BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JANET STAHL, JOHN STAHL
and ALLISON ASBJORNSEN,
Petitioners,

and

PATTIE LADD, LES HELGESON
and CHUCK BEASLEY,
Intervenors-Petitioner,

vs.

TILLAMOOK COUNTY,
Respondent,

and

BEN HATHAWAY
and MARY LOU HATHAWAY,
Intervenors-Respondent.

LUBA No. 2002-104

FINAL OPINION
AND ORDER

Appeal from Tillamook County.

Daniel Kearns, Portland, filed the petition for review and argued on behalf of petitioners and intervenors-petitioner. With him on the brief was Reeve Kearns, PC.

William K. Sargent, County Counsel, filed the response brief on behalf of the county.

Timothy V. Ramis and John C. Pinkstaff, Portland, filed a response brief on behalf of intervenors-respondent. With them on the brief was Ramis Crew Corrigan & Bachrach, LLP. John C. Pinkstaff argued on behalf on intervenors-respondent.

BASSHAM, Board Member; BRIGGS, Board Member, participated in the decision.

HOLSTUN, Board Chair, concurring.

REMANDED 01/29/2003

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal county approval of a variance to increase the height of a dwelling that was previously granted conditional use approval.

FACTS

The subject property is a 4.4-acre parcel zoned Recreational Management (RM). The property is flat, undeveloped and partially wooded, and was previously used as a campground and recreation site. The property is wedge-shaped, and runs along the shore of Netarts Bay, which borders it to the west.

A single family residence is allowed as a conditional use in the RM zone, on a parcel at least five acres in size. In 1998, intervenors-respondent (intervenors) applied for a conditional use permit (CUP) to construct a single-family dwelling on the property. Because the lot was substandard in size, the county also required intervenors to obtain a determination that a single-family dwelling on 4.4-acres was similar in use to a single-family dwelling on a five-acre parcel. In 1999, the county issued the conditional use permit and similar use determination, approving the requested dwelling. Because the RM zone has no standards governing dwellings, the conditional use permit required compliance with the dimensional standards of the Rural Residential (RR) zone. The RR zone imposes a 24-foot maximum height limit for bay-front properties, and a 35-foot height limit elsewhere. Because the subject property is on the bay, the permit limited the proposed dwelling to 24 feet in height. The permit also specifies that development shall occur as shown on the site plan that was submitted with the conditional use permit application. The approved site plan depicted a rectangular two-story, 3,100-square foot dwelling with a detached garage to the south. The footprint of the approved dwelling required removal of three existing trees, but retained a large spruce tree south of the dwelling, between the dwelling and the detached garage.

At some point after the 1999 CUP approval, intervenors decided on a different house design, and in 2001 sought county approval to construct a two-story Victorian-style house approximately 3,100 square feet in size, with an attached garage. The new design proposes a tower with a conical roof that is 35 feet, six inches in height, and a steeply pitched gable roof over the dwelling that is 31 feet, six inches in height. The second floor is approximately 12 feet above grade. According to the site plan submitted in support of the request, the footprint of the proposed new dwelling is smaller than the dwelling approved in the 1999 CUP, and is located further to the west, apparently to make room for a driveway east of the dwelling. The driveway and the new location of the house require removal of six trees instead of three, but the new site plan retains the large spruce tree south of the dwelling.

Because the roof of the proposed dwelling exceeded the 24-foot height limitation imposed by the 1999 conditional use permit, county staff concluded that the proposed dwelling required a variance pursuant to Tillamook County Land Use Ordinance (LUO) 8.030.[1] Staff denied the requested variance, for failure to satisfy LUO 8.030(1), (2) and (4). Intervenors appealed the staff decision to the planning commission, which upheld the staff

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[1] LUO 8.030 provides:

> "A variance shall be granted, according to the procedures set forth in [LUO] 8.020, if the applicant adequately demonstrates that the proposed variance satisfies all of the following criteria:
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> "(1) Circumstances attributable either to the dimensional, topographic, or hazardous characteristics of a legally existing lot, or to the placement of structures thereupon, would effectively preclude the enjoyment of a substantial property right enjoyed by the majority of landowners in the vicinity, if all applicable standards were to be met. Such circumstances may not be self-created.
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> "(2) A variance is necessary to accommodate a use or accessory use on the parcel which can be reasonably expected to occur within the zone or vicinity.
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> "(3) The proposed variance will comply with the purposes of relevant development standards as enumerated in section 4.005 and will preserve the right of adjoining property owners to use and enjoy their land for legal purposes.
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> "(4) There are no reasonable alternatives requiring either a lesser or no variance."

denial. Intervenors then appealed the planning commission decision to the board of county commissioners (BOCC). The BOCC held an evidentiary hearing on May 15, 2002, and voted 2-1 to reverse the planning commission decision, approving the requested variance. The BOCC decision limited the height variance to 35 feet, the height restriction applicable in the RR-zone on parcels that do not front the bay. This appeal followed.

MOTION TO STRIKE

Petitioners move to strike an assertion at two places in intervenors' response brief that, according to petitioners, is not supported by the record. The response brief at 1 and 42 asserts that county staff informed intervenors that the request for a 36-foot high dwelling required a variance rather than a modification of the 1999 conditional use permit. Petitioners argue that the record clearly shows that staff concluded that the proposed dwelling required modification of the 1999 permit, and possibly a variance as well. Record 99-100, 105b.

Intervenors cite to the testimony of intervenors' attorney before the BOCC, stating that county staff informed intervenors that the proposed dwelling required a variance. Record 99. What is missing from any party is an explanation for why this factual dispute is material to any issue in this case. While the question of whether the proposed dwelling requires modification of the 1999 CUP is at issue in the third assignment of error, the question of what advice staff gave intervenors has little bearing on that issue that we can see. Petitioners' motion to strike is denied.

FIRST ASSIGNMENT OF ERROR

LUO 8.030(4) requires that the applicant for a variance demonstrate that "[t]here are no reasonable alternatives requiring either a lesser or no variance." *See* n 1. In four subassignments of error, petitioners challenge the county's interpretation of LUO 8.030(4) and its findings of compliance with that criterion.

The challenged decision determines that other landowners in the vicinity have "substantial property rights" for purposes of LUO 8.030(1) to construct a Victorian-style

house exceeding 3,000 square feet in size, up to 35 feet in height, with an attached garage, and without the necessity of removing large trees on the property.[2] The challenged decision also interprets the scope of "reasonable alternatives" under LUO 8.030(4) to be limited to alternatives that can provide intervenors with the same "substantial property rights" enjoyed by others in the vicinity.[3] Finally, the county interpreted LUO 8.030(4) to require that, once

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[2] The challenged decision states, in relevant part:

> "[The testimony of intervenors' consultant] establishes that a majority of the landowners in the vicinity enjoy the same right which is sought by the applicants. That is, without disturbing large trees, they may construct homes of approximately 3,000 feet with attached garages. Moreover, there is no design restriction which limits the architectural style of these buildings, including their roofs. All of the landowners [of property in the vicinity that is not bay-front] may construct homes of up to 35 feet in height. This factual conclusion was not disputed in the hearing. * * *
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> "We find that others in the vicinity have the right to choose Victorian, or any other architectural roof design, within a 35-foot height limitation. So long as the proposed structure is confined to 35 feet we find that the applicants seek to enjoy a substantial property right enjoyed by a majority of landowners in the vicinity. * * *" Record 43.

[3] The challenged decision states, in relevant part:

> "31. In this case, a 'reasonable alternative' must afford the applicants the same opportunity that landowners in the surrounding vicinity possess. As we have previously found, that includes the right to build a 35-foot tall house of 3,000 square feet with an attached garage in a configuration that does not require the removal of significant trees. It also means the ability to choose the style of building and roof without limitation other than the dimensional limitation such as height. Using this standard we find that a reasonable alternative would be limiting the proposed structure to 35 feet so that it is subject to the same height limitation as other properties in the vicinity. This is a reasonable alternative because it is based upon the same rights enjoyed by others and because the applicant has testified that modifications to the style of the roof can be made which would bring the structure into compliance with a 35-foot height limitation. Granted the variance, subject to a 35-foot height limitation, would satisfy this standard.
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> "32. We agree with the testimony of [intervenors' consultant] that other alternatives presented were not reasonable alternatives. They require a smaller structure or the destruction of large trees or the use of a detached garage or a limitation in architectural style. We find that it is not reasonable to insist that the house be constructed in such a way that the property owners are unable to exercise the property rights enjoyed by others as they have been determined in these Findings. It is not reasonable to insist that the square footage of the proposed structure be reduced to minimize the amount of the variance. The ability to construct a home of 3,000 square feet is clearly a right enjoyed by others in the vicinity. This is equally true with respect to the attached garage feature, style of design and the ability to

the applicant for a variance has come forward with general evidence on the lack of reasonable alternatives that would allow the applicant to exercise the same substantial property rights as others in the vicinity, the burden shifts to opponents to put forward specific alternatives, and further to establish the costs and burdens of those alternatives. *See* n 3.

As discussed below, the opponents suggested that one reasonable alternative was the 3,100-square foot dwelling with detached garage approved in the 1999 CUP, which apparently requires either a lesser or no variance from the 24-foot height restriction. The county concluded that that alternative as well as others the opponents suggested did not provide intervenors with all of the "substantial property rights" other landowners enjoyed, and thus were not "reasonable alternatives." Therefore, the county concluded, the opponents had failed to meet their burden of proof under LUO 8.030(4). The county ultimately concluded that there were no "reasonable alternatives requiring either a lesser or no variance," as long as the dwelling did not exceed 35 feet in height.

> protect large trees. It is not reasonable to insist that these rights not be exercised in order to minimize the amount of the variance.
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> "* * * * *
>
> "34. In the case where the height variance causes no real undue impact, particularly with respect to views from other homes, we believe that a reasonable alternative is one which satisfies the applicant's request to exercise the rights enjoyed by others at the same or a lesser cost and without any other burdens to the applicants. None of the alternatives presented in this case meet the standard. The alternatives require major reductions in the enjoyment of the property rights which could be exercised by others in the vicinity. We also interpret our ordinance to require that an applicant go forward with general locational evidence on the lack of reasonable alternatives. Once that showing has been made, the burden shifts to opponents to put forward specific alternatives and to establish those alternatives' costs and consequences. The applicants have met the burden of going forward with general evidence on the lack of reasonable alternatives with the testimony of [intervenor's consultant] and his written submissions. Opponents did not satisfy their burden on the validity of the alternatives suggested. The drawings offered from the conditional use application plainly establish that the alternatives are not reasonable because they would not allow the applicants to exercise the same substantial property rights as can be exercised by a majority of landowners in the vicinity.
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> "35. We find that there are no reasonable alternatives requiring either a lesser or no variance so long as the height of the proposed structure is limited to 35 feet." Record 47-48.

A. First Subassignment: Burden of Proof

Petitioners argue that LUO 8.030 imposes on the applicant the burden of demonstrating that the proposed variance satisfies each of the criteria at LUO 8.030(1) through (4), and that nothing in the text of LUO 8.030 imposes any burden of proof on opponents to a variance application. Therefore, petitioners contend, the county's express interpretation of LUO 8.030(4) to impose a burden of proof on opponents is inconsistent with the text, purpose and policy of that provision. ORS 197.829(1).[4] Further, petitioners argue, the county's interpretation is inconsistent with well-established case law that the applicant has the burden of proof at all levels of the local permitting process. *Fasano v. Washington Co. Comm.*, 264 Or 574, 586, 507 P2d 23 (1973) (stating principle); *Murphy Citizens Advisory Comm. v. Josephine County*, 28 Or LUBA 274 (1994) (during the local proceedings, the applicant for development approval bears the burden of proof to establish that its application satisfies relevant approval standards).

Even if the county could interpret its ordinance to lawfully impose the burden of proof on opponents, petitioners contend, it cannot first announce that interpretation in the decision itself, long after the record is closed and the opportunity to satisfy that burden is lost. Petitioners argue that if they had known that the county would place the burden of

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[4] ORS 197.829(1) provides, in relevant part:

> "[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation; [or]
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]"

proof on the opponents to demonstrate the existence of reasonable alternatives, they would have provided that evidence.

Intervenors respond that, rather than shifting the burden of proof to the opponents, the county's decision simply weighed conflicting evidence regarding the alternatives submitted by the applicants and opponents, and concluded that the opponents had not adequately contested the applicants' evidence. At most, intervenors argue, the county properly shifted the burden of persuasion to the opponents after the applicants met their initial burden of proof.

The findings quoted at n 3 expressly interpret the county's code to shift the burden of proof to opponents to come forward with specific alternatives, and to establish the costs and consequences of those alternatives, once the applicant has submitted "general evidence" on the lack of alternatives. The findings do not identify what code provision is interpreted. Intervenors do not defend that interpretation, but instead argue essentially that the county misspoke, and that, rather than imposing a formal burden of proof on opponents, the county instead engaged in the usual weighing of conflicting evidence. We understand intervenors to argue that to the extent the county's interpretation is erroneous, it is harmless error, because in fact the county did not shift the burden of proof to the opponents.

Whatever the county's actual intentions, it expressly interpreted an unidentified code provision to place the burden of proving the existence of specific alternatives, with the costs and consequences of those alternatives, on the opponents to the application, once the applicant comes forward with "general evidence" on the lack of alternatives. Nothing we are cited to in the county's code supports such an interpretation, and LUO 8.030 appears to be to the contrary.

Whether that misconstruction of law is harmless error is a more difficult question. Intervenors are correct that, in the course of weighing conflicting evidence, a local government is entitled to accept an applicant's evidence as sufficient to demonstrate

compliance with an approval standard, and reject evidence to the contrary, as long as the contrary evidence does not undermine the applicant's evidence to the point where no reasonable person would rely on that evidence. Such an evaluation of conflicting evidence does not represent a shift in the burden of proof to the opponents. *Washington Co. Farm Bureau v. Washington Co.*, 21 Or LUBA 51, 64 (1991). However, where the local government expressly purports to shift the burden of proof from the applicant to the opponents, and explicitly rejects the opponents' evidence for failure to satisfy that burden, as here, it becomes more difficult to conclude that the local government has simply engaged in the evaluation of conflicting evidence. *See Andrews v. City of Prineville*, 28 Or LUBA 653, 659, n 5 and accompanying text (1995) (explicit and repeated shifts in the burden of proof to the opponents requires remand, notwithstanding the possibility that the local government might have actually meant only to weigh conflicting evidence and accept the applicant's evidence).

Under these circumstances, we cannot agree with intervenors that it was harmless error for the county to interpret its ordinance to impose the burden of proof on the opponents to produce evidence of reasonable alternatives under LUO 8.030(4). The problem is more than an academic one. It is one thing to weigh conflicting evidence, and choose which evidence to believe. It is another to explicitly reject proffered evidence, apparently *without* weighing that evidence against the record, because the local government deems the proponent of that evidence to have failed a nonexistent burden of proof to produce a particular kind of evidence. *See Matiaco v. Columbia County*, 42 Or LUBA 277, 288, *aff'd* 183 Or App 581, __ P3d ___ (2002) (the county erred in considering the county's rural address map to be the only valid evidence of the number of existing dwellings in an area, and refusing to consider other evidence not based on the map). Here, while the county's findings *can* be read as intervenors suggest, to weigh and choose among conflicting evidence, the findings explicitly impose a burden on the opponents to produce a particular kind of evidence

(alternatives that provide the applicants with the same substantial property rights as others to build a Victorian-style house exceeding 3,100 square feet, etc.) and conclude that the opponents failed to satisfy the burden of proof imposed. That error requires remand to apply the correct standard.

This subassignment of error is sustained.

B. Second Subassignment: Notice of Limited Scope of Alternatives

Petitioners argue in the second subassignment of error that the county's decision announced, for the first time, the design criteria that the county considered to encompass "reasonable alternatives" for purposes of LUO 8.030(4). According to petitioners, the opponents had no idea prior to the close of the evidentiary record that the scope of "reasonable alternatives" was limited to alternatives that, among other things, provided intervenors with (1) a Victorian-style house design; (2) a house larger than 3,000 square feet; (3) an attached garage; and (4) preservation of significant trees, particularly the large spruce south of the proposed dwelling. Had they known of the limited scope of "reasonable alternatives" the county would consider, petitioners argue, they would have submitted more responsive evidence.

Intervenors respond that petitioners should have been aware that the scope of "reasonable alternatives" was limited to design elements that feature a Victorian-style house 3,100 square feet in size, an attached garage and preservation of the large spruce tree south of the dwelling. According to intervenors, the county's interpretation that these design elements are "substantial property rights" enjoyed by other landowners in the vicinity, and that the scope of "reasonable alternatives" is limited to alternatives that provide the same "substantial property rights" enjoyed by other landowners is based on an earlier BOCC interpretation of LUO 8.030 affirmed in *deBardelaben v. Tillamook County*, 142 Or App 319, 922 P2d 683 (1996). Intervenors argue that the *deBardelaben* case was discussed extensively during the proceedings below, and therefore petitioners should have known that

the county would adopt a view of LUO 8.030 that was similar to that affirmed in *deBardelaben*, and presented their evidence accordingly.

deBardelaben involved a request to build a 2,100-square foot addition to an existing 1,600-square foot dwelling, in order to make the house suitable for year-round use and to accommodate the needs of a handicapped relative. The only part of the property on which it was feasible to construct an addition was on a slope behind the existing house. The proposed addition shared the same roof height as the existing house, but due to the slope and the way building height is measured from grade, the proposed addition had a height of 22 feet, five feet over the 17-foot maximum in the applicable zone, necessitating a variance request under LUO 8.030. The county approved the height variance. LUBA reversed several of the county's interpretations of LUO 8.030, in part because we deemed the county's interpretation of its variance provisions to be inconsistent with general principles of variance law. The Court of Appeals reversed LUBA's decision, concluding that the focus in reviewing local interpretations of local law under ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992) is the language, purpose and policy of the local law, not their consistency with extrinsic authority. The court applied ORS 197.829(1) and determined that, whether or not the court would interpret LUO 8.030 as the county did, each of its interpretations must be affirmed, because they were not "indefensible." 142 Or App at 325.

There were a number of issues at play in *deBardelaben*, but only two appear to have any special relevance to the present case. First, the county in *deBardelaben* found compliance with LUO 8.030(1) based in part on a finding that the ability to have a home of 3,000 to 4,000 square feet was a "substantial property right" enjoyed by other property owners in the area. Second, the county considered the personal circumstances of the applicant, the purpose of the structure, and the costs or burden caused by alternatives in determining that there were "no reasonable alternatives requiring either a lesser or no

variance," for purposes of LUO 8.030(4). As noted, the Court of Appeals affirmed these interpretations.

In the present case, the BOCC interpreted the term "substantial property rights" to refer to "the range of options available to others to construct or expand their homes, and maintain the assets of their properties, without resort to a variance." Record 41. The BOCC then limited the scope of "reasonable alternatives" to those that preserve intervenors' "substantial property rights." The combined effect gives the applicant's design preferences decisive importance, as long as a majority of others in the vicinity can build similar designs without a variance. That view of LUO 8.030(1) and (4) is a significant extension of the two pertinent interpretations affirmed in *deBardelaben*. Accordingly, we do not agree with intervenors that general discussion of *deBardelaben* during the proceedings below was necessarily sufficient to apprise petitioners of the interpretations adopted in the challenged decision, or that petitioners' suggested alternatives must satisfy all of intervenors' specific design preferences.

However, petitioners have not demonstrated that they are entitled to a remand for new evidentiary proceedings based on unanticipated interpretations. In *Gutoski v. Lane County*, 34 Or LUBA 219, 233-34, *aff'd* 155 Or App 369, 373-74, 963 P2d 145 (1998), we held that a local government may be required to reopen the evidentiary hearing where the local government (1) changes to a significant degree an established interpretation of an approval standard; (2) the change makes relevant a different type of evidence that was irrelevant under the old interpretation; and (3) the party seeking to submit evidence responsive to the new interpretation identifies what evidence not already in the record it seeks to submit. We held that petitioners in *Gutoski* failed to establish a basis for new evidentiary proceedings under that test. The Court of Appeals, while not endorsing or rejecting LUBA's formulation, agreed that

> "in certain limited circumstances, the parties to a local land use proceeding should be afforded an opportunity to present additional evidence and/or

> argument responsive to the decision maker's interpretations of local legislation and that the local body's failure to provide such an opportunity when it is called for can be reversible error. We also agree with LUBA, however, that *at least* two conditions must exist before it or we may consider reversing a land use decision on that basis. First, the interpretation that is made after the conclusion of the initial evidentiary hearing must either significantly change an existing interpretation or, for other reasons, be beyond the range of interpretations that the parties could reasonably have anticipated at the time of their evidentiary presentations. Second, the party seeking reversal must demonstrate to LUBA that it can produce specific evidence at the new hearing that differs in substance from the evidence it previously produced and that is directly responsive to the unanticipated interpretation." 155 Or App at 373-74 (emphasis in original; citation and footnote deleted).

As discussed above, the pertinent interpretations challenged in this subassignment of error are significant extensions of interpretations adopted in the *deBardelaben* case. It might be that petitioners can satisfy the first element under both LUBA's and the court's formulation in *Gutoski*. However, petitioners make no attempt to establish that, in the court's words, they can produce "specific evidence at the new hearing that differs in substance from the evidence it previously produced and that is directly responsive to the unanticipated interpretation." In the third subassignment, discussed below, petitioners argue that evidence already in the record establishes that intervenors' design preferences can be satisfied without the requested variance. But petitioners do not describe or otherwise indicate what additional evidence, directly responsive to the county's unanticipated interpretations, they would produce, or how that evidence would differ in substance from evidence already in the record. Petitioners have not demonstrated that remand for new evidentiary proceedings in this case is warranted under *Gutoski*.

This subassignment of error is denied.

C. Third Subassignment: Substantial Evidence

Petitioners contend that, contrary to finding 34, quoted at n 3, the opponents did submit an alternative that meets, or could meet, intervenors' preferred design elements. Petitioners argue that several parties below suggested that the two-story, 3,100-square foot

dwelling contemplated in the 1999 CUP approval is a "reasonable alternative" that would eliminate or reduce the need for the requested variance. According to petitioners, the 1999 CUP approval did not specify a particular architectural style, and there is no reason a two-story Victorian-style design with attached garage could not be constructed on the footprint imposed by the 1999 CUP, using a design that either meets the 24-foot height limitation or that requires a lesser variance.

Elsewhere in this opinion we conclude that the county misconstrued the applicable law in several respects, and that remand is necessary to correctly apply the variance standards at LUO 8.030 to the evidence in the record. Under these circumstances, it is premature to resolve petitioners' evidentiary challenges.

We do not resolve this subassignment of error.

D. Fourth Subassignment: Interpretation of LUO 8.030(4)

Petitioners argue that the BOCC erred in construing LUO 8.030(4) as not requiring consideration of any alternatives that call for a "lesser or no variance," so long as the proposed structure causes no conflicts with other landowners. Petitioners argue that this "no harm no foul" interpretation of LUO 8.030(4) reads the requirement to consider "lesser or no variances" out of the code, and is therefore inconsistent with the express language, purpose and policy of that provision.

In relevant part, the challenged decision interprets LUO 8.030 to treat requests to obtain relief from a height limitation differently from other dimensional limitations, because a lesser height is always possible. The BOCC also states that it will apply LUO 8.030 differently when the requested height is consistent with the purpose of the height restriction, in this case to protect views of nearby landowners.[5] Consistent with these preliminaries, the

[5] The challenged decision states, in pertinent part:

> "* * * The [BOCC has] previously stated, and we again conclude, that the [LUO] clearly contemplates the use of the variance process to obtain relief from the height limitations of

decision interprets LUO 8.030(4) to not require consideration of "lesser" height variances, when there is no evidence of conflicts caused by the requested height.[6]

Intervenors respond that, far from reading the "lesser or no variance" requirement out of LUO 8.030(4), as petitioners argue, the BOCC's findings apply that requirement to reduce the proposed variance from 35 feet, six inches, to 35 feet. *See* finding 31, quoted at n 3. Intervenors do not dispute that the BOCC refused to consider the possibility of a "lesser" variance for a height less than 35 feet. However, we understand intervenors to argue, that

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> various zones. [Quoting LUO 3.010(4)(h); *see* n 7]. We therefore do not interpret the variance standards in a way that would preclude an allowance of any height variance. The County has previously ruled that it interprets the [variance] criteria less strictly for height variances than is the case for other types of variances. This is because a lower building height is almost always possible. We do not interpret the criteria to require denial just because a lower or smaller building is possible. The [BOCC's] ruling on this point, and related matters, has been upheld by Oregon's Court of Appeals.
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> "* * * In interpreting the criteria we take into account the purpose underlying the height limitations. In areas on the bay/ocean, lower heights may be necessary to protect views. Where this is not an issue, away from the water, 35 feet is permitted. In this area of the County the legislative policy is that heights up to 35 feet are generally appropriate * * * Heights above 24 feet (but below 35 feet) near the bay/ocean require review in the variance process primarily to ensure that views from other homes are not impaired.
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> "* * * We carefully review objections to variances of the type presented in this case to determine if the privacy or views of adjoining property owners are truly affected. We take into account the need to protect adjacent property owners while balancing the fact that a height of 35 feet is permitted as a matter of right in most of the area near the site. Viewed in this manner, the variance does not give offence. If limited to 35 feet the proposal seeks a height allowance equal to what is permitted on nearby properties. No claim is made that the structure will block views from other homes or have any significant impact on privacy. * * *" Record 28.

[6] The challenged decision states, in relevant part:

> "We do not interpret this criterion [LUO 8.030(4)] in the abstract to require the County to redesign the addition purely for the sake of determining if a slightly lesser variance is feasible. The concept of 'reasonable' here is subjective and depends, in part, on the judgment of the County regarding whether the proposed variance causes undue impacts. Whether an alternative is reasonable depends upon whether it is needed in order to avoid harm, not just whether it is abstractly possible. In this case, there is not strong evidence of conflicts caused by the variance requested. The height variance impairs the view from no other home, and therefore we believe the criterion requires only a showing that the general needs of the applicants require a variance of approximately the size requested. That showing has been made in this case. The applicants wish to enjoy a property right enjoyed by others. The applicants also wish to construct a home suitable for year-round living. We have previously observed and found that homes designed for year-round living frequently include up to 4,000 square feet of area." Record 47-48.

limitation stems from the BOCC's determination that the right to build up to 35 feet is one of the "substantial property rights" enjoyed by the majority of landowners in the vicinity, and therefore any height less than 35 feet is simply not a "reasonable alternative." Intervenors argue that the county correctly declined to consider lesser variances below 35 feet in height.

We see no support in the county's code for the county's views that (1) height limitations are treated differently than other types of dimensional requirements; (2) variances for height limitations are treated differently if the proposed variance is consistent with the purpose of the limitation to protect view; and (3) the county need not consider reasonable alternatives that require lesser or no variances if the proposed variance poses no conflicts with views. The last interpretation appears contrary to the terms of LUO 8.030(4). All three interpretations appear to effectively amend LUO 8.030 to add significant terms and qualifications not found in the text. The deference afforded the county's interpretations of its code under ORS 197.829(1) and *Clark* does not extend to interpretations that depart so profoundly from the text as to constitute, in practical effect, an amendment to the code. *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 218, 843 P2d 992 (1992) (to amend legislation *de facto* or to subvert its meaning in the guise of interpretation is not a permissible exercise).

Intervenors are correct that finding 31 limits "reasonable alternatives" in the present case to those alternatives that provide the rights enjoyed by others in the vicinity, particularly the right to build a 35-foot tall house. In resolving the second assignment of error, below, we agree with petitioners that the county erred in including property subject to the 35-foot height limitation in the pertinent "vicinity," for purposes of the comparisons and alternatives analysis required by LUO 8.030(1) and (4), and that the county erred in considering the right to build a 35-foot high dwelling to be a "substantial property right," limiting the scope of "reasonable alternatives" that must be considered under LUO 8.030(4). Accordingly, we

disagree with intervenors that the county's limited view of what constitutes "reasonable alternatives" is a basis to reject alternatives below 35 feet in height.

This subassignment of error is sustained.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

As explained earlier, the requested variance is from a 24-foot height limitation imposed on residential development of the subject property pursuant to the 1999 CUP. The 1999 CUP borrowed that height limitation from the RR zone, specifically from LUO 3.010(4)(h).[7] In finding compliance with LUO 8.030(1), the county adopted findings that examined the "substantial property rights" of landowners "in the vicinity," in order to determine whether "[c]ircumstances attributable either to the dimensional, topographic, or hazardous characteristics of a legally existing lot * * * would effectively preclude the enjoyment of a substantial property right enjoyed by the majority of landowners in the vicinity, if all applicable standards were to be met." LUO 8.030(1).[8] As noted, the county concluded that the majority of other property owners in the vicinity have the right to construct a Victorian-style dwelling up to 35 feet in height and over 3,000 square feet in size, with an attached garage, and without removing significant trees. *See* n 2.

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[7] LUO 3.010(4)(h) provides that in the RR zone:

> "The maximum building height shall be 35 feet, except on ocean or bay frontage lots, where it shall be 24 feet. Higher structures may be permitted only according to the provisions of Article 8."

[8] The county's decision finds that "physical characteristics of the land and dimensional limitations" constrain the possible location of the proposed dwelling on the subject property, for purposes of LUO 8.030(1). Record 31. Although it is not entirely clear, the "dimensional" limitations appear to be front and side yard setback requirements, and a riparian setback from the bay, while the limiting "topographic" characteristics appear to be wetlands in the northern portion of the property and several large trees on the subject property. Petitioners do not advance any challenge to these findings.

The relevant "vicinity" adopted by the county for purposes of LUO 8.030(1) includes nearby properties zoned mostly RR, including bayfront property and non-bayfront property.[9] In other words, it includes RR-zoned property that is subject to the 24-foot height restriction for bayfront property, and property that is subject to the 35-foot height restriction applicable elsewhere. The county considered the right to build a house up to 35 feet in height to be one of the "substantial property rights" enjoyed by the majority of other property owners in the vicinity, and therefore one of the rights intervenors may seek to enjoy for purposes of LUO 8.030(1) through (4).

Petitioners argue that the county erred in considering non-bayfront property that is subject to the 35-foot height restriction, for purposes of the comparisons and alternatives analysis required by LUO 8.030. We understand petitioners to argue that, in seeking a height variance under LUO 8.030, it is improper to compare the "rights" of the subject property with the "rights" of a property owner in a zoning district or an area that is subject to different height limitations. Therefore, we understand petitioners to argue, the county should only consider bayfront properties that are subject to the 24-foot height limitation, or at the least the county should not consider the rights of property owners of non-bayfront property to build up to 35 feet.

Intervenors respond, first, that the opponents failed to raise this issue below, and the issue is therefore waived. ORS 197.763(1); 197.835(3). At oral argument, petitioners cited

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[9] The county's findings provide the following rationale for the adopted "vicinity":

> "* * * We agree with the maps submitted by [intervenors' consultant] defining the parcels of land that will be considered to be within the vicinity. These parcels contain residences and are located in close proximity to the subject property. Together they form a cluster of housing in an area of similar topography. They are close to the bay and close to the road. This cluster development is separated from other areas of development by a reasonable distance. Moreover, the zoning on these parcels is RR, and therefore they are subject to the same dimensional requirements as the subject property. This is an area of single family homes near the Netarts Bay. No specific evidence was offered at the hearing contesting the vicinity described in [intervenors'] exhibit." Record 42-43.

to Record pages 124-25, 195-97 and 417, and argued that the issue under this assignment of error was raised below. The cited record pages, particularly Record 195 and 417, appear to express the position that the question of what "substantial property rights" are enjoyed by the "majority of property owners in the vicinity" should be determined by examining similar properties in the area that are subject to the 24-foot height limitation.[10] Although the cited pages do not develop the argument further, we believe that the issue of whether the comparisons required by LUO 8.030 should be limited to properties that are subject to the 24-foot height limitation was adequately raised below.

On the merits, intervenors argue that the question of what the "vicinity" encompasses is a factual judgment that is adequately explained in the finding quoted at n 6 and supported by substantial evidence. According to intervenors, the "vicinity" is the universe the county examines to determine comparable rights under LUO 8.030, and there is no dispute that the owners of nearby non-bayfront property enjoy the right to build up to 35 feet in height. Intervenors argue that the county did not err in considering those rights, or in concluding that as long as intervenor's proposed dwelling is confined to 35 feet in height, intervenors seek to enjoy the same substantial property right enjoyed by a majority of landowners in the vicinity.

The county's findings view LUO 8.030(1) as requiring a comparison of the "substantial property rights" of the applicant and the majority of land owners in the vicinity,

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[10] Record 195 states, in relevant part:

> "The criteria require that a variance cannot be approved unless [quoting portions of LUO 8.030(1) and (4)]. The existing legally constructed homes on similar properties in the area meet the 24-foot height requirement. Such homes are the 'substantial property right enjoyed by a majority of the landowners in the vicinity.' * * *"

Record 417 states, in relevant part:

> "This criterion [LUO 8.030(1)] requires a comparison of the property rights that the applicant would be deprived of by meeting the height limitation, and the property rights that are being enjoyed by a majority of the landowners in the vicinity. However no comparison is provided. The applicant should describe how the other bayfront dwellings in the area have responded to the 24-foot height requirement and include the number and extent of variances to the 24-foot height limitation that have been granted in the area in the past."

and allowing a variance if the dimensional, topographic, or hazardous characteristics of the subject property preclude the applicant from enjoying rights that others enjoy. That comparison of property rights under LUO 8.030(1) seems relatively straightforward when the properties compared share a common regulatory scheme, *i.e.*, are within the same zoning district or otherwise subject to the same regulations, such as the 24-foot restriction on bayfront properties. However, comparison of property in different zoning districts or regulatory areas that differ in *precisely* the dimensional characteristic for which a variance is sought leads to strange results. In the present case, it makes the regulatory distinction between bayfront and non-bayfront properties under the county's land use ordinance illusory.

As explained earlier in this opinion, LUO 8.030(4) requires a finding that "[t]here are no reasonable alternatives requiring either a lesser or no variance." The county's decision takes the position that the only "reasonable alternatives" are those that provide the applicants with a 35-foot high dwelling, with other stated characteristics, and therefore the county declines to consider any alternative calling for a lesser height variance. That position is based, in turn, on the county's views that "height" variances must be evaluated differently from other variances, and that the right to a 35-foot high dwelling is a "substantial property right" for purposes of LUO 8.030(1). This supposed substantial property right to a 35-foot high dwelling is based on the county's view that the relevant "vicinity" includes areas that are subject to the 35-foot height limitation for non-bayfront properties. The cumulative effect of these interpretations is that the seemingly rigorous alternatives analysis imposed by LUO 8.030(1) becomes a pro forma exercise, and the regulatory distinction between bayfront and non-bayfront property virtually disappears. The deference afforded the county's interpretations of its code under ORS 197.829(1) and *Clark* does not extend to interpretations that constitute, in practical effect, an amendment to its code. *Goose Hollow Foothills League*, 117 Or App at 218.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

The 1999 CUP required intervenor to abide by the 24-foot height restriction applicable to bayfront properties, and condition 1 of that permit also required that "[d]evelopment shall only occur as shown on the plot plan submitted" in support of the 1999 CUP application. Record 178. Petitioners argue that the challenged decision approves several changes that cannot be approved by a variance, and can only be approved by modifying the 1999 CUP.

Petitioners explain that the 24-foot height restriction is not imposed by any code requirement, because the RM zone has no height restriction. Instead, the 24-foot height restriction is imposed only as a condition of the 1999 CUP. Petitioners argue that the variance procedure at LUO 8.010 through 8.070 is intended to provide relief from application of *code* requirements, not from conditions imposed under a CUP. The only proper means to provide relief from conditions imposed under a CUP, petitioners contend, is to modify the CUP, as required by LUO 6.030(2)(a).[11]

The county addressed petitioners' argument as follows:

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[11] LUO 6.030(2) provides, in relevant part:

"A CONDITIONAL USE may be enlarged or altered pursuant to the following:

"(a) Major alterations of a CONDITIONAL USE, including changes to or deletion of any imposed conditions, shall be processed as a new CONDITIONAL USE application.

"(b) Minor alterations of a CONDITIONAL USE may be approved by the Director according to the procedures used for authorizing a building permit * * *. Minor alterations are those which may affect the siting and dimensions of structural and other improvements relating to the CONDITIONAL USE, and may include small changes in the use itself. Any change which would affect the basic type, character, arrangement, or intent of the approved CONDITIONAL USE shall be considered a major alteration.

"(c) The enlargement or alteration of a one- or two-family dwelling * * * that is authorized as a CONDITIONAL USE under the provisions of this Ordinance shall not require further authorization, if all applicable standards and criteria are met."

> "The claim was made by [an opponent] that the variance procedure before us is the wrong process for review of the proposed structure. The testimony suggested that an amendment of the conditions imposed in the prior land use approval would be more appropriate. We disagree with the interpretation and find that the planning staff was correct when it found in the staff report that [the request for a 36-foot height requires a variance]. We find that our code permits the imposition of the dimensional regulations of the RR zone in making a Conditional Use and Authorization of Similar Uses decision with respect to property in the RM zone. As we interpret the height regulations of the RR zone, they include the right to apply for a variance under LUO 8.030. Our interpretation confirms the staff's conclusion that the variance procedure is the appropriate process for review of the proposed structure." Record 41.

Intervenors respond that the foregoing interpretation adequately explains why a variance was required to authorize the proposed height, and that that interpretation is not reversible under ORS 197.829(1). In addition, intervenors point to LUO 3.010(4)(h), which sets out the height limitations applicable in the RR zone, and which expressly directs the county to process requests for higher structures "according to the provisions of [LUO 8.010 through 8.070]." *See* n 7. For further support, intervenors argue that the proposed change in height is an "enlargement or alteration" of a dwelling, and therefore requires no further conditional use authorization, if all other applicable criteria (such as the variance standards) are met. LUO 6.030(2)(c); *see* n 11. We agree with intervenors that the county did not err in considering the requested change in height under the variance criteria at LUO 8.010 through 8.070.

Petitioners also argue that, even if it is permissible to change the height of the proposed structure by means of a variance, the county's decision changes more than the height. According to petitioners, the challenged decision approves significant changes in the footprint of the dwelling, the location of the garage and driveway, and the number of trees that must be removed to allow development, contrary to condition 1 of the 1999 CUP that limited development to that shown on the 1999 site plan. Condition 3 of the variance approval requires that "[t]he structure shall be located as proposed and shown in the variance application materials." Record 49. We understand petitioners to argue that the county can

authorize the changes shown on the site plan submitted in support of the variance request only by modifying the 1999 CUP, pursuant to LUO 6.030.

The challenged decision does not appear to address this issue. Intervenors respond, first, that petitioners failed to raise the issue below and therefore it is waived. We reject that waiver argument for two reasons. First, in responding to petitioners' motion to strike, intervenors quote a portion of the minutes of the hearing before the BOCC, suggesting that the BOCC intended to approve only the height variance, and did not intend to approve the site plan submitted with the variance application or changes in that site plan from the 1999 CUP site plan that might trigger an obligation to modify the 1999 permit.[12] That portion of the minutes makes it reasonably clear that county staff advised, and that at least one commissioner was aware, that approving more than a height variance, in particular approving the other changes depicted on the 2002 site plan, might require modifications to the 1999 CUP.

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[12] Intervenors quote the following colloquy from the minutes of the May 15, 2002 BOCC hearing:

> "[BOCC Chair]: Okay then, my motion would be to deny the Variance of the 36 feet but the height not to exceed nor the footprint to exceed what was in the [1999] Conditional Use [permit].
>
> "* * * * *
>
> "[Staff]: We have two footprints here.
>
> "[BOCC Chair]: Okay.
>
> "[Staff]: If you are using the Conditional Use one, it doesn't meet theirs. That is a different issue. We've got another Land Use problem then. They had a different footprint here than the one in the Conditional Use. * * * Well, the other piece will come up. County Counsel and I will have to talk about it because it will require an amendment to the Conditional Use if this [is] approved because they are requesting a footprint that does not meet the Conditions of Approval on the [1999] Conditional Use [permit].
>
> "[BOCC Chair]: Okay. Thank you. Thank you. So my motion will be just to the height that you, the existing ordinance is 35 feet. That is what I would move for approval of, or denial of the 36[-foot] height limitation and would be to, to reduce the height to a lesser of 35 feet." Record 105b.

Second, given the BOCC's apparent intent to approve only the variance request and not other changes, petitioners could not have anticipated that the challenged decision would impose condition 3, requiring that "[t]he structure shall be located as proposed and shown in the variance application materials." Record 49. Although intervenors appear to view condition 3 somewhat differently, that condition plainly requires compliance with the site plan submitted in support of the variance application, at least with respect to the location of the "structure."[13] The dwelling shown in the variance application appears to be located partially outside the footprint of the dwelling in the 1999 CUP site plan. *See* Record 128, 130, 541, 577. Further, the site plan submitted with the variance request relocates the two-car garage and attaches it to the dwelling. In short, petitioners appear to be correct that the county approved changes that go beyond the height variance, and that arguably require modification to the 1999 CUP.

On the merits, we understand intervenors to argue that the disputed changes do not require modification of the 1999 CUP, because LUO 6.030(2)(c) expressly allows the "enlargement or alteration" of a dwelling that is a conditional use without further authorization, if all applicable standards and criteria are met. However, the challenged decision does not take that position, or interpret LUO 6.030(2)(c) in that manner. Based on the portion of the minutes quoted above, it appears that at least one BOCC member agreed with staff's position that approval of changes beyond the requested height variance might require modification to the 1999 CUP. Given that circumstance, we decline to interpret LUO 6.030(2)(c) in the first instance, or accept intervenors' view of that provision. The better course is to remand to the BOCC to clarify whether the county intended to approve

[13] In a footnote to the response, intervenors argue that, if the proposed dwelling is located entirely within the footprint of the dwelling depicted in the 1999 CUP site plan, then no modification to that permit will be necessary. Although we need not resolve that issue, we note that condition 1 of the 1999 CUP appears to regulate more than the footprint of the proposed dwelling. The 1999 site plan depicts a different location for the dwelling, the garage, and the driveway than the site plan submitted in support of the variance application.

changes beyond the requested height variance and, if so, to either modify the 1999 CUP or adopt findings that explain why no such modification is necessary.

The third assignment of error is sustained, in part.

The county' s decision is remanded.

Holstun, Board Chair, concurring.

I write separately to emphasize my agreement with the resolution of the second assignment of error. Even the highly deferential standard of review that must be applied under the Court of Appeals' decisions that have interpreted and applied *Clark* and ORS 197.829(1) is violated by the county's interpretation and application of LUO 8.030(1) in this case. A property owner in a zone that imposes a 24-foot height limit on houses does not have a "substantial property right" to build a house that is 35 feet high, simply because a property owner in a different zone in the vicinity, which imposes a 35-foot height limit, is permitted to build a house that is 35 feet high.[14] Whether the county's interpretation to the contrary is a misconstruction of the word "vicinity," or a misconstruction of the concept of "substantial property right[s]," or both is not important. However the misconstruction is characterized, it is an interpretation and application of LUO 8.030(1) that is "clearly wrong."

[14] I recognize that most or all of the properties in the vicinity that were considered by the county are zoned RR and that the subject RM-zoned property is subject to the restrictions of the RR zone under the 1999 conditional use permit. Thus the subject property and the properties in the vicinity that were considered by the county might be viewed as being in the same zoning district. However, the different regulatory scheme that is applied within the RR zone to bay front and non-bay front properties is indistinguishable from a situation where different zones are applied to different properties to impose different height limitations.