found that the second application was for the same proposal, a Wal-Mart store, and therefore the two applications were "substantially similar." In the first application, Wal-Mart proposed to locate a parking lot on an adjacent parcel to the store, and the adjacent parcel required a comprehensive plan and zone change. The city denied the comprehensive plan and zone change. The second application eliminated the proposed parking lot on the adjacent parcel that required the comprehensive plan and zone change, and proposed underground parking beneath the store instead.

LUBA held that the two applications were not the same or substantially similar because the second application eliminated the request for a post acknowledgement plan amendment for parking on an adjacent parcel. In finding that the two applications were not substantially similar, we relied in large part on the fact that Wal-Mart had eliminated the sole reason for the denial of the first application. The Court of Appeals reversed, stating that the city commission's interpretation of the applicable OCMC code section as focusing on the "proposal" that was previously denied, rather than merely on the particular application, was consistent with the text and context of the applicable code section and was entitled to deference under ORS 197.829(1). 204 Or App at 365.

The present case differs from *Wal-Mart* in a few important ways. First, the city commission's interpretation of its code section was entitled to deference under ORS 197.829(1). As noted, the hearings officer's interpretation of the county's ordinance in the present appeal is not entitled to such deference. Second, in interpreting its code provision, the city commission's focus in *Wal-Mart* was more generally on the use being proposed, and less specifically on certain changes to design features or the location of amenities such as parking. In the present case, rather than focusing generally on the use being proposed, as the

city commission did in *Wal-Mart*, the hearings officer's interpretation of the county's code provision focused on the operational details of the two proposals.

The parties agree that the 2007 application is not the "same" as the 2005 application. The question therefore is whether the 2007 application is "substantially similar" to the 2005 application. The phrase "substantially similar" is not defined in the ZDO. We therefore look to its ordinary meaning. *DLCD v. Columbia County*, 24 Or LUBA 338, 339-40 (1992).

Black's Law Dictionary defines "similar" as:

> "Nearly corresponding; resembling in many respects; somewhat alike; having a general likeness, although allowing for some degree of difference. Word 'similar' is generally interpreted to mean that one thing has a resemblance in many respects, nearly corresponds, is somewhat like, or has a general likeness to some other thing but is not identical in form or substance, although in some cases 'similar' may mean identical or exactly alike. It is a word with different meanings depending on context in which it is used." Black's Law Dictionary, 6th Ed. (1990) 1383.

As petitioner notes, the definition of "similar" gives little clue as to the degree to which two things can have differences and still be considered similar. The operative phrase, however, also includes the word "substantially" which is defined as:

> "Essentially; without material qualification; in the main; in substance; materially; in a substantial manner. About, actually, competently, and essentially." *Id*. at 1428-29.

By preventing the refiling of applications that are "substantially similar" the ZDO requires a greater degree of similarity than would be required if the standard merely "similar" Applications. In other words, applications must not only be similar, they must very similar. We agree with petitioner that the plain meaning of "substantially similar" is that under ZDO 1305.02(H) a second application is barred within two years of the first application's denial only when there is a high degree of similarity.

Turning to the particulars of the two applications, the 2005 application proposed to store eight vehicles or trailers on site: petitioner's personal use pick up truck, a diesel

concrete pour box van, a gas framing box van, a diesel mini-dump truck, two forms trailers (used for pouring of concrete), a skid steer loader with trailer, and a track hoe with trailer. The 2007 application proposes to store only the petitioner's pick up truck, the skid steer loader with trailer, and the track hoe with trailer. The 2005 application proposed to allow employees to commute to and park on the subject property before leaving for the job site in one or more of the vehicles stored on site, and then returning to the subject property in the evening. The 2007 application requires employees to meet at an off-site location, and thereby not arrive or depart from the subject property. The 2005 application proposed no limitations on the hours of operation. The 2007 application limits the movement of equipment to between 8 A.M. and 6 P.M.

While the two applications both propose uses that fall generally under the "umbrella of construction contracting," as the hearings officer found, and likely could be considered similar, as explained above ZDO 1305.02(H) appears to require a relatively high degree of similarity between the initial and current applications. Mere similarity is not enough; the two applications must be essentially or materially similar. Here, the differences between the actual activities proposed to occur under the two applications are significant. There will be five fewer construction vehicles stored on the site (three versus eight), employees will not be arriving and departing from the site early in the morning, and the hours of operation will be limited. In particular, we believe the fact that employees will not be using the subject property as essentially the business headquarters and as a parking lot are very significant differences. While any one of these changes might not individually be enough to warrant the filing of a second application under ZDO 1305.02(H), the cumulative differences are so significant and given such limited attention in the hearings officer's findings that we conclude that the hearings officer misconstrued the "substantially similar" test to mean something like "somewhat similar" or "generally similar" instead of the relatively high degree of material similarity that the code terms require, under their commonly understood

dictionary definitions. Accordingly, remand is necessary for the hearings officer to apply ZDO 1305.02(H) to the evidence under a correct understanding of that provision.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

After concluding that consideration of the 2007 application was premature because petitioner was required to wait until two years after denial of the 2005 application to file another application, the hearings officer also addressed petitioner's arguments on the merits. If the hearings officer's findings were alternative grounds for denying the 2007 application, they would also be alternative grounds for affirming the decision. The parties, however, agree that the hearings officer's consideration of the merits of the application is merely advisory and not an independent basis for affirming the county's decision.[4] Because the hearings officer's additional findings are merely advisory, we will not address arguments directed at them.

We do not reach the second assignment of error.

The county's decision is remanded.

[4] The county states:

> "In light of her prior holding that the application was not properly before her and could not be reviewed until July 8, 2008, the statements that follow should be viewed as merely advisory, in anticipation of a future application being filed by the petitioner." Response Brief 4-5.