

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

3  
4 PATRICIA J. ROBERTS,  
5 *Petitioner,*

6  
7 vs.

8  
9 CITY OF GEARHART,  
10 *Respondent,*

11  
12 and

13  
14 MICHAEL GRAHAM,  
15 *Intervenor-Respondent.*

16  
17 LUBA No. 99-196

18  
19 FINAL OPINION  
20 AND ORDER

21  
22 Appeal from City of Gearhart.

23  
24 Peggy Hennessy, Portland, filed the petition for review and argued on behalf of  
25 petitioner. With her on the brief was Reeves, Kahn & Eder.

26  
27 Edward J. Sullivan, Portland, and William K. Kabeiseman, Portland, filed the  
28 response brief. William K. Kabeiseman argued on behalf of intervenor-respondent. With  
29 them on the brief was Preston Gates & Ellis. William R. Canessa, City Attorney, Seaside,  
30 joined in the brief for respondent.

31  
32 HOLSTUN, Board Member; BASSHAM, Board Chair; BRIGGS, Board Member,  
33 participated in the decision.

34  
35 REMANDED

07/20/2000

36  
37 You are entitled to judicial review of this Order. Judicial review is governed by the  
38 provisions of ORS 197.850.

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**NATURE OF THE DECISION**

Petitioner appeals a city council decision granting a variance.

**MOTION TO INTERVENE**

Michael Graham, one of the applicants below, moves to intervene on the side of respondent.<sup>1</sup> There is no opposition to the motion, and it is allowed.

**FACTS**

The house on intervenor’s property is located at the rear yard setback line, which is 15 feet from the rear property line. Without first obtaining required permits, intervenor constructed a storage shed that is attached to the house and protrudes 10 feet into the 15-foot rear yard setback area.<sup>2</sup> The city issued a stop work order, and intervenor requested a variance to allow the storage shed to remain. On August 20, 1998, the planning commission denied the request.

On September 15, 1998, intervenor requested that the city council remand the matter to the planning commission. The city council granted intervenor’s request. Intervenor revised his proposal and requested a variance to allow the storage shed to protrude into the 15-foot rear yard setback area for a distance of 6 feet 8 inches rather than 10 feet. Intervenor took the position below that constructing a similarly sized attached shed on any other wall of the house would require costly structural modifications because it would interfere with existing doors or windows. Intervenor also appears to have taken the position that the septic field that is located in one of the side yards precludes locating a similarly sized freestanding shed on top of the drainage field. Existing landscaping in the other side yard would have to be moved to accommodate a similarly sized freestanding shed in that side yard. A

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<sup>1</sup>Jill Graham, intervenor’s wife, was the other applicant below. She has not intervened in this appeal.

<sup>2</sup>Apparently if the shed is attached to the house, it is treated as part of the house for purposes of the rear yard setback.

1 freestanding shed could be constructed in the back yard, but the City of Gearhart Zoning  
2 Ordinance (GZO) would require that the shed be set back five feet from the rear property line  
3 and five feet from the house. Therefore, the shed could only be five feet wide. A motion to  
4 approve the revised variance request resulted in a 3-3 planning commission vote. On  
5 November 17, 1998, the planning commission chair signed a document denying the  
6 requested variance.

7 Intervenor appealed the planning commission's decision to the city council. A  
8 motion to approve the requested variance resulted in a 2-2 city council vote. Thereafter a  
9 period of months passed with no further action by the city council. On October 6, 1999, the  
10 city council voted 3-1 to grant the variance. This appeal followed.

11 **INTRODUCTION**

12 The GZO defines the term "variance" as follows:

13 "A variance is a relaxation of the terms of the zoning ordinance where such  
14 variance will not be contrary to the public interest and where, owing to  
15 *conditions peculiar to the property and not the result of the actions of the*  
16 *applicant*, a literal enforcement of the ordinance would result in *unnecessary*  
17 *and undue hardship*. As used in this ordinance, a variance is authorized only  
18 for height, area and size of structure or size of yards and open spaces. \* \* \*"  
19 GZO 1.030 (emphases added).

20 GZO 8.010 provides that "[t]he purpose of a variance is to provide relief when a strict  
21 application of the zone requirements would impose unnecessary hardships on the applicant."

22 The criteria that must be satisfied to grant a setback variance parallel, in some respects, the  
23 above definition. Those criteria are set out at GZO 8.030 and provide as follows:

24 "Criteria for Granting Variances. Variances to a requirement of this  
25 ordinance, with respect to \* \* \* setbacks \* \* \*, may be granted only if \* \* \*  
26 findings are made based on the four criteria listed below:

- 27 "1. The request is necessary to prevent a hardship to the applicant; and
- 28 "2. The proposed development that will result from the granting of the  
29 variance will not be injurious to the adjacent area in which the  
30 property is located; and

1           “3.     The request is necessary to enable reasonable use of the property; and

2           “4.     The request is not in conflict with the Comprehensive Plan.”

3     Section 8.030 goes on to set out nonmandatory considerations that are to be used to  
4     determine whether the above criteria are met:

5           “In evaluating whether a request meets the above criteria, the Planning  
6     Commission shall consider the following. The considerations listed below are  
7     not standards and are not intended to be an exclusive list of considerations.  
8     The considerations are to be used as a guide in Planning Commission  
9     evaluation of an application:

10          “5.     Relevant factors to be considered in determining whether a hardship  
11               exists include:

12               “A.     Physical circumstances related to the property involved;

13               “B.     Whether reasonable use can be made of the property without  
14                       the variance;

15               “C.     Whether the hardship was created by the person requesting the  
16                       variance.

17          “\* \* \* \*”

18           There is some confusion in this appeal that can be attributed to the similar language  
19     in some of the approval criteria and some of the relevant factors. The approval criteria are  
20     standards that must be satisfied to grant a variance. The relevant factors are guides or  
21     considerations that must be considered but are not approval standards in and of themselves.  
22     In this decision we refer to GZO 8.030(1) as the “hardship criterion” and to GZO 8.030(3) as  
23     the “reasonable use criterion.” We refer to the relevant factors set out at GZO 8.030(5)(A),  
24     (B) and (C) as the “physical circumstances factor,” “reasonable use factor,” and “self-created  
25     hardship factor.”

26     **FIRST AND SECOND ASSIGNMENTS OF ERROR**

27           Petitioner’s second assignment of error alleges the city erred by addressing only the  
28     hardship criterion and failing to address the other three criteria at GZO 8.030(2), (3) and (4).

1 Petitioner’s first assignment of error includes specific arguments that the challenged decision  
2 fails to demonstrate compliance with the reasonable use criterion at GZO 8.030(3).

3 In response to the second assignment of error, intervenor argues that petitioner did  
4 not raise any issue with regard to any criterion other than the hardship criterion. The appeal  
5 of the planning commission’s decision was filed by the *applicant*. The applicant’s appeal  
6 was expressly limited to the planning commission’s finding of noncompliance with the  
7 hardship criterion. Record 44-45. In opposing the applicant’s appeal, petitioner’s arguments  
8 were also directed exclusively at the hardship criterion. Petitioner did include arguments  
9 before the city council that the variance is not necessary to enable reasonable use of the  
10 property. However, those arguments were raised as part of petitioner’s arguments that the  
11 reasonable use factor did not support a finding that the hardship criterion is met. If petitioner  
12 intended to raise an issue concerning compliance with variance approval criteria other than  
13 the hardship criterion, her efforts to do so were insufficient to provide the city reasonable  
14 notice that she disputed the proposal’s compliance with those other approval criteria. *Boldt v.*  
15 *Clackamas County*, 107 Or App 619, 623, 813 P2d 1078 (1991). We conclude that the  
16 issues raised in the first and second assignments of error were not raised below and for that  
17 reason were waived.<sup>3</sup> ORS 197.763(1); 197.835(3).<sup>4</sup>

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<sup>3</sup>We consider the parties’ arguments concerning whether reasonable use can be made of the property without the variance under the third assignment of error, where we address the city’s findings concerning the hardship criterion and the relevant factors that the city is required to consider under GZO 8.030(5).

<sup>4</sup>ORS 197.763(1) provides:

“An issue which may be the basis for an appeal to the Land Use Board of Appeals shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue.”

ORS 197.835(3) provides:

1 The first and second assignments of error are denied.

2 **THIRD ASSIGNMENT OF ERROR**

3 In her final assignment of error, petitioner argues the city’s findings fail to  
4 demonstrate that the requested variance is “necessary to prevent a hardship to the  
5 applicant[s].” The GZO does not define “necessary” or “hardship,” and the challenged  
6 decision does not adopt a reviewable interpretation of those words. We therefore assume  
7 those words were intended to carry their ordinary meaning.<sup>5</sup> As previously noted, GZO  
8 8.030(5) lists three relevant factors that are to be considered in determining whether a  
9 variance is necessary to prevent a hardship to the applicants. Petitioner argues that those  
10 relevant factors show the variance is not necessary to prevent a hardship.

11 We consider below the city’s findings addressing the relevant factors of GZO  
12 8.030(5).

13 **A. The Self-Created Hardship Factor**

14 Only one finding specifically addresses the self-created hardship factor:

15 “As the current storage structure can be removed there was no hardship  
16 created by the Applicant.” Record 10.

17 Viewed in isolation, this finding might be consistent with an ultimate conclusion that the  
18 requested variance is necessary. However, as petitioner correctly notes, the findings that  
19 were adopted under the other factors, which are discussed below, appear to consider the costs

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“[In an appeal to LUBA of a quasi-judicial land use decision, i]ssues shall be limited to those raised by any participant before the local hearings body as provided by ORS \*\*\* 197.763 \*\*\*.”

<sup>5</sup>Dictionary definitions of “necessary” and “hardship” are as follows:

“**necessary** \* \* \*: items \* \* \* that cannot be done without: things that must be had (as for the preservation and reasonable enjoyment of life)[.]” *Webster’s Third New International Dictionary*, 1510 (unabridged ed. 1981).

“**hardship** \* \* \*: suffering, privation \* \* \* a particular instance or type of suffering or privation[.]” *Webster’s Third New International Dictionary*, 1033 (unabridged ed. 1981).

1 the applicants will incur if the existing storage shed has to be removed and a new shed has to  
2 be constructed in another location. Those findings are at least logically inconsistent with the  
3 above-quoted finding, and they support petitioner’s position that any hardship or  
4 inconvenience that the applicants face is attributable to their own act of constructing the  
5 existing shed within the rear yard setback before seeking a variance from the city. Moreover,  
6 as petitioner also points out, the city’s findings addressing the remaining factors appear to  
7 ignore the fact that the identified difficulties the applicants face in constructing a storage  
8 shed in conformance with GZO setback requirements are at least partially attributable to the  
9 locations the applicants selected for their house, garden, septic field and landscaping. As  
10 petitioner correctly notes, all of these difficulties appear to be created by the applicants.  
11 While the self-created hardship factor is not an ultimate approval criterion, we agree with  
12 petitioner that the city’s finding that this factor supports approval of the requested variance  
13 rather than denial is inadequate and logically inconsistent with its other findings.

14 **B. The Physical Circumstances Factor**

15 Petitioner argues there are no physical circumstances in this case that would justify  
16 finding that a variance is necessary to prevent a hardship. The lot is flat and rectangular.  
17 Petitioner contends it is “similar to existing residential lots in the area.” Petition for Review  
18 10.

19 Intervenor responds that the challenged decision identifies “existing trees, shrubs and  
20 a garden” as “‘physical circumstances’ that would support a finding of hardship.”  
21 Intervenor-Respondent’s Brief 13. Intervenor argues that while petitioner may disagree with  
22 the city’s interpretation and application of the hardship criterion and physical circumstances  
23 factor, the city’s interpretation and application are within its discretion under ORS  
24 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992).<sup>6</sup>

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<sup>6</sup>ORS 197.829 provides:

1 We assume intervenor relies on the following finding:

2 “The proposed location allows for the continuity of established landscaping,  
3 including trees, shrubs, garden area and small structures. A large portion of  
4 available space for a freestanding structure is the drainfield for the septic  
5 system. An unattached storage structure would necessitate building in the  
6 middle of a yard, regardless of side, rear or front, and require the major  
7 removal and replacement of existing landscaping with the exception of where  
8 it is presently located. The removal and replacement of existing landscaping  
9 would create a hardship.” Record 10.

10 We agree with petitioner that the city’s findings concerning the physical circumstances factor  
11 do not support its ultimate finding on the hardship criterion. It is true that a local governing  
12 body must be given significant interpretive discretion under ORS 197.829(1) and *Clark*.  
13 However, the above-quoted finding does not include a reviewable interpretation of the  
14 physical circumstances factor. The finding does not expressly refer to the physical  
15 circumstances factor. Neither does it explain why the “trees, shrubs, garden area and small  
16 structures,” all features that presumably were planted or constructed by the applicants,  
17 constitute “physical circumstances related to the property” that result in a hardship to the  
18 applicants. As noted earlier, the definition of “variance” at GZO 1.030 requires that the  
19 hardship justifying a variance must be attributable to “conditions peculiar to the property and

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“(1) The Land Use Board of Appeals 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:

“(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;

“(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or

“(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.

“(2) If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, the board may make its own determination of whether the local government decision is correct.”

1 [must] not [be] the result of the actions of the applicant \* \* \*.” The physical circumstances  
2 factor and self-created hardship factor apparently implement that part of the definition and  
3 must be read together. Accordingly, we do not believe that physical circumstances on the  
4 site that were created by the property owner are relevant considerations in determining  
5 whether a variance is necessary to prevent a hardship to the applicants. Even if the city’s  
6 decision can be read to adopt an implied interpretation to the contrary, we reject it as  
7 inconsistent with the “express language” and “purpose” of the GZO. ORS 197.829(1)(a) and  
8 (b). *See* n 6.

9 The city’s findings are inadequate to support approval of the requested variance under  
10 the physical circumstances factor.

11 **C. Reasonable Use Factor**

12 The reasonable use factor requires that the city consider “[w]hether reasonable use  
13 can be made of the property without the variance.” The city’s remaining findings, which  
14 apparently were adopted to address the reasonable use factor, are as follows:<sup>7</sup>

- 15 1. “The way in which the house is constructed on the lot and the  
16 determination of what is a side yard and rear yard affect the  
17 positioning of an attached storage structure in the preferred location.  
18 If the location of the main entrance to the house and garage were  
19 considered the front yard then the storage structure would be in a side  
20 yard, with a 5’ setback, [and] thus permissible [without a variance].”  
21 Record 10.
- 22 2. “The design and style of the storage structure match those of the  
23 house. This would be difficult to accomplish with a freestanding  
24 structure.” *Id.*
- 25 3. “Building an attached structure on any other available wall of the  
26 existing house would call for structural changes incurring a financial  
27 hardship.” *Id.*

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<sup>7</sup>We have assigned numbers to unnumbered findings and renumbered the numbered findings to facilitate our discussion.

- 1           4.       “Building an unattached storage structure in the rear yard with 5’  
2 setbacks from the existing house and property line would allow for a  
3 structure 5’ in width and varying length. Matching a structure such as  
4 this to the existing design and style of the house would be improbable  
5 at best. It would also defeat the purpose of a 15’ rear setback, which is  
6 to allow for open spaces between the rear of adjacent houses.” *Id.*
- 7           5.       “Consideration as to what a freestanding storage building, built in any  
8 area of available space, would look like from the viewpoint of the  
9 adjacent property owners (especially one that is 5’ wide and in the  
10 middle of a 15’ yard) must be given in determining a hardship.” *Id.*
- 11          6.       “The Applicant agrees that a similar sized storage structure would  
12 allow reasonable use of their property. However, the location for such  
13 a structure could only be in the rear yard as any other location,  
14 whether attached or freestanding, would impose financial hardship on  
15 the Applicant. Location in the rear yard would not allow them to build  
16 a similar sized structure, as it could only be a maximum of 5’ in  
17 exterior width due to setback considerations.” *Id.*

18           Finding one does not have any obvious bearing on the reasonable use factor.  
19 Findings two and five and the second sentence of finding four identify difficulties that may  
20 be encountered in designing a freestanding storage shed to match the design of the existing  
21 house and ensuring that a freestanding shed presents an aesthetically pleasing appearance  
22 when viewed from the house and adjoining properties. The findings do not attempt to  
23 explain what these design problems are or why they make constructing one or more  
24 freestanding sheds an unreasonable alternative to the requested variance.

25           We do not understand petitioner to dispute that constructing an attached shed of the  
26 proposed dimensions on other walls of the house would be an extremely expensive  
27 proposition, as finding three suggests. However, the significance of finding three depends on  
28 the validity of two unstated assumptions: (1) that the amount of storage that the applicants  
29 desire is necessary for reasonable use of the property and (2) that one or more freestanding  
30 storage units could not reasonably meet the applicants’ storage needs. We conclude below  
31 that the city has not established the validity of either assumption.

1           The first sentence of finding four concludes that a freestanding storage shed could be  
2 built in the rear yard. That sentence states that while the storage shed can only be five feet  
3 wide, its length could vary. This suggests that a longer shed with the same storage capacity  
4 could be constructed in the rear yard.<sup>8</sup> Even if the point made in the last sentence of finding  
5 four about the purpose of setbacks is true, we do not see how it had any direct bearing on the  
6 reasonable use factor.

7           The parties focus their arguments on the sixth finding. Petitioner partially quotes the  
8 sixth finding and argues that it represents an affirmative concession that reasonable use of the  
9 property is possible without the variance. We do not agree. However, neither do we agree  
10 with intervenor's arguments in response to petitioner's concession argument. Intervenor  
11 argues that the first sentence of the finding concludes that a structure of similar size to the  
12 existing shed is necessary to allow reasonable use of the property. Intervenor argues the  
13 second sentence concludes that the needed structure can only go in the rear yard. Finally,  
14 intervenor argues, the third sentence concludes that the freestanding shed that could be built  
15 in the rear yard cannot be wide enough to meet the applicant's needs and, therefore, the  
16 variance is needed to allow reasonable use of the property. We have some question whether  
17 the three sentences of finding six say what intervenor says they do. However, for purposes  
18 of this opinion we will assume that they do.

19           Finding six is inadequate to demonstrate that the reasonable use factor supports a  
20 finding that the hardship criterion is met, *i.e.* that a variance is "necessary to prevent a  
21 hardship." There are two major problems with the express and implied interpretations in

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<sup>8</sup>Based on the drawing that appears at page 54b of the record, we see no reason why a freestanding shed in the rear yard could not be made longer or taller to make up for the loss of storage area that would be caused by reducing the width of the shed from six feet eight inches to five feet. Intervenor took the position at oral argument that such a longer or taller shed would block views from windows in the house. We question the relevance or significance of that position, even if true. In any event, the challenged decision does not address whether the applicants' storage needs could reasonably be met by a longer or taller freestanding storage shed located in the rear yard.

1 finding six. First, they make the applicants’ desire to have additional storage a necessary  
2 element of “reasonable use” of the property.<sup>9</sup> Neither the findings nor intervenor cite any  
3 support in the language of the GZO variance provisions for such an extreme view of what is  
4 required for reasonable use of the property, and we reject that view. Such an interpretation  
5 of the reasonable use factor would effectively make the “hardship” (*i.e.* the “suffering or  
6 privation”) that makes a variance “necessary” (*i.e.* a thing “that must be had \* \* \* for the  
7 preservation and reasonable enjoyment of life”) the applicants’ inability to construct as much  
8 storage as they would like to have on their property, in the single location on the lot that they  
9 would prefer to construct that storage. Even under the deferential standard of review that we  
10 are required to apply under *Clark*, we reject that interpretation, to the extent it can be inferred  
11 from the findings.

12 A second problem with finding six is the unexplained conclusion that constructing a  
13 storage shed or sheds in other locations would result in a financial hardship on the applicants.  
14 If that conclusion relies on the costs to the applicants of removing the existing attached  
15 storage shed, those costs are not properly considered. To allow the applicants to consider the  
16 cost of removing the existing shed would make the self-created hardship factor meaningless.  
17 The cost of constructing a similarly sized attached shed on other walls of the house  
18 apparently would be expensive due to conflicts with existing windows and doors. However,  
19 the challenged decision does not explain what those costs would be. Neither does it make  
20 any attempt to explain (1) why constructing one or more freestanding storage sheds could not  
21 provide the storage that the applicants desire, (2) what the cost of constructing a freestanding  
22 storage shed would be or (3) why that cost would itself constitute a hardship.

23 The reasonable use factor does not support the city’s finding that a variance is

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<sup>9</sup>The applicants explained below that their need for storage for their residential use has grown over the years since their single-car garage was built. In addition, they recently purchased a grocery store and apparently some of the applicants’ storage needs are related to this commercial venture. Record 69a.

1 “necessary to avoid a hardship to the applicant[s].” The city’s findings applying the factors  
2 that the GZO requires to be considered in addressing the hardship criterion do not support the  
3 city’s ultimate finding that the hardship criterion is met.

4 The third assignment of error is sustained.

5 The city’s decision is remanded.