

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a Hood River City Council order
4 denying his application for a variance from setback
5 requirements of the Urban Standard Density Residential (R-2)
6 zone.

7 **FACTS**

8 Petitioner owns a narrow, tapering strip of R-2 zoned
9 property. The subject property is approximately 5,900 sq.
10 ft. in area,¹ and is over 300 ft. in length, but has a
11 maximum width of only 38 ft. The subject property is
12 bordered by city streets and rights-of-way on all sides. In
13 the R-2 zone, "[n]o structure shall be placed closer than
14 ten feet from the nearest public right-of-way line of a
15 dedicated public street." HRZO 17.03.020(D)(1). The
16 surrounding property is zoned R-2 or Urban Medium Density
17 Residential (R-3), and is developed with single family
18 dwellings and duplexes.

19 In 1987, the city issued petitioner a building permit
20 to construct a duplex on the subject property, without
21 requiring that a variance from the setback requirements of
22 the R-2 zone be obtained. However, petitioner did not begin
23 construction of the duplex, and this building permit

¹Single family dwellings and duplexes are permitted uses in the R-2 zone. Hood River Zoning Ordinance (HRZO) 17.03.020(A)(1) and (2). The R-2 zone's minimum lot size for both types of dwellings is 5,000 sq. ft. HRZO 17.03.020(C).

1 expired.

2 In November 1990, petitioner applied for a variance
3 from the setback requirements on the north and south sides
4 of the subject property, to construct a 22 ft. by 80 ft.
5 duplex. Petitioner proposed to minimize the setback
6 variances required for this structure by positioning the
7 structure as close to the wider eastern end of the property
8 as the 10 ft. street setback requirement allowed.
9 Positioned thus, the required variances from the street
10 setback requirements on the north and south would range from
11 2 ft. at the eastern end of the structure to 3.5 ft. at the
12 western end.

13 The planning commission held public hearings on
14 petitioner's application on November 20, 1990 and
15 January 15, 1991.² At petitioner's request, the planning
16 commission left the hearing record open for the submittal of
17 additional written evidence until January 22, 1991.
18 Record 87. On approximately January 18, 1991, petitioner
19 submitted a "supplemental application for variance," in
20 which the proposed structure was changed to a 22 ft. by

²Around January 4, 1991, petitioner submitted a "supplemental application for variance," proposing a duplex structure with a slightly altered configuration that would require a variance from the street setback requirement on the north ranging from 1 ft. to 4.5 ft., and on the south ranging from 3 ft. to 2.5 ft. Record 100, 108. The revised site plan in the record bears a notation by the city planning director stating "[t]his option cannot be considered by the [planning] commission [without] a new advertised quasi-judicial hearing." Record 100. The published and mailed notices of both the November 20, 1990 and January 15, 1991 planning commission hearings refer only to petitioner's original proposal.

1 40 ft. single family dwelling (essentially the eastern half
2 of the originally proposed duplex), for which the requested
3 variances from street setback requirements on the north and
4 south ranged from 2 ft. at the eastern end of the structure
5 to 2.75 ft. at the western end. Record 74, 79.

6 On January 31, 1991, the planning commission issued a
7 decision denying petitioner's application.³ Petitioner
8 appealed the decision to the city council. The city council
9 conducted its review on the record established before the
10 planning commission. On April 8, 1991, after a public
11 hearing for argument on petitioner's appeal, the city
12 council adopted the challenged order denying petitioner's
13 request for a variance.⁴

14 **FIRST ASSIGNMENT OF ERROR**

15 Petitioner challenges the city council's determinations
16 with regard to two of the four applicable HRZO criteria for

³The planning commission's decision refers only to petitioner's originally proposed duplex and originally requested north and south street setback variances ranging from 2 ft. to 3.5 ft. Record 63.

⁴The city council's order does not identify the rejected variance request as being either petitioner's original request for variances to accommodate construction of a 22 ft. by 80 ft. duplex on the subject property, or petitioner's modified request for variances to accommodate construction of a 22 ft. by 40 ft. single family dwelling on the subject property, or both. However, this does not impede our review of the city council's decision, as the findings appear to be equally applicable to either request, and no issue raised by petitioner's assignments of error requires us to determine whether the "variance request" referred to in the city council's order is the original or the modified request.

1 approval of a variance.⁵

2 **A. HRZO 17.05.050(B)**

3 HRZO 17.05.050(B) establishes the following criterion
4 for approval of a variance:

5 "The variance is necessary for the preservation of
6 a property right of the applicant substantially
7 the same as owners of the other property in the
8 same zone or vicinity possess."

9 The challenged order includes the following finding
10 addressing this criterion:

11 "The variance is not necessary for the
12 preservation of a property right of applicant
13 substantially the same as owners of other property
14 in the same zone or vicinity because applicant has
15 failed to show that a functional home can not be
16 built on the property in compliance with the
17 setback requirements of the [HRZO]." Record 2-3.

18 Petitioner contends the city failed to define the
19 property right which owners of other property in the same
20 zone or vicinity possess. Petitioner also argues the city's
21 determination of noncompliance with HRZO 17.05.050(B) is not
22 supported by substantial evidence in the whole record.
23 Petitioner contends the evidence in the record shows that
24 any functional residence on the subject property will
25 require a setback variance. According to petitioner,
26 letters from a real estate broker, two appraisers, a senior
27 bank loan officer and two licensed building contractors, as

⁵The city council found that the proposed variance complies with the other two approval criteria.

1 well as petitioner's own survey of existing homes in the
2 vicinity, all support a conclusion that "[t]he proposed 22
3 foot wide building is the narrowest possible * * *
4 cost-effective, functional, financeable dwelling." Petition
5 for Review 15.

6 This Board has previously stated that HRZO 17.05.050(B)
7 authorizes approval of a variance "only when necessary to
8 establish a use allowed by the applicable zoning
9 regulations." Hood River Valley Residents Comm., Inc. v.
10 Hood River, 15 Or LUBA 37, 40 (1986). The above quoted city
11 finding correctly interprets HRZO 17.05.050(B) to require an
12 applicant for a variance from requirements of the R-2 zone
13 to demonstrate that a functional dwelling cannot be placed
14 on the property without a variance. In addition, the
15 finding adequately explains that the property right which
16 owners of other property in the same zone or vicinity
17 possess is the right to construct a functional dwelling.
18 Accordingly, the finding is adequate to comply with
19 HRZO 17.05.050(B).

20 We next consider petitioner's evidentiary challenge.
21 In challenging the city's determination of noncompliance
22 with HRZO 17.05.050(B) on evidentiary grounds, petitioner
23 bears a heavy burden. It is not sufficient for petitioner
24 to show there is evidence in the record which supports his
25 position. Rather, the "evidence must be such that a
26 reasonable trier of fact could only say [petitioner's]

1 evidence should be believed." Forest Park Estate v.
2 Multnomah County, ___ Or LUBA ___ (LUBA No. 90-070,
3 December 5, 1990), slip op 30; McCoy v. Marion County, 16
4 Or LUBA 284, 286 (1987); Weyerhauser v. Lane County, 7
5 Or LUBA 42, 46 (1982); see Jurgenson v. Union County Court,
6 42 Or App 505, 510, 600 P2d 1241 (1979).

7 We have reviewed all evidence in the record on this
8 issue cited by the parties. The evidence shows that 99% of
9 the dwellings in the vicinity are at least 22 ft. in width,
10 and that a dwelling less than 22 ft. in width would probably
11 be less marketable or rentable than the dwelling(s) proposed
12 by petitioner. Record 35, 44, 47, 56. The evidence also
13 indicates that constructing a dwelling on the subject
14 property without a variance would be difficult and would
15 cost more per square foot than the 22 ft. wide dwelling(s)
16 proposed by petitioner.⁶ Record 37, 38. However, there is
17 also evidence in the record that a functional dwelling as
18 small as 16 ft. in width could be built on the subject
19 property. Record 37, 89-90. Considering all the evidence
20 in the record, we do not believe a reasonable decision maker
21 could only decide that a variance is required in order to
22 construct a functional dwelling on the subject property.

⁶The evidence also indicates that a dwelling which does not require a variance would be difficult to finance through conventional means. Record 39, 47, 56. There is also conflicting evidence in the record with regard to whether the 22 ft. wide dwelling proposed by petitioner could be financed through conventional means. Record 74-74, 85.

1 This subassignment of error is denied.

2 **B. HRZO 17.05.050(D)**

3 HRZO 17.05.050(D) establishes the following criterion
4 for approval of a variance:

5 "The variance requested is the minimum variance
6 which would alleviate the hardship."

7 The challenged order includes the following finding
8 addressing this criterion:

9 "Pursuant to [the finding addressing HRZO
10 17.05.050(B) quoted in the previous section], the
11 Hood River City Council has determined that
12 [petitioner] has failed to meet [his] burden of
13 proving that the variance is necessary for the
14 preservation of a property right. Therefore, the
15 Council has determined that [petitioner] has
16 failed to prove that a hardship exists. Whether
17 the variance requested is or is not the minimum
18 variance which will alleviate the hardship is not
19 at issue." Record 3.

20 Petitioner contends neither the HRZO nor the city's
21 decision explains the meaning of "hardship" as that term is
22 used in HRZO 17.05.050(D). Petitioner argues the city's
23 denial of his variance request will create many "hardships"
24 for him, including purchasing new custom design plans, and
25 difficulty in obtaining financing, and that the city
26 improperly failed to consider these "hardships."

27 We understand the above quoted finding to explain that
28 the "hardship" referred to in HRZO 17.05.050(D) is the same
29 deprivation of a property right possessed by other property
30 owners which must exist in order for HRZO 17.05.050(B) to be
31 satisfied. Thus, the city interprets HRZO 17.05.050(B) and

1 (D) together to require that an applicant show that (1) he
2 will be deprived of a property right other property owners
3 possess if a variance is not granted; and (2) the variance
4 requested is the minimum variance necessary to enable such
5 property right to be exercised. We believe this is a
6 reasonable and correct interpretation of HRZO 17.05.050(B)
7 and (D). Furthermore, we agree with the city that under
8 this interpretation, if an application does not satisfy HRZO
9 17.05.050(B), as the city determined here, then HRZO
10 17.05.050(D) is inapplicable.

11 This subassignment of error is denied.

12 The first assignment of error is denied.

13 **THIRD ASSIGNMENT OF ERROR**

14 "The City [erroneously] based its setback
15 requirement on [HRZO] 17.03.020(D)(1) * * *."

16 HRZO 17.03.020(D)(1) provides:

17 "No structure [in the R-2 zone] shall be placed
18 closer than ten feet from the nearest public
19 right-of-way line of a dedicated public street."

20 Petitioner contends Mollie Street, bordering the
21 subject property to the north, is a "one block long * * *
22 narrow dirt alley [which] degenerates into a wide path at
23 one end." Petition for Review 21. Petitioner also contends
24 that when he obtained a building permit in 1987, the city
25 building inspector told petitioner's representative the
26 3 ft. rear yard setback requirement of HRZO 17.03.020(D)(3)
27 would apply to the north side of the subject property.

1 Petitioner further argues that if the 3 ft. rear yard
2 setback requirement of HRZO 17.03.030(D)(3) were applied to
3 the north side of his property, rather than the 10 ft.
4 street setback requirement of HRZO 17.03.020(D)(1), his
5 proposed 22 ft. wide structure would be able to fit within
6 the setbacks.

7 Petitioner does not contend Mollie Street is not a
8 dedicated public street. Petitioner therefore provides no
9 basis for concluding that the city erred in finding the
10 10 ft. street setback requirement of HRZO 17.03.020(D)(1)
11 applies to the north side of the subject property.

12 The third assignment of error is denied.

13 **SECOND ASSIGNMENT OF ERROR**

14 "The City erred in not following correct
15 procedures by prejudging the case, altering
16 submitted documents, disregarding written factual
17 evidence, and not identifying specific
18 relationships to supporters of the variance."

19 Petitioner contends the mayor failed to disclose that
20 he is a business competitor of some of the people who
21 submitted evidence in support of petitioner's variance
22 request. Petitioner also contends the mayor refused to
23 consider the evidence submitted by such people. Petitioner
24 further contends the city planning director was biased, and
25 committed procedural error by submitting proposed findings
26 supporting denial of petitioner's request to the planning
27 commission before petitioner had finished presenting his
28 case and by separating the appendices from his notice of

1 appeal to the city council.

2 Petitioner fails to identify any requirement of the
3 HRZO or other applicable legal standards which were violated
4 by the procedural errors petitioner alleges. Without a
5 showing by petitioner that an applicable legal criterion has
6 been violated, LUBA cannot grant relief. Reynolds v.
7 Clackamas County, ___ Or LUBA ___ (LUBA No. 91-037, July 30,
8 1991), slip op 8; Lane County School Dist. 71 v. Lane
9 County, 15 Or LUBA 150, 153 (1986).

10 To the extent petitioner also contends a city decision
11 maker was biased,⁷ we note that personal bias sufficiently
12 strong to disqualify a public official must be clearly
13 demonstrated. Petitioner has the burden of demonstrating
14 that the public official was incapable of making a decision
15 based on the evidence and argument before him. Lovejoy v.
16 City of Depoe Bay, 17 Or LUBA 51, 66 (1988); Schneider v.
17 Umatilla County, 13 Or LUBA 281, 284 (1985). In this case,
18 the evidence cited by petitioner establishes only that the
19 mayor's statements during city council deliberation on
20 petitioner's appeal indicated the mayor did not agree with

⁷Petitioner also argues that the planning director was biased. However, in order to obtain reversal or remand of the city's decision on the basis of bias, petitioner must show he was not afforded an impartial tribunal, i.e. that there was bias on the part of the city decision makers. Even if actions by the city planner could be construed to demonstrate bias, they would not, in themselves, demonstrate bias on the part of the city decision makers. Knapp v. City of Jacksonville, ___ Or LUBA ___ (LUBA No. 90-064, October 31, 1990), slip op 22-23; see Slatter v. Wallowa County, 16 Or LUBA 611, 617 (1988).

1 petitioner concerning compliance of the variance request
2 with applicable standards. This does not establish bias.

3 The second assignment of error is denied.

4 **FOURTH ASSIGNMENT OF ERROR**

5 "The City erred in not granting the Petitioner his
6 vested rights."

7 Petitioner argues he has a vested right to build a
8 22 ft. wide dwelling on the subject property because the
9 city "assur[ed] him, prior to purchase of the lot, that a
10 Building Permit would be granted and renewed, and a variance
11 would not be a problem," and because a "building permit was
12 previously issued with no variance required." Petition for
13 Review 22. Petitioner also argues he purchased the property
14 in reliance on the city's representations, and that he has
15 expended considerable money on the purchase and subsequent
16 applications, plans and research for development of the
17 property.

18 A use which existed lawfully prior to enactment of
19 restrictive regulations, and which may therefore be
20 continued after such regulations become effective, although
21 it does not comply with the applicable restrictions, is
22 termed a nonconforming use. Clackamas County v. Holmes, 265
23 Or 193, 508 P2d 190 (1973). The uses protected from newly
24 enacted regulations include those which do not yet exist,
25 but have proceeded towards completion to a significant
26 degree. In such instances, the property owner is said to
27 have a vested right to complete and continue the

1 development. Hanley v. City of Salem, 14 Or LUBA 204, 209
2 (1986).

3 It is somewhat unclear whether the doctrine of vested
4 rights could apply here, as petitioner is not prevented from
5 completing his proposed development by a newly enacted
6 regulation, but rather by one which existed at the time
7 petitioner purchased the subject property.⁸ Assuming for
8 the sake of argument that the doctrine of vested rights
9 could apply in the situation presented in this case, any
10 expenditures considered in determining the existence of a
11 vested right would have to have been made at a time when the
12 proposed development did not require approvals, or at a time
13 when required approvals were given. DLCD v. Curry County,
14 ___ Or LUBA ___ (LUBA No. 90-022, June 5, 1990), slip op 8;
15 see Clackamas County v. Holmes, supra, 265 Or at 198-99;
16 Mason v. Mountain River Estates, 73 Or App 334, 698 P2d 529,
17 rev den 299 Or 314 (1985).

18 In this case, if petitioner made expenditures towards
19 developing the subject property, they could arguably qualify
20 towards a vested right if they were made after the 1987
21 building permit was issued, but before it expired, and

⁸We note that some of petitioner's arguments under this and other assignments of error, although not relevant to whether a variance from the HRZO setback requirement should be granted, could be relevant to determining whether the city should be estopped from denying petitioner a building permit for the proposed development of the subject property. However, because the challenged decision does not deny petitioner a building permit, this issue is not presented here.

1 otherwise conformed to the factors established in Clackamas
2 County v. Holmes, supra. However, petitioner cites no
3 evidence in the record establishing the nature and amount of
4 any such expenditures he made to develop the subject
5 property between the 1987 issuance of the building permit
6 and its expiration. Therefore, petitioner has not
7 demonstrated he has a vested right to complete the proposed
8 development of the subject property.

9 The fourth assignment of error is denied.

10 The city's decision is affirmed.