

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

LAND USE
BOARD OF APPEALS
Nov 12 2 31 PM '82

JAMES M. DeWOLFE,
Petitioner,

vs.

CLACKAMAS COUNTY,
BOARD OF COMMISSIONERS,
and OLIVER L. JONES,

Respondent.

LUBA No. 82-043

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Elizabeth A. Normand, Beaverton, filed the Petition for Review and argued on the cause on behalf of Petitioner.

Michael E. Judd, Oregon City, filed the brief and argued the cause on behalf of Respondent Clackamas County.

John C. Anicker, Jr., Oregon City, attorney for Respondent Oliver L. Jones.

REYNOLDS, Chief Referee; COX, Referee; BAGG, Referee; participated in this decision.

AFFIRMED

11/12/82

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).

1 REYNOLDS, Chief Referee.

2 INTRODUCTION

3 Petitioner appeals the county's approval of a building
4 permit for an 1,152 square foot addition to a garage on a
5 parcel adjoining petitioner's property. The structure has
6 already been built and is located ten feet from the south side
7 of petitioner's home. The garage, with the addition, is 26
8 feet by 48 feet by 20 feet high. The zone designation for the
9 area is residential, 7,000 square foot minimum lot size.

10 The sole issue presented on appeal is whether the county
11 properly applied Clackamas County Ordinance Section 301.08 as
12 it relates to accessory structures. Petitioner contends the
13 county did not properly apply the ordinance because the county
14 did not determine whether the structure would comply with the
15 "purposes" section of Section 301.08. The county says it was
16 not required to consider the purposes section of the ordinance
17 because the accessory structure met the minimum lot and
18 structure design requirements for the R-7 zone pertaining to
19 such things as setback, building height, and maximum lot
20 coverage. We agree with the county and affirm.

21 OPINION

22 Clackamas County Ordinance Section 301.08(A) provides:

23 "A. Purpose: The setback, lot frontage, coverage,
24 depth, and structure height requirements of these
districts are intended to:

- 25 "1. Provide consistent standards ensuring a
26 stable pattern and intensity of development
for new and existing neighborhoods;

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- "2. Provide for fire safety and protection of all structures;
- "3. Protect the privacy and liveability of dwellings and yard areas;
- "4. Provide for adequate light and air circulation between structures;
- "5. Provide for, and protect the unique character and liveability of each district;
- "6. Ensure suitable access to each lot with minimum impact on adjacent lots or dwellings;
- "7. Ensure consistency in the scale of structures, both vertically and horizontally."

Petitioner claims the county must consider the purposes section quoted above, in addition to the actual setback, and other requirements which are applicable to each zone before approving an accessory structure. In other words, according to petitioner, if the minimum sideyard setback requirement in the zone is five feet, an accessory structure must not only meet this five foot side yard requirement, but must also be consistent with the above enumerated purposes of the zone. Petitioner claims this consistency is required by sections 301.08(B) and (C), which provide as follows:

"B. General Requirements: The minimum requirements for frontage, setbacks, corner vision, lot coverage and depth, and building height are illustrated on Table No. I, except as provided below under Section 301.08(C).

"C. Exceptions to General Requirements: The general requirements of these districts shall be subject to the provisions under Section 900. Further, exceptions and modifications of these requirements set forth on Table No. I shall be as follows:

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"1. Accessory Structures: All accessory structures shall be consistent with the purposes under Subsection 301.08(A). Lot coverage limitations shall apply to all accessory structures, except swimming pools. Setbacks may be modified as follows:

"a. 100 Square Feet or Less: No side or rear yard setback behind the front building line shall be required for any detached accessory structure which is one hundred (100) square feet or less an area and does not exceed an height of eight (8) feet. No portion of any such structure shall project across a lot line.

"b. 200 Square Feet or Less: A side or rear yard setback behind the front building line may be reduced to three (3) feet for any detached accessory structure and its projections which is 200 square feet or less an area and does not exceed a height of ten (10) feet.

"c. Over 200 Square Feet: Accessory structures in excess of 200 feet an area located behind the front building line shall observe the side yard setback requirement for the district for both the side and rear yards, except that a side or rear side setback behind the front building line may be reduced to three (3) feet for one accessory structure and its projections which is larger than 200 square feet, provided the structure and its projections:

"(1) Are detached and separated from other structures by at least three (3) feet; and

"(2) Do not exceed a height of fifteen (15) feet; and

"(3) Do not exceed an area of 500 square feet. * * *"

The county, in issuing the building permit, did not construe the ordinance the way petitioner claims it should have

1 been construed. According to the county, Table I was adopted
2 to conform to the purpose section of the Ordinance. Section
3 301.08 requires that any structure built within the applicable
4 zone must comply with the minimum requirements listed in Table
5 I. The county says subsection C(1) of Section 301.08 is a
6 relaxation of the minimum requirements for accessory
7 structures, and subsections C(2) through C(9) do the same for
8 additional uses such as PUD's, common wall dwellings, corner
9 lots, lots on cul-de-sacs, flag lots, under sized legal lots of
10 record and zero lot line developments. In other words, the
11 county interprets the ordinance as providing that exceptions
12 may be made to the general requirements applicable to accessory
13 structures depending upon the size of the accessory structure.
14 Only if an exception to one of the setback or other
15 requirements is sought does the purposes section of the
16 ordinance come into play. According to the county's
17 interpretation, if a person requested a building permit to
18 construct a 100 square foot building not exceeding a height of
19 8 feet and wanted to put that building right on the property
20 line as is allowed by Section 301.08(C)(1)(a), then the county
21 would be required to consider whether such a use would meet the
22 purposes section of the county's ordinance. But if the 100
23 square foot building were proposed to be located 5 feet from
24 the property line, the minimum setback distance in Table I for
25 the R-7 zone, the purposes section of the ordinance would not
26 have to be considered.

1 Petitioner believes the county's interpretation of the
2 ordinance is wrong because: (1) the language in the ordinance
3 is clear and unambiguous and supports petitioner's position;
4 (2) a reading of the ordinance as a whole does not state that
5 Subsection 301.08(C) only applies when an applicant does not
6 wish to meet the requirements of Table I; (3) the use allowed
7 by Clackamas County seriously violates the purposes listed in
8 Subsection 301.08(A), and (4) an ordinance should not be
9 construed in a manner which allows, as here, an absurd or
10 incongruous result.

11 The county concedes, and we agree, that the ordinance is
12 susceptible to the interpretation advanced by petitioner.
13 However, we disagree with petitioner that the ordinance is
14 clear and unambiguous. A possible reading of Section 301.08(C)
15 is that it is only concerned with requests for modification of
16 the Table I minimum requirements. If a request is made for
17 modification or exception to the Table I requirements for an
18 accessory structure, then the purposes section of the ordinance
19 must be considered. In other words, a possible reading is that
20 the "all accessory structures" portion of the first sentence in
21 Section 301.08(C)(1) was only intended to refer to all
22 accessory structures for which a modification or exception has
23 been requested. Because we believe this to be a possible
24 reading of Ordinance Section 301.08(C), we conclude the
25 ordinance is ambiguous.

26 Petitioner argues even if the ordinance is ambiguous, the

1 county's interpretation should not be accepted because it
2 produces an incongruous result - this 20 foot high, 1,500
3 square foot "garage" ten feet from petitioner's house. Whether
4 one considers this to be an incongruous result does not, in
5 this case, require that we say the county's interpretation of
6 its ordinance should not be upheld. Equally incongruous, in
7 our view, is the result if petitioner's position on the
8 ordinance is followed. Petitioner's position is that all
9 accessory structure permits are required to be reviewed for
10 conformance with the "purposes" section of the ordinance.
11 "Accessory structures" is not defined in Section 301.08² but
12 presumably would include small garden sheds (under 100 square
13 feet) and even dog houses or play equipment or structures. We
14 cannot presume the county intended to have every accessory
15 structure permit reviewed for conformance to the purposes
16 section of the ordinance when the county has adopted minimum
17 requirements for structure height, setback and lot coverage
18 which are intended to satisfy the policy stated in the purposes
19 section of the ordinance.

20 In Cascade Broadcast Corp. v Groener, 51 Or App 533, 626
21 P2d 384 (1981), the court was faced with a conflict in the
22 Clackamas County Zoning Ordinance. The conflict involved two
23 sections of the county zoning ordinance, one of which appeared
24 to say radio transmitting towers were not a conditional use and
25 the second of which appeared to say such towers were a
26 conditional use. Said the court:

1 "***The county interpreted its ordinance as not
2 permitting the use as a conditional use in an RA-1
3 zone. We defer to the county's resolution of that
4 conflict, because the county has the duty of
5 administering the ordinance and is its legislative
6 source, and, therefore, the county is in a better
7 position than we to determine the legislative intent.
8 Bienz v City of Dayton, 29 Or App 761, 776, 566 P2d
9 904 (1977); Heilman v City of Roseburg, 39 Or App 71,
10 77, 591 P2d 390 (1979). If the county's
11 interpretation of its zoning ordinance were 'clearly
12 contrary to the express language and intent' of the
13 ordinance, it would be our duty to supplant the
14 county's interpretation with our own. Fifth Avenue
15 Corp v Washington County, 282 Or 591, 599, 581 P2d 50
16 (1978). We do not find the county's interpretation to
17 be contrary to the language and intent." 51 Or App
18 533 at 536-537.

11 We find ourselves in virtually the same position as was the
12 Court of Appeals in Cascade Broadcast Corp v Groener, supra.
13 We cannot say the county's interpretation of its ordinance is
14 unreasonable or contrary to a clear expression of intent in the
15 ordinance. Accordingly, we conclude Clackamas County did not
16 misapply Section 301.08 of its ordinance.

17 The county's decision is affirmed.

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FOOTNOTES

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Table I contains the minimum requirements for six different zones (R-7 through R-30) for the following: minimum street frontage, minimum lot depth, minimum setback (front, rear and side), maximum building height, maximum lot coverage and corner vision. The table also directs the reader to Section 801.08C and Section 900.

"* * * for the general exceptions and modifications of these requirements as they apply to (1) accessory structures, (2) flexible lot size subdivisions, (3) planned unit developments, (4) common-wall dwellings, (5) corner lots, (6) cul-de-sac lots, (7) flag lots, and non-conforming structures."

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We note that under "accessory uses" in Section 301.04 are listed the following:

"A. Accessory uses, buildings and structures customarily incidental to any primary use located on the same lot therewith.

"B. Living quarters, without kitchen facilities, of persons employed on the premises or of guests, which are not rented or otherwise used as a separate dwelling.

"C. Home occupations, subject to the provisions of Section 822 (adopted to 4/81).

"D. A private garage or parking area.

"E. Keeping of not more than two (2) roomers or boarders by a resident family.

"F. Keeping of livestock and farm animals subject to the provisions of Section 821.

"G. Signs, as provided under Section 1010. (8-6-81)

"H. Temporary buildings for uses incidental to construction work, which building shall be removed upon completion or abandonment of the construction work.

"I. Bus shelters, subject to the provisions of Section 823."