

LAND USE
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS DEC 2 2 19 PM '88

OF THE STATE OF OREGON

3	LEWIS K. SCOTT,)	
)	
4	Petitioner,)	LUBA No. 88-063
)	
5	vs.)	FINAL OPINION
)	AND ORDER
6	CITY OF PORTLAND,)	
)	
7	Respondent.)	

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9 Appeal from the City of Portland.

10 Lewis K. Scott, Portland, filed the petition for review and
11 a reply brief, and argued on his own behalf. With him on the
12 briefs was Spears, Lubersky, Bledsoe, Anderson, Young &
13 Hilliard.

14 Adrienne Brockman, Portland, filed the response brief and
15 argued on behalf of respondent.

16 HOLSTUN, Chief Referee; SHERTON, Referee, participated in
17 the decision.

18 AFFIRMED 12/02/88

19 You are entitled to judicial review of this Order.
20 Judicial review is governed by the provisions of ORS 197.850.
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1 NATURE OF DECISION

2 Petitioner appeals the city's denial of his request for a
3 variance from a city code provision limiting the height of
4 hedges to 3 1/2 feet.¹ Petitioner asks that we order the
5 city to grant the variance or order the city to allow his hedge
6 to remain until the city requires other property owners with
7 hedges greater than 3 1/2 feet tall to comply with the 3 1/2
8 foot limit.

9 FACTS

10 Petitioner's hedge, now six feet high, was five feet high
11 when it was planted several years ago. The residences on
12 petitioner's property are at a lower level than the adjacent
13 roadway and petitioner planted the hedge to provide privacy.
14 One or more persons reported the nonconforming hedge to the
15 city, and the city commenced enforcement action. Petition for
16 Review 5.

17 In the surrounding neighborhood there are many
18 nonconforming hedges. The city apparently enforces the 3 1/2
19 foot hedge limit only upon receipt of a citizen complaint. The
20 complainant's identity is kept confidential if requested.
21 After the complaint was filed against his hedge, petitioner
22 filed 316 notices of other violations in the neighborhood.²

23 The city suspended its enforcement proceedings against
24 petitioner, pending final resolution of petitioner's variance
25 request. The city has not commenced enforcement proceedings
26 based on petitioner's 316 complaints.

1 FIRST ASSIGNMENT OF ERROR

2 "The city's action is discriminatory and a violation
3 of the due process clause of the 14th Amendment of the
4 Federal Constitution because the city knowingly and
deliberately has singled out petitioner and has not
treated all persons alike under the circumstances."

5 SECOND ASSIGNMENT OF ERROR

6 "The city's action is discriminatory and a violation
7 of the due process clause of the 14th Amendment of the
8 Federal Constitution because of its selective
enforcement of a usually disused provision based on
the complaint of a private party."

9 It is significant that the decision challenged in this
10 appeal is the city's denial of petitioner's variance request,
11 not a city order requiring that petitioner comply with PCC
12 33.90.040(f). A separate decision by the city to enforce PCC
13 33.90.040(f), and require petitioner to remove his hedge or cut
14 it to conform with the 3 1/2 foot limit, eventually may be
15 adopted by the city. However, that decision has not yet been
16 made and, therefore, is not before us for review.³

17 Although petitioner appeals the city's denial of his
18 variance request, the arguments advanced in the petition for
19 review attack the city's anticipated decision to require
20 petitioner to comply with PCC 33.90.040(f). Petitioner
21 apparently assumes that the city's decision to refuse his
22 request for a variance is the same as a decision to require
23 petitioner to take action to bring his hedge into compliance
24 with PCC 33.90.040(f). Petitioner argues the city's denial of
25 his variance request singles him out unfairly and therefore
26 violates his rights to due process and equal protection under

1 the 14th Amendment to the U.S. Constitution and to equal
2 privileges and immunities under the Oregon Constitution Article
3 I, Section 20. Petitioner also argues the city's
4 complaint-initiated enforcement policy violates his 14th
5 Amendment due process rights.

6 However, there is nothing in the record to show petitioner
7 has been treated differently than his neighbors with regard to
8 hedge height variances. Petitioner was denied a variance, but
9 as far as the record shows, none of the other 316 properties
10 identified by petitioner have been granted variances either.
11 In other words, everyone has been treated the same; no one has
12 been granted a variance.

13 Petitioner does not contend that PCC 33.90.040(f) is
14 unconstitutional on its face. Petitioner seeks, in this
15 proceeding, to obtain a variance that would enable him to avoid
16 the enforcement action he anticipates the city otherwise will
17 take against him. However, petitioner's assignments of error
18 and the argument supplied by petitioner under those assignments
19 of error assert only that enforcement of PCC 33.90.040(f) would
20 be unconstitutional. The cases cited by petitioner all concern
21 discriminatory enforcement and application of zoning and other
22 local regulations. In our view, whatever relevance those cases
23 may have when the city proceeds with enforcement action, they
24 simply are inapposite in this appeal. None of the cases cited
25 by petitioner hold a local government is bound to grant a
26 variance in a situation where enforcement of an otherwise

1 proper zoning ordinance would violate a property owner's rights
2 to equal protection or due process. We are aware of no such
3 authority.

4 The criteria for granting variances are specified in the
5 city code. See Fisher v. City of Gresham, 10 Or LUBA 283, 289,
6 rev'd 69 Or App 411 (1984). The fact petitioner may have a
7 constitutional defense to an enforcement action is not a
8 sufficient independent basis upon which to compel the city to
9 grant a variance. We turn then to the code criteria petitioner
10 must satisfy to obtain a variance.

11 Under the city code, the following criteria must be
12 satisfied to grant a variance such as the one requested by
13 petitioner:

14 "(a) Generally, any variance granted shall satisfy all
15 of the following general conditions:

16 "(1) It will not be contrary to the public
17 interest or to the intent and purpose of
this Title and particularly to the zone
involved.

18 "(2) It shall not permit the establishment within
19 a zone of any use which is not a permitted
20 use within that zone or the establishment of
any use for which a conditional use is
21 required within that zone. This prohibition
is not applicable to nonconforming uses
described in Sections 33.98.015(b)(2)
22 through 33.98.015(b)(5).

23 "(3) It will not cause substantial adverse effect
24 upon property values or environmental
conditions in the immediate vicinity or in
25 the zone in which the property of the
applicant is located.

26 "(4) It will relate only to the property that is
owned by the applicant.

1 "(b) Special Conditions. * * *

2 When all of the foregoing conditions can be
3 satisfied a variance may be granted as follows:

4 "* * * * *

5 "(2) Major Variances. A major variance as
6 specified in Section 33.98.015(b) may be
7 granted when any of the following applicable
8 conditions can be satisfied:

9 "A. The variance is required in order to
10 modify the impact of exceptional or
11 extraordinary circumstances or
12 conditions that apply to the subject
13 property or its development that do not
14 apply generally to other properties in
15 the vicinity; or

16 "B. The variance is required in order to
17 allow enjoyment by the appellant of a
18 property right possessed by a
19 substantial portion of the owners of
20 properties in the same vicinity, while
21 resulting in the comparatively trivial
22 detriment to the neighborhood.

23 "* * * * *" PCC 33.98.010.

24 Nowhere in petitioner's two assignments of error or in the
25 argument under those assignments of error does petitioner
26 allege the county erroneously interpreted or applied the
27 above-quoted criteria.⁴

28 The only place petitioner comes close to arguing his
29 request complies with the applicable variance criteria is in
30 the statement of facts. In petitioner's statement of facts, he
31 acknowledges the existence of the above-quoted variance
32 criteria. However, petitioner suggests the reasons the city
33 gave for concluding several of the variance criteria were not
34 met were improper, because the city failed to show those

1 reasons do not apply equally to other nonconforming hedges.
2 Petition for Review 9.

3 Petitioner also suggests the city's reliance on a staff
4 report is misplaced because the staff report is not
5 independently supported by substantial evidence. We have
6 previously held that a staff report may constitute substantial
7 evidence upon which a governing body may rely. Grovers Beaver
8 Electric Plumbing v. Klamath Falls, 12 Or LUBA 61, 64 (1984);
9 Meyer v. City of Portland, 7 Or LUBA 184, 196 (1983), aff'd 67
10 Or App 274 (1984). Petitioner offers no reason why we should
11 not view the staff report as evidence supporting the city's
12 decision. Petitioner does cite to other evidence in the record
13 which petitioner argues contradicts several of the findings
14 adopted by the city.⁵

15 In order to challenge successfully the city's denial of the
16 variance, it is not sufficient for petitioner simply to
17 challenge the evidentiary support for some of the city's
18 findings. Rather, petitioner must demonstrate his request
19 satisfies all applicable approval criteria as a matter of law.
20 Jurgenson v. Union County Court, 42 Or App 505, 510, 600 P2d
21 1241 (1979); Weyerhauser v. Lane County, 7 Or LUBA 42, 46
22 (1982); Chemeketa Industrsries Corp. v. City of Salem, 14 Or
23 LUBA 159, 163 (1985). Petitioner does not make such a showing.

24 One of the reasons given by the city for denying the
25 variance is that the hedge is located, in part, not on
26 petitioner's property but rather in the city street

1 right-of-way. See footnote 6, supra. Record 9. Under the
2 city code, a variance can only be granted if the applicant owns
3 all the affected property. PCC 33.98.010(a)(4). Petitioner
4 does not challenge this finding or its evidentiary basis, and
5 for this reason alone we must sustain the city's denial. See
6 Hutmacher v. City of Salem, (LUBA No. 87-052, October 16, 1987)
7 slip op at 5.

8 Petitioner does point out that the city did not show that
9 other nonconforming hedges are located outside the
10 right-of-way. Petitioner is correct, but the point is
11 irrelevant. The owners of those other hedges are not
12 requesting a variance, and the location of their hedges has no
13 bearing on petitioner's compliance with PCC 33.98.010(a)(4).

14 In addition, the city found the existence of other illegal
15 hedges could not provide a basis for concluding a variance "is
16 required to allow enjoyment by the appellant of a property
17 right possessed by a substantial portion of the owners of
18 properties in the same vicinity * * *." PCC 33.98.010(b)(B).
19 Although petitioner expressly recognized this basis for denial
20 of his request, Petition for Review 9, he did not assign this
21 interpretation of the code as error.⁶ Petitioner's failure
22 to challenge this reason for denial also requires that we
23 sustain the city's decision. Hutmacher v. City of Salem, supra.

24 Petitioner suggests throughout his statement of facts that
25 the evidence in the record contradicts several of the reasons
26 given by the city for denying the request. Record 8-10; See

1 n. 5, supra. Even if we were to treat these suggestions as a
2 substantial evidence challenge, they do not provide a basis for
3 remanding the city's decision. First, even if the evidence did
4 contradict the disputed findings, petitioner does not attempt
5 to show all of the criteria in PCC 33.98.010 are met as a
6 matter of law. Petition for Review, 10. In any event, the
7 evidence concerning several of the findings is at best
8 conflicting and falls substantially short of clearly
9 demonstrating the relevant criteria are satisfied as a matter
10 of law.⁷

11 Petitioner's assignments of error are denied..

12 The city's decision is affirmed.

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1 FOOTNOTES

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Portland City Code (PCC) 33.90.040(f) provides in pertinent part:

4 "Open ornamental fences, hedges, landscape architectural
5 features, or guard railings * * * may be located in any
6 front, side, or rear yard if maintained at a height not
7 more than 3-1/2 feet above the average ground level
8 adjacent thereto * * *."

9 2

In its brief, the city suggests not all of the 316 hedge
and fence violation notices filed by petitioner actually
identify violations of PCC 33.90.040(f). The city suggests
that some of the identified properties may be outside city
limits or have been annexed after the hedges or fences were
established. Respondent's Brief 4. However, we do not
understand the city to dispute that a substantial number of the
316 properties identified in the notices are in violation of
the code, and for purposes of this opinion we will assume a
large number of those properties do violate PCC 33.90.040(f).

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As provided in PCC 33.205.030(D) petitioner was given
notice that his hedge violates PCC 33.90.040(f). Respondent's
Brief 7. The city apparently has an unwritten policy of not
proceeding with enforcement actions while a property owner is
seeking a land use approval that would make the enforcement
action unnecessary. Therefore, the city has not proceeded
further with enforcement action against petitioner, pending
final resolution of petitioner's variance request. If the
city's denial of the variance is affirmed on appeal, the city
may institute proceedings against petitioner by filing a
complaint with the code hearings officer. PCC 22.03.020(b). A
notice of hearing would be issued and a hearing would be held
before the code hearings officer. PCC 22.03.030; 22.03.040.
Following the hearing, a written final order would be issued.
PCC 22.03.050; 22.03.110.

Although PCC 22.04.010 provides judicial review of the
final order of the code hearings officer "shall be by writ of
review as provided in ORS 34.010-34.100" and petitioner assumes
this is the case, we express no opinion on the proper forum for
review of such a final order. See ORS 197.015(10); 197.825.

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Petitioner does argue that because there are numerous similarly situated properties, it would violate his 14th Amendment due process and equal protection guarantees and the equal privileges of immunities clause of the Oregon Constitution to enforce the 3 1/2 foot hedge limit against him alone. However, petitioner does not argue his application satisfies the applicable variance criteria or that the city erred in finding several of the criteria are not met.

The city adopted findings under three general categories. Although it is not clear in the city's decision, it appears the findings under category 1 address PCC 33.98.010(b)(2)(A), those under category 2 address PCC 33.98.010(b)(2)(B) and those under category 3 address PCC 33.98.010(a).

The city first addressed "Hardship or Practical Difficulties." The city found there were areas on petitioner's property not subject to the 3 1/2 foot height limit where private outdoor recreational space could be provided. The city also found houses on petitioner's property have only one small row of windows facing the roadway blocked by the hedge and that the applicant could instead place the hedge adjacent to the house if it wished to screen the windows.

The second area addressed by the city concerns "Exceptional Circumstances or Rights Enjoyed by Others." Among other findings adopted by the city addressing these considerations, the city concluded the other hedges the petitioner relied on to demonstrate he was requesting a right enjoyed by others were illegal hedges. The city concluded illegal hedges could not constitute a property right and could not provide justification for the variance under this criterion.

Finally, under a general discussion of "Code Intent and Impact" the city found cars emerging from petitioner's property would be shielded visually from traffic until the car is in the street. The city found the hedge would block visibility along the curve and constitute a traffic hazard. The city noted the road attracts a large number of joggers and bicyclists and lacks "curbs, sidewalks and full shoulders." Record 9. In addition, the city found the hedge is located in the street right-of-way and is therefore not located on property owned by the applicant. The city found it could not grant a variance for property not owned by the applicant.

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Petitioner challenges the correctness of this interpretation for the first time in his reply brief. Reply Brief 12-15. However, under our rules, petitioner is required to specify assignments of error in the petition for review. OAR 661-10-030(3)(d). Petitioner may not assert for the first time what is for all practical purposes a new assignment of error in his reply brief. We do not consider petitioner's argument that the city's interpretation of PCC 33.98.010(b)(2)(B) is erroneous.

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For example, the evidence cited by petitioner that the hedge is 20 feet back from the street, where the driveway enters the roadway, and that a car in the driveway can be seen long before it enters the street is not, in our view, evidence that compels the city to conclude the safety of cars entering and exiting the driveway is not affected by the hedge. The city's findings also cite existing traffic conditions and the presence of joggers and bicyclists. Record 9. Also, petitioner's point that a hedge located adjacent to the house would have to be 23 feet high to shield upper floor bedroom windows from the adjacent street does not establish the existence of hardship or practical difficulties as a matter of law. As the city noted, the top of the hedge currently is taller than the highest point of the houses on petitioner's property and there are other means available to achieve private outdoor space on the property.