

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

3
4 MAIN AUTO BODY,)
5)
6 Petitioner,) LUBA No. 95-076
7)
8 vs.) FINAL OPINION
9) AND ORDER
10 CITY OF SALEM,)
11)
12 Respondent.)

13
14
15 Appeal from City of Salem.

16
17 Dennis V. Messoline, Salem, filed the petition for
18 review and argued on behalf of petitioner.

19
20 Paul A. Lee, Assistant City Attorney, Salem, filed the
21 response brief and argued on behalf of respondent.

22
23 HANNA, Referee; GUSTAFSON, Referee, participated in the
24 decision.

25
26 AFFIRMED 11/16/95

27
28 You are entitled to judicial review of this Order.
29 Judicial review is governed by the provisions of ORS
30 197.850.

1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the city council's denial of a
4 variance request.

5 **FACTS**

6 Petitioner is an auto body repair shop that is adjacent
7 to a residential area in a general commercial zone.
8 Petitioner sought a variance from several standards of the
9 Salem Revised Code (SRC) in response to the city's
10 determination through an enforcement proceeding that
11 petitioner does not comply with several SRC provisions. A
12 planner described the applicant's request:

13 "To vary from the development standards of * * *
14 SRC Chapters 132 and 133 for property located at
15 1605, 1615, and 1639 Liberty Street NE; and 333
16 Norway Street NE which will:

17 "1. Reduce the 30 foot bufferyard along the north
18 line of the subject property as required
19 under SRC 132.220 to 5 feet; and

20 "2. Eliminate the landscaping requirement for the
21 10 foot yard adjacent to Liberty and Norway
22 streets as prescribed under SRC
23 132.230(d)(1); and

24 "3. Allow a gravel surface parking/vehicular
25 storage area where a hard surface is required
26 under SRC 133.020."¹ Record 192.

27 A city hearings officer granted the variance to permit
28 a gravel surface where a paved surface is otherwise

¹Petitioner's application for a variance does not set forth a statement of the specific code provisions from which petitioner sought a variance.

1 required, denied the bufferyard variance request, because he
2 determined it was unnecessary, and denied the landscaped
3 yard variance request.

4 Petitioner then appealed to the city council.² A March
5 13, 1995 staff report describes petitioner's two appealed
6 variance requests. The first request is entitled "Reducing
7 the 30-foot bufferyard landscaping and sight obscuring fence
8 requirements along the north property line to five feet."
9 Record 11. The report concludes that:

10 "[T]he bufferyard along the north property line of
11 the subject property under the Code is five feet
12 rather than 30 feet. * * * * * Therefore, variance
13 to the development standard requiring a 30-foot
14 bufferyard required by SRC Chapter 132 is not
15 necessary since only a 5-foot bufferyard is
16 required." Record 12.

17 The second request, as described in the staff report,
18 is entitled "Eliminate the required 10-foot landscaped yard

²As petitioner proceeded through the local appeal process, petitioner did not clarify the basis of the appeal. The city council findings include the following statement, which demonstrates the council's difficulty in identifying the relief petitioner sought:

"In the written notice of appeal of the Hearings Officers [sic] decision, the applicant has requested that the 30 foot bufferyard along the north property line be eliminated. The original request was to reduce the bufferyard from 30 feet to 5 feet. According to the City Attorney's Office, the City Council can only address the variance request that originally came before the Hearings Officer on an appeal. Staff has been unable to contact the applicant's attorney to clarify the intent of the appeal. Therefore, City staff has addressed this issue only as an appeal of the original variance request which was to reduce the required bufferyard along the north property line from 30 feet to 5 feet." (Emphasis in original.) Record 10.

1 adjacent to Liberty and Norway Streets NE." Id.

2 The city council's final decision, Resolution 95-41,
3 adopted the March 13, 1995 staff report to the city council
4 and affirmed the December 8, 1994 hearings officer decision.

5 This appeal followed.

6 **ASSIGNMENT OF ERROR**

7 Petitioner argues that to allow a variance from the
8 paving requirement and deny the variance request with
9 respect to other requirements is illogical and not supported
10 by substantial evidence.³ Petitioner explains that the
11 subject property may be undergoing environmental assessment
12 and possible cleanup of hazardous materials at some future
13 undetermined date. In light of this possible cleanup,
14 petitioner argues that it would be beneficial to await the
15 eventual hazardous material cleanup before making any
16 improvements. Petitioner objects to the city's enforcement
17 of its zoning ordinance prior to the anticipated cleanup.

18 We have authority to review only the actual decision of
19 the city council. ORS 197.835. The city council determined
20 that the appeal to reduce the bufferyard from 30 feet to 5
21 feet was unnecessary, and denied the request for a variance
22 from the requirement for a 10-foot landscaped yard adjacent
23 to two streets. Petitioner does not argue that the city's

³The relief sought by petitioner is not clear. The petition for review states: "Petitioner seeks a reversal of those requests denied by the City to allow the property to remain in the status quo * * *." Petition for Review 1.

1 application of its ordinances to require a five-foot
2 bufferyard was in error. We agree with the city that, while
3 it is apparent that petitioner now wants a variance to
4 eliminate the code requirement for a five-foot bufferyard,
5 the record does not reflect that such a variance was
6 requested before the hearings officer or denied by him.

7 The city council concluded it could not address
8 petitioner's new variance request during an appeal
9 proceeding. Petitioner does not assign error to that
10 conclusion. We in turn do not have authority to review a
11 variance request that was never considered by the city
12 council.

13 The city premised its denial of petitioner's
14 application with respect to the 10-foot landscaped yard on
15 petitioner's failure "to address the criteria necessary to
16 justify a variance."⁴ Record 12.

⁴SRC 115.020 establishes the standards for granting variance requests and provides:

"The hearings officer may grant the degree of variance from any of the development standards imposed on a particular subject property under the provisions of this zoning code which is reasonably necessary to permit development for an otherwise lawful use upon a finding that each of the following criteria is met:

"(a) There are special conditions applying to the land, buildings, or use referred to in the application which circumstances or conditions do not apply generally to land, buildings, or uses in the same district, and which create unreasonable hardships or practical difficulties which can be most effectively relieved by a variance. Nonconforming land, uses, or structures in the vicinity shall not in themselves constitute special conditions,

1 In challenging the city's determination of
2 noncompliance with the criteria for the landscape variance
3 on evidentiary grounds, petitioner must demonstrate that it
4 sustained its burden of proof for compliance with the
5 criteria as a matter of law. Petitioner must show that only
6 petitioner's evidence should be believed. Horizon
7 Construction, Inc. v. City of Newberg, 28 Or LUBA 632
8 (1995), Thomas v. City of Rockaway Beach, 24 Or LUBA 532
9 (1993).

10 The March 13, 1995 staff report adopted by the city
11 council applied the SRC 115.020 criteria to petitioner's
12 evidence and explained in what manner petitioner failed to
13 meet each criterion. Petitioner has not shown that the
14 city's analysis regarding each of the criteria is legally
15 wrong and that only its evidence should be believed.

16 The city's decision is affirmed.

nor shall the purely economic interests of the applicant.
* * *

- "(b) Granting a variance will not be unreasonably detrimental to the public welfare or to property or improvements in the neighborhood of the subject property.
- "(c) Granting a variance will not, under the circumstances of the particular case, unreasonably affect the health or safety of persons working or residing in the neighborhood of the subject property; and
- "(d) Granting a variance will be consistent with the comprehensive plan and with the intent and purpose of the zoning code."