

AUG 7 4 24 PM '80

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

3 ROSCOE E. WATTS and)
 4 JEAN R. WATTS,)
)
 5 Petitioners,)
)
 6 v.)
 7 CLACKAMAS COUNTY,)
)
 8 Respondent.)
)
 9 v.)
 10 RONALD L. BROWN,)
)
 11 Respondent.)

LUBA No. 80-038

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

John S. Watts, Portland, filed a petition for review and argued the cause for Petitioners Watts. With him on the brief were Watts and Watts.

Michael E. Judd, Oregon City, filed a brief and argued the cause for Respondent Clackamas County.

Kenneth M. Gerstein, Lake Oswego, filed a brief and argued the cause for Respondent Brown.

REYNOLDS, Chief Referee; COX, Referee; BAGG, Referee; participated in the decision.

AFFIRMED

8/07/80

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a).

1 REYNOLDS, Chief Referee

2 NATURE OF THE DECISION

3 Petitioners appeal Clackamas County's granting of a
4 variance creating a flag lot and the county's simultaneous
5 granting of a flood hazard permit. Together these decisions
6 would allow erection of a residence in an area designated to be
7 within the "flood fringe" of the Willamette River one hundred
8 year flood plain.

9 ASSIGNMENTS OF ERROR

10 Petitioners first assignment of error is that the new lot
11 to be created would violate the 10,000 minimum square foot
12 requirement in the R-10 zone because it would have a usable lot
13 area of less than 10,000 square feet. The second assignment of
14 error alleges that development of the lot is not "compatible
15 with existing development" in violation of one of the criteria
16 stated in section 27 of the Clackamas County Zoning Ordinance
17 regarding flood hazard development. Finally, petitioners
18 contend that inasmuch as this development is taking place
19 within a flood plain, it violates the Clackamas County
20 Comprehensive Plan which states as a purpose:

21 "To direct development away from agricultural
22 lands, flood plains, stream banks, places with unique
23 natural values, and other desirable permanent public
open spaces."

24 Moreover, according to petitioners, the requirement in section
25 27 of the zoning ordinance concerning safety of access in times
26 of flood would be violated by development of this lot.

1 FACTS

2 Applicant Ron Brown owns a lot overlooking the Willamette
3 River with an existing house at the back of the lot. The
4 applicant applied for a variance creating a flag lot for the
5 existing residence and a flood hazard permit in order to allow
6 him to erect a house on the front half of the lot. The lot to
7 be created would sit in the "flood fringe" of the Willamette
8 River one hundred year flood plain. The area in which the lot
9 would be situated is zoned R-10 (single family residential,
10 10,000 square foot minimum lot size).

11 Fielding Road would bisect the new lot with approximately
12 8,000 feet of the new lot on one side of Fielding Road and
13 approximately 2,000 feet on the other side of the road. There
14 is no dispute that the total square footage on both sides of
15 the road exceeds 10,000 square feet. Testimony indicated that
16 the lot is subject to "ponding" and one expert testified that
17 the house would be at elevation 28-30, while ponding occurs
18 annually at elevation 28-29.¹ This expert also testified
19 that due to surface water conditions, access during these
20 "ponding" conditions may not be possible.

21 Mr. Brady, who would be purchasing and developing the new
22 lot from the applicant, testified, however, that the slab for
23 the garage floor for the new residence would be at elevation 30
24 and the main floor of the residence would be at elevation 37.
25 Mr. Brady testified that ponding on the property did not occur
26 last year and that

1 "there are statements that prove that it didn't
2 happen any year prior to that, except 1964. He states
3 that this ponding, or potential ponding, as I would
4 have to call it, is a 28-29 foot elevation. This
5 elevation would cover parts of our lot that we are
6 partitioning."

7 Mr. Ausman testified before the hearings officer with
8 respect to the water problem as follows:

9 "As far as the water problem, yes, we do have a
10 water problem on the road. I particularly have it in
11 front of my own residence. However, it's seldom, and
12 I feel that it is no worse than many of the
13 intersections in many of the areas of the metropolitan
14 area, whether it be Portland, Clackamas or wherever."

15 The staff report concluded that safety of access to the
16 property for ordinary and emergency vehicles would be adequate
17 "because the Willamette River rises at a rate which provides
18 adequate warning to residents of the area..." There was no
19 evidence in the record identified by the petitioners that
20 disputes the staff report's conclusion as to the rate of rise
21 of the Willamette River.

22 OPINION ON THE MERITS

23 Petitioners first assignment of error is that the usable
24 lot area of the newly created lot would be less than 10,000
25 square feet, thus violating the minimum square footage
26 requirement in the R-10 zone. Petitioners contend that the
27 2,000 square feet on the other side of Fielding Road should not
28 be considered as usable because the road splits it off from the
29 rest of the property and because, in addition, it is located on
30 a steep hillside which makes it undevelopable.

31 whether all 10,000 square feet is "usable" is immaterial in

1 determining whether compliance with the minimum lot size in
2 Clackamas County's ordinance has been met. We agree with the
3 county that, generally speaking, minimum lot sizes are for the
4 purpose of regulating density and whether all of the land is
5 usable or developable has nothing to do with density.

6 Moreover, no language in the R-10 zone has been cited to us
7 which would indicate that, in fact, all 10,000 square feet must
8 be usable. The county has not construed its ordinance in this
9 fashion, and we cannot conclude based on the record before us
10 that the county's interpretation of its own zoning ordinance is
11 at all unreasonable. See: Fifth Avenue Corp. v. Washington
12 County, 282 Or 591, 581 P2d 50 (1978); Bienz v City of Dayton,
13 29 Or App 761, 566 P2d 904 (1977).

14 Petitioners second assignment of error asserts that
15 development of the newly created lot would not be "compatible
16 with existing development" in violation of section 27 of the
17 Clackamas County Zoning Ordinance regarding flood hazard
18 development. Petitioners assert that because the lot is
19 located within the flood fringe while most of the existing
20 residences are located to the east of the lot and above the one
21 hundred year flood plain, the lot is not consistent with the
22 majority of the residential lots in the area. Again, however,
23 petitioners assert an interpretation of the Clackamas County
24 Zoning Ordinance which is not required in that they add the
25 requirement that proposed new development be consistent with a
26 "majority" of existing development. All the Clackamas County

1 Zoning Ordinance requires is that there be compatibility with
2 existing residences. There was evidence in the record that
3 other homes in the area were at an elevation similar to that of
4 the proposed new development. There was, indeed, conflicting
5 evidence in the record as to whether the proposed new home
6 would be "compatible" with existing homes in the area.

7 Compatibility of the new home was part of a general concern
8 expressed at the hearings before the county as to whether
9 development on low lying lots would be compatible with existing
10 homes located on large lots higher in elevation with panoramic
11 views of the river. While disrupting the park like setting of
12 the area may be a concern of neighbors in the area, it is not a
13 concern which would justify the county in denying development
14 of applicant's proposed lot when zoning in the area is single
15 family residential with 10,000 square foot minimum lot sizes.

16 Petitioners third assignment of error is that the county
17 erred in even allowing development within the "flood fringe" in
18 view of the Clackamas County Comprehensive Plan which states as
19 a purpose to direct development away from flood plains.

20 Respondents reply, however, that this plan provision should not
21 be interpreted as a flat prohibition against development and
22 that the Clackamas County Zoning Ordinance which implements the
23 comprehensive plan allows development if certain conditions are
24 met. The county's interpretation of its comprehensive plan
25 provision, especially in view of the enactment of an
26 implementing ordinance which would allow development, cannot be

1 said to be unreasonable and must be given deference. Fifth
2 Avenue Corporation, supra; Biehz, supra. Moreover, the
3 provision concerning directing development away from flood
4 plains must be read in connection with other provisions in the
5 comprehensive plan which encourage development in areas where
6 public services exist.

7 Concerning the Clackamas County Zoning Ordinance
8 requirement that there be adequate access in times of flood for
9 ordinary and emergency vehicles, there was, again, conflicting
10 evidence on whether access would be adequate and the county
11 resolved this question in favor of concluding that access would
12 be adequate. We cannot say there was no substantial evidence
13 in the record to support this finding. Christian Retreat
14 Center v. Comm. for Washington County, 28 OR App 673, 560 P2d
15 1100, Rev Den (1977).

16 The decisions of Clackamas County are affirmed.
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FOOTNOTE

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¹ These references apparently are to distance in feet above mean low water for the Willamette River.