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

3	BILLIE J. DAVIS,)	
)	
4	Petitioner,)	LUBA NO. 81-030
)	
5	v.)	FINAL OPINION
6	CITY OF NEHALEM,)	AND ORDER
)	
7	Respondent.)	

Appeal from City of Nehalem.

Steven T. Campbell, Seaside, filed a brief and argued the cause for Petitioner.

Lois A. Albright, Pacific City, filed a brief and argued the cause for Respondent.

Cox, Referee; Reynolds, Chief Referee; Bagg, Referee; participated in the decision.

Remanded. 8/24/81

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a).

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1 COX, Referee.

2 NATURE OF PROCEEDING

3 The petitioner appeals two variance decisions of Respondent
4 City of Nehalem. The two decisions have been combined on
5 appeal since they relate to a common applicant, were dealt with
6 as integral parts of a proposal to develop neighboring tax
7 lots, and the findings relating to the two decisions are
8 identical. The Nehalem City Council granted variances from set
9 back requirements for Lots 1, 2 and 3, Block 10 in the City of
10 Nehalem. In so doing it reversed the Nehalem Planning
11 Commission's decision regarding the properties. Petitioners
12 seek reversal of the two decisions.

13 SUMMARY OF ARGUMENTS

14 Petitioner sets forth numerous allegations of error which
15 generally attack the decisions on the grounds that the findings
16 are defective; there is a lack of evidence in the record to
17 support the findings; the city failed to follow applicable
18 procedures; and the city improperly construed the applicable
19 law.

20 FACTS

21 Lots 1, 2 and 3, Block 10 in the City of Nehalem are owned
22 by Joe and Helen Zagata (hereinafter Applicant). All the lots
23 are adjacent to one another and abut Eighth Street. An
24 existing storage shed overlaps lots 2 and 3. The applicants
25 wished to place a foundation under this shed and proceeded to
26 obtain a building permit to do so. In addition, the applicants

1 desired to place a day-care facility on Lot 1. Allegedly the
2 applicants' contractor requested and received oral approval to
3 pour a foundation under the existing building on Lot 1. No
4 written building permit was issued for the foundation under the
5 building on Lot 1, however.

6 Subsequent to the pouring of the foundations for the
7 buildings, it was discovered the shed on Lots 2 and 3
8 encroached into the abutting 60 foot street right of way. A
9 "stop work" order was issued and applicants were informed that
10 they would need a variance in order to continue their work.
11 Applicants promptly requested variances from the set back
12 requirements for both buildings and at the same time applied
13 for a conditional use permit for the day-care center. The
14 day-care center conditional use permit was granted and is not
15 at issue in this appeal.

16 On January 7, 1981, formal findings denying the variance
17 request were adopted by the planning commission. Applicants
18 appealed the planning commission's decision to the Nehalem City
19 Council. On February 3, 1981, the City Council held a public
20 hearing on the appeals. It continued the hearing until the
21 next day so that all council members could view the properties
22 in question. After personally viewing the properties, the
23 council reconvened the hearings on February 4, 1981. The city
24 council reviewed the planning commission's decision de novo.
25 The record contains tapes of the planning commission meetings
26 but those tapes were not reviewed by the city council when the

1 matter was appealed to it.

2 The city council approved set backs of five feet each way
3 from the corner of Lot 1 but it denied the requested zero foot
4 set back for the shed that straddles Lots 2 and 3. Instead,
5 the city council granted a variance to allow a five foot set
6 back to conform with that given to the structure on Lot 1. The
7 city council's findings and decisions were entered on February
8 17, 1981.

9 DECISION

10 Petitioner first asserts that the city council erred in
11 expanding the scope of review beyond that provided by Section
12 11.070(1) of the City of Nehalem zoning ordinance. Section
13 11.070(1) of Ordinance 80-2 provides:

14 "If an appeal is filed, the city council, at a public
15 hearing, shall review the findings made by the
16 planning commission."

17 Petitioner argues that the minutes of the city council meeting
18 of February 3 and 4 and the order of February 17 make no
19 reference to the findings of fact adopted by the planning
20 commission. Petitioner contends that "the record is
21 resplendent with discussions on matters totally unrelated to
22 the action taken by the planning commission except the
23 statement that: 'the PC decision was punitive and overly
24 harsh.'" Petitioner reasons that by hearing testimony of the
25 applicant and reviewing matters not made part of the findings
26 of the planning commission, the city council exceeded its
27 authority.

1 A review of the minutes of the City Council hearing
2 indicates that a member of the council did read out loud to the
3 entire council the findings and decision of the planning
4 commission. In addition, nothing in Section 11.070(1) of
5 Ordinance 80-2 precludes de novo review or the taking of
6 additional testimony on appeal from the city planning
7 commission to the city council. There is no indication in the
8 ordinance that the appeal from the city planning commission
9 must be on the record. Therefore, petitioners' first assertion
10 of error is denied.

11 Petitioner's remaining assertions of error cover various
12 grounds but the majority of them deal with insufficient
13 findings and lack of substantial evidence in support thereof.
14 Section 12.020 of the Nehalem City Code sets forth the
15 conditions for granting a variance. Specifically, Section
16 12.020 states:

17 "No variance shall be granted by the planning
18 commission unless it can be shown that all of the
following conditions exist:

19 "1. Exceptional or extraordinary circumstances apply
20 to the property and result from lot size or
shape, topography, or other circumstances over
which the owners of the property have no control.

21 "2. The variances necessary for the preservation of a
22 property right of applicant substantially the
23 same as owners of other property in the same zone
or a vicinity possesses.

24 "3. The variance should not be materially detrimental
25 to the purposes of the ordinance, the
26 comprehensive plan, or to property in the same
zone, or vicinity in which the property is
located, or otherwise conflict with the
objectives of any city policy.

1 "4. The variance request is the minimum variance
2 which would alleviate the hardship." (Emphasis
3 added).

4 The findings made in support of the city council's decisions
5 are identical for all the subject lots. Specifically those
6 findings are as follows:

7 "I. That there are exceptional and extraordinary
8 circumstances applying to the property and
9 resulting from lot topography, over which the
10 owners or applicant have no control. Because of
11 high bank, the building needs to be set closer
12 to street to meet Oregon State guidelines for
13 day care center use. e.g. per pupil requirements
14 and off-street parking required for compliance.

15 "II. That a variance is necessary for the
16 preservation of a property right, of the owners
17 or applicant, substantially the same as owners
18 of other property in the same zone or vicinity.
19 Lots 4, 5, & 6, Block 10, have buildings on City
20 property and School District 56 also have
21 non-conforming buildings.

22 "III. That a variance would not be materially
23 detrimental to the purpose of the Zoning
24 Ordinance and Comprehensive Plan of the City of
25 Nhealem [sic] or to the property in the same
26 zone or vicinity in which property is located,
or otherwise conflict with objectives of any
City policy.

"IV. The variance request is the minimum variance
which would allevaite the hardship."

Petitioner first attacks the findings on the grounds that
they are mere conclusions. Citing Sunnyside Neighborhood v.
Clackamas Co., 280 Or 3 (1977), petitioner argues that the
findings of fact in the Sunnyside case were much more detailed
and involved than the findings in this case and in Sunnyside
the court held that they were mere conclusions of law.
Petitioner maintains that in the case at bar the findings are

1 simply a restatement of the zoning ordinance followed by mere
2 conclusions which do not provide any guide or justification for
3 the proposed variances. Citing ORS 227.173(2)¹ and Fasano v.
4 Bd. of Co. Comm. of Washington Co., 264 Or 574, petitioner
5 argues that generalizations and conclusions without any
6 statement of facts on which they are based are insufficient to
7 justify the action taken. We agree with petitioner. The city's
8 own code requires findings on all of the four standards set
9 forth before a variance can be granted. Nehalem Zoning Code,
10 Sec 12.020 supra. Without addressing whether or not the
11 findings regarding the first two standards are more than mere
12 conclusions, it is clear that the above quoted findings
13 regarding conditions 3 and 4 for granting a variance are merely
14 restatements of the standards to be applied. They neither state
15 the facts relied upon in rendering the decision nor do they
16 explain the justification for the decision based upon the
17 criteria, standards and facts set forth. ORS 227.173(2) supra.

18 The existence of adequate findings of fact is a prerequisite
19 to this Board's review of a land use decision. When, as here,
20 the findings are inadequate, this Board is unable to determine
21 without conjecture the basis for the city's decision. Remand is
22 the proper manner for us to deal with such a situation. Laudahl
23 v. Polk County, 2 Or LUBA 149, (1980). Therefore, the contested
24 variances are remanded to the City of Nehalem for further
25 consideration not inconsistent with this opinion.

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FOOTNOTES

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1 ORS 227.173(2) states as follows:

"Approval or denial of a permit application shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based upon the criteria, standards and facts set forth."