

LAND USE
BOARD OF APPEALS

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

DEC 8 5 23 PM '89

ANNA J. MILLER,)
)
Petitioner,)
)
vs.)
)
DUNES CITY,)
)
Respondent.)

LUBA No. 88-116
FINAL OPINION
AND ORDER

Appeal from City of Dunes City.

Michael E. Farthing, Eugene, filed the petition for review and argued on behalf of petitioner. With him on the brief was Gleaves, Swearingen, Larsen & Potter.

D. Ronald Gerber, Florence, filed the response brief and argued on behalf of respondent.

SHERTON, Chief Referee; HOLSTUN, Referee; KELLINGTON, Referee, participated in the decision.

REMANDED 12/08/89

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

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1 Opinion by Sherton.

2 NATURE OF THE DECISION

3 Petitioner appeals an order of the City of Dunes City
4 denying her application for a variance from highway and
5 lakeshore setback requirements to alter an existing building.

6 FACTS

7 The subject property is a 315 foot long strip between
8 Highway 101 to the west and Woahink Lake to the east. The
9 property is approximately 40 to 50 feet wide at the north and
10 south ends, and 80-100 feet wide at its widest point.¹ The
11 property is zoned Community Commercial (CC). In the CC zone,
12 buildings are required to be setback 30 feet from Highway 101
13 and, if not water-dependent, 50 feet from the lake shoreline.
14 Dunes City Zoning Ordinance (DCZO) 6.A.

15 The property contains a 32 by 40 foot two-story building,
16 with an attached shop measuring 20 by 36 feet. The building is
17 situated 14 feet from Highway 101 and 37 feet from the shoreline
18 of Woahink Lake. The building was constructed prior to adoption
19 of the DCZO.

20 Petitioner purchased the subject property in 1984. At that
21 time, the property and existing building were used for
22 commercial purposes (seaplane rides). On July 12, 1984,
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24 ¹The city finds the maximum width reached in the middle of the property
25 is 80 feet. Record 1E. However, evidence in the record submitted by
26 petitioner, the applicant below, indicates the maximum width is
approximately 100 feet. Record 6C, 6L. The maximum width of the property
is discussed in more detail under the second assignment of error, infra.

1 petitioner obtained city approval of variances to the
2 Highway 101 and lakeshore setbacks (1) to add to the existing
3 building a two-story addition, consisting of a garage with
4 living quarters above and an 11'4" deck along the back of the
5 addition; (2) to refurbish the seaplane dock; (3) to refurbish
6 the ramp to the seaplane hangar; and (4) to construct a parking
7 lot between the hangar and the existing building. However,
8 petitioner left the state, and the variance approvals lapsed.

9 On July 20, 1988, petitioner applied for variances from the
10 Highway 101 and lakeshore setbacks and height requirements of
11 the CC zone for an addition to the existing building.²
12 Petitioner's proposal includes removing the 20 by 36 foot shop
13 attached to the north side of the existing building and adding a
14 30 by 32 foot addition, with an 11'4" deck along the back, to
15 the south side of the existing building. The net change in
16 building floor area would be an increase of 240 square feet.³

17 After a public hearing, the city planning commission
18 recommended denial. After an additional public hearing, the
19 city council adopted an order denying the variances on the
20 ground that they would increase the nonconformity of the
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23 ²Petitioner's request for a height variance was withdrawn during the
24 course of the city proceedings. Whether the 1988 proposal is otherwise
identical to the 1984 proposal is disputed by the parties.

25 ³We note that in determining there will be a net increase of 240 square
26 feet, the parties do not include the area occupied by the proposed deck
along the back of the addition.

1 existing structure, in violation of DCZO 10.IV.A.⁴ This appeal
2 followed.

3 FIRST ASSIGNMENT OF ERROR

4 "Dunes City erred by adopting Finding 34 which found
5 the structure on the subject property as well as the
6 lot itself to be nonconforming. Such finding is not
7 supported by substantial evidence in the record and is
8 also an improper construction of the Dunes City Zoning
9 Ordinance."

10 In this assignment of error, petitioner challenges the
11 following city finding:

12 "The present building was in existence at the time the
13 city was zoned and is a non-conforming structure of
14 record located on a nonconforming lot of record."
15 Record 1F.

16 Petitioner contends that the existing building is not a
17 "nonconforming structure."

18 Petitioner points out that DCZO 10.IV provides in relevant
19 part:

20 Nonconforming Structures. Where a lawful structure
21 exists at the effective date of adoption or amendment
22 of this Ordinance that could not be built under the
23 terms of this Ordinance as adopted or later amended by
24 reason of restrictions on lot coverage, height, yards,
25 or other characteristics of the structure or its
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27 ⁴The city's order also states that the proposed variances would violate
28 DCZO 10.III.A (prohibition against enlargement or increase of a
29 nonconforming use) and 10.III.E (prohibition against alterations which
30 materially prolong the economic life of a nonconforming use). The DCZO
31 distinguishes in its regulations between nonconforming lots of record
32 (DCZO 10.II), nonconforming uses (DCZO 10.III and V), and nonconforming
33 structures (DCZO 10.IV). The city conceded at oral argument that the
34 proposed use of the subject property conforms to the CC zone and,
35 therefore, that the proposed variances would not violate DCZO 10.III.A and
36 E. We agree with the city that petitioner's proposed use of the existing
37 structure does not constitute a nonconforming use and, therefore,
38 DCZO 10.III.A and E are not applicable to approval of the requested
39 variances (see n 7, infra).

1 location on the lot, such structure may be continued
so long as it remains otherwise lawful * * *

2 Petitioner contends that according to this provision, a
3 structure is nonconforming only if it "could not be built under"
4 the DCZO. Petitioner argues that the DCZO provides at least two
5 processes which could result in the existing structure being
6 built on the subject property.

7 Petitioner first argues that under DCZO 9.XI, the existing
8 structure could be built if a variance to the setback
9 requirements of the CC zone were granted. Petitioner next
10 argues the existing structure could be built under the
11 provisions of DCZO 10.II allowing the construction of a
12 residence on a nonconforming lot of record.⁵ Petitioner argues
13 that the existing structure could be built under DCZO 10.II
14 because single family dwellings are a permitted use in the CC
15 zone and the city determined in the above-quoted finding that
16 the subject property is a nonconforming lot of record.

17 Petitioner finally argues that the city's interpretation of
18 the term "nonconforming structure" produces an unreasonable

19 _____
20 ⁵DCZO 10.II provides:

21 "Nonconforming Lots of Record. In any district in which
22 single-family dwellings are allowed by permitted or conditional
23 use, notwithstanding limitations imposed by other provisions of
24 this Ordinance, a single-family dwelling and customary
25 accessory buildings may be erected on any single lot of record
26 otherwise conforming to the requirements of all applicable city
ordinances effective at the date the lot was platted. * * *
This provision shall apply even though such lot fails to meet
the requirements for area or width, or both. Other
requirements not involving area or width or both shall conform
to the regulations for the district in which such lot is
located."

1 result. According to petitioner, under the city's
2 interpretation, a new structure built pursuant to an approved
3 variance would be a nonconforming structure upon its completion.

4 The city argues that its interpretation of "nonconforming
5 structure" as being a structure lawfully built prior to the
6 adoption of the DCZO which does not comply with the requirements
7 of the DCZO is reasonable. The city argues that under its
8 interpretation of "nonconforming structure," a building which is
9 constructed pursuant to, or is the subject of, an approved
10 variance complies with the DCZO and, therefore, is not a
11 nonconforming structure.

12 According to the city, the existing building on the subject
13 property is a nonconforming structure because it was built prior
14 to the adoption of the DCZO, does not comply with the highway
15 and lakeshore setback requirements of the CC zone and is not the
16 subject of an approved variance to those requirements. The city
17 contends it is because the existing building is a nonconforming
18 structure, that it is allowed to continue in the CC zone without
19 obtaining variances to the setback requirements. However,
20 according to the city, if petitioner wants to establish that the
21 existing building is not a nonconforming structure because
22 variances to the setback requirements could be obtained, then
23 petitioner must actually obtain such variances.⁶

24 _____
25 ⁶The city also argues that the existing building could not be approved
26 as a residence on a nonconforming lot of record under DCZO 10.II (see n 4)
in any case. Under that subsection, nonconforming lots are those which

1 The DCZO includes the following definition:

2 "NONCONFORMING STRUCTURE - A structure or portion
3 thereof, which was lawfully established in compliance
4 with all applicable ordinances and laws, but which,
5 because of the application of a subsequent zoning
6 ordinance (1) no longer conforms to the setback,
7 height, maximum lot coverage, or other building
development requirements of this Ordinance; or (2) is
clearly designed and intended for uses other than any
use permitted in the zoning district in which it is
located." (Emphasis added.) DCZO 11.

8 In addition, the DCZO section regulating nonconforming lots,
9 uses and structures includes the following purpose subsection:

10 "Within the districts established by this ordinance or
11 amendments that may later be adopted, there exist
12 lots, structures, and uses of land and structure which
13 were lawful before this Ordinance was passed or
amended, but which would be prohibited, regulated, or
restricted under the terms of this Ordinance or future
amendments.

14 "It is the intent of this Ordinance to permit these
15 nonconformities to continue until they are removed or
16 abandoned, but not to encourage their survival. * * *
17 It is further the intent of this Ordinance that
nonconformities shall not be enlarged upon, expanded
or extended, nor be used as grounds for adding other
structures or uses prohibited elsewhere in the same
district."

18 "* * * * *" DCZO 10.I.

19 Finally, DCZO 10.IV regulates changes to nonconforming
20 structures as follows:

21 "Nonconforming Structures. Where a lawful structure
22 exists at the effective date of adoption or amendment

23 _____
24 fail to meet the requirements of the zoning district for area or width, or
25 both. In this case, the subject property is a nonconforming lot of record
26 because it fails to meet both the one acre minimum lot size and 150 feet
minimum average width requirements of the CC zone. DCZO 6.I. According to
the city, a single family dwelling nevertheless could be built on the lot
under DCZO 10.II, but only if it complied with the other requirements of
the CC district, including the Highway 101 and lakeshore setbacks.

1 of this Ordinance that could not be built under the
2 terms of this Ordinance as adopted or later amended by
3 reason of restrictions on lot coverage, height, yards,
4 or other characteristics of the structure or its
5 location on the lot, such structure may be continued
6 so long as it remains otherwise lawful, subject to the
7 following provisions:

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It is not disputed that the existing building on the subject property was lawfully established prior to the city's adoption of the DCZO. Thus, since it does not comply with the Highway 101 and lakeshore setback requirements of the CC zone, it fits the DCZO's definition of "nonconforming structure." Furthermore, the purpose subsection of DCZO 10 expresses an intent to regulate nonconforming structures which were lawfully created but would be prohibited, regulated, or restricted under the terms of the DCZO. That description also fits the building in question. DCZO 10.IV was adopted to carry out the purpose expressed in DCZO 10.I.

Considering all three DCZO provisions together, we see no significance in the use of the phrase "could not be built under the terms of this Ordinance" in DCZO 10.IV. We agree with the city that a structure which does not comply with the setback requirements of the DCZO and has not received city approval of variances from those requirements is a "nonconforming structure" to which the limitations of DCZO 10.IV apply.⁷ See Morse Bros.,

⁷We note we also agree with the city that the provisions of DCZO 10.II allowing construction of single family dwellings on nonconforming lots of record does not provide a means of avoiding compliance with applicable setback requirements of the DCZO.

1 Inc. v. Clackamas County, ___ Or LUBA ___ (LUBA Nos. 89-069 and
2 89-090, October 20, 1989), slip op 9-11 (a use which is listed
3 by the county code as a conditional use, but has not received
4 conditional use approval by the county is a nonconforming use).

5 The first assignment of error is denied.

6 SECOND ASSIGNMENT OF ERROR

7 "Even if it is found that the subject structure is
8 nonconforming, Dunes City erred in interpreting its
9 code by finding the variance, if approved, would
10 result in an enlargement of the nonconformity of the
11 existing structure. Dunes City's finding in this
12 regard is not supported by substantial evidence."

13 In this assignment of error, petitioner challenges the
14 following conclusion by the city:⁸

15 "Approving the variance would enlarge the structure
16 and increase the non-conformity of an existing
17 structure (10-IV-A) * * *" Record 1G.

18 DCZO 10.IV.A imposes the following limitation on nonconforming
19 structures:

20 "No such structure may be enlarged or altered in a way
21 which increases its nonconformity."

22 Petitioner argues that DCZO 10.IV.A does not generally
23 prohibit enlargement of nonconforming structures, but rather

24 ⁸Under this assignment of error, petitioner also challenges the city's
25 conclusions that the proposed variances would violate DCZO 10.III.A and E.
26 However, as explained in n 2, supra, the city concedes that these DCZO
provisions are not applicable to the proposed variances. We agree with the
city and, therefore, sustain the portions of petitioner's assignment of
error challenging the city's denial on the bases of violation of
DCZO 10.III.A and E. However, in order to obtain reversal or remand of a
decision denying a requested development approval, petitioner must
successfully challenge all bases for denial. Baughman v. Marion County,
___ Or LUBA ___ (LUBA No. 89-117, April 12, 1989), slip op 6; Kegg v.
Clackamas County, 15 Or LUBA 239, 244 (1987).

1 prohibits only enlargements which "increase the nonconformity"
2 of such structures. Petitioner argues that an enlargement made
3 under a properly approved variance (for the enlargement) cannot
4 increase the nonconformity of a nonconforming structure. We
5 understand petitioner to argue that if a variance is granted for
6 the enlargement of a nonconforming structure, then the
7 enlargement is conforming and, therefore, cannot increase the
8 nonconformity of the structure. Thus, under petitioner's
9 interpretation of the DCZO, the city should determine whether
10 the proposed remodeling complies with the DCZO 9.XI.B standards
11 for a variance. If the proposal does comply with these
12 standards, DCZO 10.IV.A would not be violated, and a variance
13 should be approved.

14 Petitioner also argues that the city's decision is
15 inadequate because it fails to explain how the proposed
16 remodeling would increase the existing structure's
17 nonconformity. Petitioner argues that the existing structure
18 would merely be reconfigured, with its use unchanged.
19 Petitioner further contends there is no evidence in the record
20 that the nonconformity of the existing structure would be
21 increased by her proposal.

22 The city points out that petitioner does not specifically
23 challenge its findings that the proposal would increase the
24 total area of the existing structure by 240 square feet, or that
25 the subject property is 80 feet at its widest point. The city
26 argues that because the Highway 101 and lakeshore setback

1 requirements of the CC zone total 80 feet, these facts establish
2 that the proposal would necessarily result in a net increase of
3 240 square feet in the area of the structure within the
4 setbacks.⁹⁻

5 The city maintains that such a net increase in building
6 area would increase the nonconformity of the structure. The
7 city argues that in this case, any additional encroachment into
8 the required setbacks would constitute an increase in
9 nonconformity, whether allowed under a variance or not. The
10 city argues that petitioner's interpretation is unreasonable
11 because it disregards the clear intention of DCZO Section 10
12 with regard to discouraging nonconforming uses and makes
13 DCZO 10.IV.A superfluous.

14 A. Interpretation of the DCZO

15 The correct interpretation of local ordinance provisions is
16 a question of law which must be decided by this Board. McCoy v.
17 Linn County, 90 Or App 271, 275-276, 752 P2d 323 (1988); Mental
18 Health Division v. Lake County, ___ Or LUBA ___ (LUBA
19 No. 89-004, July 18, 1989), slip op 8. The provisions of a
20 comprehensive zoning ordinance should be construed as a whole,
21 and effect given to the ordinance's overall policy. Clatsop
22 County v. Morgan, 19 Or App 173, 178, 526 P2d 1393 (1974);
23 Kellogg Lake Friends v. Clackamas County, ___ Or LUBA ___ (LUBA
24 _____)

25 ⁹Although petitioner does not expressly attack the city's findings, she
26 does contend the record does not contain substantial evidence to support
the city's decision. We discuss petitioner's evidentiary challenge, infra.

1 No. 88-061, December 22, 1988), slip op 10, aff'd 96 Or App 536,
2 rev den 308 Or 197 (1989).

3 In this case we must determine the correct interpretation
4 of the relationship between the nonconforming lot, structure and
5 use provisions and the variance provisions of the DCZO.
6 DCZO 9.XI.A states the purpose of the variance provisions is

7 " * * * to provide relief when a strict application of
8 the zoning requirements impose [sic] unusual practical
9 difficulties, or unnecessary physical hardships may
10 result from the size, shape or dimensions of a site or
the location of existing structures thereon; from
geographic, topographic, or other physical conditions
on the site or in the immediate vicinity * * * .

11 " * * * * "

12 DCZO 10.I provides the following purpose statement for that
13 section's provisions regulating nonconforming lots, structures
14 and uses:

15 "Within the districts established by this ordinance or
16 amendments that may later be adopted, there exist
lots, structures, and uses of land and structure which
17 were lawful before this Ordinance was passed or
amended, but which would be prohibited, regulated, or
18 restricted under the terms of this Ordinance or future
amendments.

19 "It is the intent of this Ordinance to permit these
20 nonconformities to continue until they are removed or
abandoned, but not to encourage their survival. Such
21 uses are declared by this Ordinance to be incompatible
with permitted uses in the districts involved. It is
22 further the intent of this Ordinance that
nonconformities shall not be enlarged upon, expanded
23 or extended, nor be used as grounds for adding other
structures or uses prohibited elsewhere in the same
district."

24 "To avoid undue hardship, nothing in this Ordinance
25 shall be deemed to require a change in the plans,
construction, or designated use of any building,
26 structure or use for which a building permit in

1 accordance with the Dunes City Building Code has been
2 legally issued prior to the effective date of adoption
or amendments of this ordinance * * *

3 DCZO 10.I expresses a clear intent to discourage survival
4 of nonconforming lots, uses and structures. DCZO 10.I also
5 indicates an intent to avoid undue hardship by (1) allowing
6 nonconforming uses and structures to continue, without
7 enlargement or expansion, until they are removed or abandoned;
8 and (2) not applying the restrictions of DCZO 10 to lots, uses
9 or structures for which a valid building permit is issued prior
10 to the change in the DCZO making the lot, use or structure
11 nonconforming. While DCZO 9.XI.A expresses an intent to use the
12 variance process to alleviate unnecessary physical hardships due
13 to property size or shape and the location of existing buildings
14 thereon, considering these provisions together, we do not
15 believe that the variance process of DCZO 9.XI is intended to
16 override the city's policy of discouraging the survival of
17 nonconforming uses and structures. We agree with the city that
18 DCZO 10.IV.A prohibits approval of an addition to a
19 nonconforming structure through the variance process, if that
20 addition would increase the structure's nonconformity.¹⁰

21
22 ¹⁰We note that in addressing a similar question concerning the
23 relationship of the conditional use and nonconforming use provisions of a
24 county zoning ordinance, we determined that under the county zoning
25 ordinance, if a proposed use is both listed as a conditional use and also
26 constitutes an alteration of a nonconforming use, approval of the proposed
use cannot be granted based on compliance with the standards for
conditional uses. Rather, we interpreted the county ordinance to require
the proposed use to satisfy the ordinance's criteria for alteration of a
nonconforming use. Morse Bros., Inc. v. Clackamas County, supra, at
slip op 28-29.

1 This subassignment of error is denied.

2 B. Findings

3 While the city's explanation of its conclusion could be
4 clearer, we conclude the city adequately explained in its
5 findings the basis for its determination that approval of
6 petitioner's proposal would increase the nonconformity of the
7 existing structure. The city's findings include the following:

8 "4. The Zoning Ordinance, Section 6, requires the
9 following setback requirements: * * * a front
10 yard setback from Highway 101 of 30 feet, * * *
11 setback from the shoreline of 50 feet.

12 "5. According to the plot plan submitted, the
13 present building is located 37 feet from the
14 shoreline of Woahink Lake and 14 feet from
15 Highway 101.

16 * * * * *

17 "24. The property, by measurement, appears to be 50
18 feet wide at the north property line, 80 feet
19 wide at the widest point, and 40 feet in width
20 at the southern property line.

21 "25. The applicant plans to remove an attached shed
22 at the north end of the existing building and
23 hopes to trade that space for the addition at
24 the south end.

25 "26. The statement submitted by the applicant notes
26 that here would still be an increase of 240
square feet." Record 1B-1E.

27 Read together, we believe the above-quoted findings
28 adequately explain that the basis for the city's determination
29 that petitioner's proposal would increase the existing
30 structure's nonconformity was (1) petitioner's proposal would
31 result in a net increase to the area of the existing building of
32 240 square feet; (2) because the subject property's maximum

1 width is 80 feet, all of the subject property is within the
2 required setback from Highway 101 or from the lake shoreline;
3 and, therefore, (3) petitioner's proposal would result in a net
4 increase in the area of the structure within the setbacks
5 required by the CC zone. We also agree with the city that a net
6 increase in the area of the structure within the required
7 setbacks would be an enlargement "which increases its
8 nonconformity," prohibited by DCZO 10.IV.A.

9 This subassignment of error is denied.

10 C. Evidentiary Support

11 We do not understand petitioner to challenge the
12 evidentiary support for the city's determination that her
13 proposal would result in a net increase in the area of the
14 existing structure of 240 square feet. However, we do
15 understand petitioner to argue that there is no evidence in the
16 record to support the city's determination that there would be a
17 net increase in the area of the structure within the required
18 setbacks. Petitioner cites us to a site plan and setback
19 location map which she submitted to the city. Record 6L, 6T.
20 These maps indicate that the subject property has a maximum
21 width of 101 feet, and that there is an area in the center of
22 the property, encompassing part of the existing structure and
23 part of the proposed addition, which is within neither setback.
24 Thus, according to petitioner, construction could occur within
25 this area without increasing the nonconformity of the existing
26 structure.

1 The city's determination that there would be a net increase
2 in the area of the structure within the setbacks is dependent
3 upon its finding that the maximum width of the property is 80
4 feet and, therefore, all of the property is within the setbacks.
5 However, the city cites us to no evidence in support of its
6 determination that the maximum width of the property is 80 feet.
7 Thus, the only evidence we are cited to in the record concerning
8 this issue is the maps submitted by petitioner.

9 We are authorized to reverse or remand the city's decision
10 if the decision is not supported by substantial evidence in the
11 record. ORS 197.835(8)(a)(C). Substantial evidence to support
12 a decision exists when the evidence in the whole record would
13 allow a reasonable mind to reach that decision. Younger v. City
14 of Portland, 305 Or 346, 360, 752 P2d 262 (1988). In this case,
15 the evidence to which we are cited indicates (1) a substantial
16 portion of the existing 720 square feet shed proposed to be
17 removed is within the required setbacks, and (2) approximately
18 half of the 960 square foot proposed addition is within the
19 required setbacks. A reasonable person could not conclude,
20 based on this evidence, that the proposal would result in a net
21 increase in the area of the structure within the setbacks.

22 This subassignment of error is sustained.

23 The second assignment of error is sustained, in part.

24 THIRD ASSIGNMENT OF ERROR

25 "Dunes City erred in denying this variance application
26 because it was bound by its prior approval of an
identical application."

1 Petitioner argues that the city approved the same variance
2 in 1984 that it denied in 1988. Petitioner contends that in
3 this case, the variance application, the proposed project, the
4 subject property and the parties are the same as they were in
5 the 1984 proceeding. Petitioner argues

6 "Where there is a second proceeding brought upon past
7 facts involving the same parties and claim, the
8 findings and decision of the prior proceeding are res
9 judicata; and this is the case whether the tribunal
making the decision is an administrative agency or a
court of law. Stuckey v. Weinberger, 488 F2d 904 (9th
Cir., 1973). * * *" Petition for Review 21-22.

10 According to petitioner, under the doctrine of res judicata, a
11 local governing body may not reverse itself as to a previous
12 administrative decision unless there is a showing of a change in
13 circumstances. Petitioner contends that because the city failed
14 to establish there has been a change in circumstances, it is
15 precluded from reversing its 1984 decision to approve variances
16 for the proposed project.

17 The city argues that the variances it approved in 1984 have
18 expired. According to the city, its 1988 decision was the
19 result of a new proceeding, based on a new application and,
20 therefore, the doctrine of res judicata does not apply. The
21 city also argues that petitioner's current proposal differs in
22 some respects from the proposal approved in 1984. The city
23 contends that if petitioner invokes the doctrine of res
24 judicata, petitioner has the burden of establishing that the
25 1984 and 1988 applications are identical.

26 In Marsh v. Wasco County, 10 Or LUBA 58, 62 (1984), we

1 quoted the following Oregon Supreme Court discussion regarding
2 the elements of res judicata:

3 "It is settled law in this state, as elsewhere, that a
4 judgment or decree rendered upon the merits is a final
5 and conclusive determination of the rights of the
6 parties, and a bar to a subsequent proceeding between
7 them upon the same claim or cause of suit, not only as
8 to the matter actually determined, but as to every
9 other matter which the parties might have litigated
10 and had decided as incident to or essentially
11 connected therewith, either as a matter of claim or
12 defense * * *" (Emphasis added; citations omitted.)
13 Grant v. Yok, 233 Or 491, 494, 378 P2d 962 (1963).

9 In this case, the appealed decision was based on a
10 different application, concerning a different proposal, than was
11 the subject of the city's 1984 order. It is clear from the
12 record that the variance application approved in 1984 included
13 refurbishing of the seaplane dock and ramp and construction of a
14 parking lot, and did not include removal of the attached shop.
15 Record 6Q-6R. Furthermore, under DCZO 9.XI.H, the variances
16 approved in 1984 were automatically revoked when they were not
17 exercised within one year of the date of their approval. Thus,
18 in order to proceed with petitioner's proposal, a new decision
19 approving variances to the setback standards of the CC zone is
20 required from the city. In these circumstances, the doctrine of
21 res judicata does not prevent the city from reaching a different
22 decision on the 1988 variance application than it did on the
23 1984 application.

24 The third assignment of error is denied.

25 The city's decision is remanded.