

LAND USE  
BOARD OF APPEALS

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

OCT 10 12 16 PM '86

HOOD RIVER VALLEY RESIDENTS )  
COMMITTEE, INC., DONNA DAVIS )  
POLLY TIMBERMAN, JEAN HARMON )  
CHRISTOPHER NEIHLS, STEVE )  
DATNOFF, PAUL RANDALL, CHARLES )  
LAVENTURE, STEVE DAVIS, DEE )  
FRAHM and STEPHEN BRONSVELD, )  
Petitioners, )  
vs. )  
CITY OF HOOD RIVER, )  
Respondent. )

LUBA No. 86-043  
FINAL OPINION  
AND ORDER

Appeal from City of Hood River.

B. Gill Sharp, Hood River, filed the petition for review and argued on behalf of Petitioners.

Deborah Phillips, of Parker, Bowe, Jaques, Blakely & Phillips filed the response brief and argued on behalf of Respondent City of Hood River.

KRESSEL, Referee; BAGG, Referee; DuBAY, Chief Referee, participated in the decision.

REMANDED

10/10/86

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

1 Opinion by Kressel.

2 NATURE OF THE DECISION

3 Respondent approved a variance increasing the allowable  
4 height for a sign in a commercial zone from 45 to 60 feet.

5 FACTS

6 McDonald's Corporation leases a site for a fast-food  
7 restaurant in the Hood River Village area between Interstate 84  
8 and the Columbia River. The property abuts a west-bound exit on  
9 Interstate 84. Other uses in the area are the Hood River Inn and  
10 two gas stations.

11 The Hood River Village area is zoned for commercial use.  
12 Under respondent's zoning ordinance, the maximum height for a  
13 commercial structure is 45 feet in the commercial zone.  
14 Commercial signs are subject to this limitation.

15 The sign for the Hood River Inn, which is northeast of the  
16 McDonald's property, conforms to the 45 foot height limitation.  
17 However, the signs for the gas stations, which are to the west of  
18 the McDonald's property, exceed the limitation by about 15 feet  
19 each.

20 In March 1986, McDonald's applied for a variance to allow  
21 construction of a 70 foot free-standing "golden arches" sign in  
22 the southwest corner of the property. The application stated  
23 that:

24 "the southwest corner is the most advantageous location  
25 for the requested sign, but the sign will have limited  
26 visibility at 45 feet without the variance grant due to  
its being situated between (and lower) the [sic] motel  
and gas station signs (neighbors)." Record at 75.

1 The planning commission denied the application after a public  
2 hearing. McDonald's appealed the denial to the Hood River City  
3 Council, which granted a variance in May, 1986. The approved  
4 sign will be 60 feet high, 15 feet higher than allowed by the  
5 zoning ordinance.

6 Respondent's zoning ordinance authorizes a variance from  
7 zoning requirements "where it can be shown that owing to  
8 special and unusual circumstances related to a specific lot  
9 area or permitted use, strict application of the ordinance  
10 would be inappropriate or cause hardship." Section 17.05.040  
11 Hood River Zoning Code. The ordinance lists the following  
12 criteria for approval of a variance:

13 "A variance may be granted in accordance with all the  
14 following criteria.

15 "A. Exceptional or extraordinary circumstances apply  
16 to the property which do not apply to most  
17 properties in the same zone or vicinity, and  
18 result from lot size or shape, topography, an  
19 existing structure, or other circumstances over  
20 which the owners of property since enactment of  
21 this ordinance have had no control.

22 "B. The variance is necessary for the preservation of  
23 a property right of the applicant substantially  
24 the same as owners of the other property in the  
25 same zone or vicinity possess.

26 "C. The variance would not be materially detrimental  
to the purpose of this ordinance, nor to property  
in the same zone or vicinity in which the  
property is located.

"D. The variance requested is the minimum variance  
which would alleviate the hardship." Section  
17.05.050 Hood River Municipal Code.

The city's final order states that the variance is needed

1 to improve the visibility of the McDonald's property. A  
2 critical finding states that visibility is affected by the  
3 topography of the Columbia Gorge area, the curves on Interstate  
4 84, and the two nearby gas station signs, each of which exceeds  
5 the 45 foot height limit. However, the order does not explain  
6 the effect of gorge topography or the alignment of the highway  
7 on the visibility issue, nor does it state that a 45 foot high  
8 sign on the McDonald's property would be blocked by the  
9 nonconforming signs to the west. Rather, the city's rationale  
10 is that a height variance is necessary to put the McDonald's  
11 sign on equal footing with the nonconforming signs nearby. The  
12 order states:

13 "Other signs in the immediate vicinity are  
14 approximately 60 feet in height. The other signs in  
15 the immediate vicinity effectively limit the visibility  
16 of the proposed sign of McDonald's Corporation by  
17 competing for the attention of the fast-moving traffic  
18 on Interstate 84." Record at 6.

19 FIRST ASSIGNMENT OF ERROR

20 Petitioners allege the city's findings do not demonstrate  
21 compliance with the first two approval criteria in the city's  
22 ordinance. The first criterion requires that exceptional or  
23 extraordinary circumstances apply to the property that do not  
24 apply to most properties in the same zone or vicinity. The  
25 city's order does not refer to this criterion. However, it is  
26 fair to say that the order relies principally on the nearby  
nonconforming signs as proof of exceptional or extraordinary  
circumstances.

1           Petitioners complain that the off-site circumstances relied  
2 on by the city are neither exceptional nor extraordinary as  
3 those terms are used in the zoning ordinance. We agree.  
4 Exceptional or extraordinary circumstances that justify a  
5 variance must arise out of conditions inherent in the property  
6 to be benefitted by the variance Lovell v. Independence  
7 Planning Commission, 37 Or App 3, 586 P2d 99 (1978). The  
8 off-site circumstances relied on by the city affect all  
9 properties in the immediate area in the same way. As we see  
10 it, the city's rationale would convert the 45 foot height  
11 maximum into a variable guideline, depending on the height of  
12 nearby structures. If the city intends to approach the  
13 structure height problem in this way, the proper course is to  
14 amend the zoning code in a legislative process, rather than to  
15 grant variances on a case-by-case basis. Lovell v.  
16 Independence Planning Commission, supra.

17           Petitioners are also correct that the city's findings do  
18 not demonstrate compliance with the second criterion for a  
19 variance under the zoning ordinance. That criterion requires a  
20 finding that relief is "necessary for the preservation of a  
21 property right of the applicant substantially the same as  
22 owners of the other property in the same zone or vicinity  
23 possess." The city's finding is that McDonald's has a property  
24 right to erect a sign comparable to the height of existing signs  
25 in the area. However, as noted earlier, the existing signs  
26 would not block a conforming McDonald's sign, but would

1 "effectively limit the visibility of the proposed sign...by  
2 competing for the attention of the fast-moving traffic on  
3 Interstate 84." Record at 6.<sup>1</sup>

4 However, we do not construe the terms "property right" in  
5 Section 17.05.050(B) so expansively. We read the code to  
6 authorize variance relief only when necessary to establish a  
7 use allowed by the applicable zoning regulations. Under the  
8 ordinance, an owner of commercially zoned land has a property  
9 right to erect a commercial structure, including an advertising  
10 sign visible from the public right of way. This is the scope  
11 of the right recognized by the ordinance. The protected right  
12 does not encompass whatever structure is deemed necessary to  
13 "compete for the attention" of nearby traffic. Such a right  
14 would have indefinable bounds, potentially allowing the  
15 variance procedure to undermine or supplant zoning regulations.

16 We conclude that the city's findings do not demonstrate  
17 compliance with Section 17.05.050(A) and (B) of the zoning  
18 ordinance. Accordingly, the first assignment of error is  
19 sustained.

#### 20 SECOND ASSIGNMENT OF ERROR

21 Petitioners next assail the city council's findings for  
22 failure to address an issue raised during the public hearings  
23 on the variance request, viz, the possibility of locating the  
24 sign on another portion of the property to improve the sign's  
25 visibility from the highway without the need for a variance.

26 The issue was raised in a staff report to the planning

1 commission and was included as a basis for denying the variance  
2 of the planning commission. Petitioners assert that the city  
3 council was obligated to address this issue under Section  
4 17.05.050(D) of the zoning ordinance. This provision requires  
5 a finding that "the variance requested is the minimum variance  
6 which would alleviate the hardship."

7 The city's final order does not address whether variance  
8 relief would be unnecessary if the sign was placed on a  
9 different portion of McDonald's property. Instead, the order  
10 accepts the location selected by the applicant and concludes  
11 that, at that location, a 15 foot variance is the minimum  
12 necessary "to alleviate the hardship imposed by the 45 foot  
13 height limitation." Record at 6.

14 We hold that, under Section 17.05.050(D) of the code, the  
15 city was obligated to consider whether available alternatives  
16 would eliminate the need for a height variance. The issue was  
17 raised in the planning commission's decision, and that decision  
18 was before the city council during the appeal. It was also  
19 relevant to a standard governing approval of the application,  
20 viz, Section 17.05.050(D). Under the circumstances, the city  
21 could not approve the application by simply concluding, as it  
22 did, that a 15-foot variance was the minimum necessary to  
23 alleviate the hardship. See City of Wood Village v. Portland  
24 Metro, 48 Or App 79, 87, 616 P2d 528 (1980).

25 The second assignment of error is sustained.  
26

THIRD ASSIGNMENT OF ERROR

This assignment of error, like the previous one, directs our attention to Section 17.05.050(D) of the city code. Petitioners here assume, in contrast to the previous assignment of error, that the applicant's selection of the southwest corner of the property as the sign site was binding on the city. Petitioners argue, however, that the record does not contain substantial evidence to support the conclusion that a 15 foot variance at that site is the "minimum variance which would alleviate the hardship." Petitioners support this challenge by citing the testimony of a representative of McDonald's to the effect that McDonald's "could live with" a lesser variance than requested in the application.

We uphold this assignment of error, albeit for a more fundamental reason than petitioners advocate. The city's final order concludes, without explanation, that "the variance requested by McDonald's Corporation is the minimum variance which would alleviate the hardship." Record at 6. As noted earlier, the hardship faced by the applicant consists of competition for motorist attention. The findings state:

"Other signs in the immediate vicinity effectively limit the visibility of the proposed sign...by competing for attention of the fast-moving traffic on Interstate 84." Id.

We have previously stated that the hardship relied on by the city is not sufficient to justify a variance. Accordingly, we see no point in attempting to determine whether substantial

1 evidence supports the conclusion that the 15 foot variance is  
2 the minimum necessary to alleviate the hardship.

3 We interpret the third assignment of error as a restatement  
4 of petitioner's earlier attack on the city's findings. So  
5 interpreted, the assignment of error is sustained.

6 FOURTH ASSIGNMENT OF ERROR

7 This assignment of error reiterates petitioner's claim that  
8 the city failed to identify a property right that would support  
9 approval of the contested variance. We have already upheld  
10 this claim. See discussion of first assignment of error. No  
11 further discussion is warranted.

12 The fourth assignment of error is sustained.

13 The city's decision is remanded.

FOOTNOTES

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3 The city does not explain whether the nearby nonconforming  
4 signs constitute lawful nonconforming uses or are zoning  
5 violations. The record indicates that city planners were unable  
6 to determine the zoning status of the signs. The city seems to  
7 contend that regardless of whether the nearby signs are lawful,  
8 they can create a right in other property owners to exceed the 45  
9 foot height limitation. We question this proposition, but it is  
10 not necessary to address it in the appeal.  
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