

LAND USE  
BOARD OF APPEALS

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

Aug 23 8 10 PM '89

MANFRED WAGNER and )  
JUNE HARRISON-WAGNER )  
 )  
Petitioners, )  
 )  
vs. )  
 )  
CITY OF YACHATS, )  
 )  
Respondent, )  
 )  
and )  
 )  
JERRY DILLER, )  
 )  
Intervenor-Respondent. )

LUBA No. 89-044  
FINAL OPINION  
AND ORDER

Appeal from the City of Yachats.

Evan P. Boone, Newport, filed the petition for review and argued on behalf of petitioners. With him on the brief was Minor, Beeson & Boone, P.C.

No appearance by respondent City of Yachats.

James Allen Hackett, Newport, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Litchfield, Carstens & Hammersley.

KELLINGTON, Referee; SHERTON, Referee, participated in the decision.

REMANDED 08/23/89

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

1 Opinion by Kellington.

2 NATURE OF THE DECISION

3 Petitioners appeal a decision of the City of Yachats  
4 denying petitioners' application for a building permit.

5 FACTS

6 Petitioners applied for a building permit to construct a  
7 single family dwelling on property zoned Residential (R-1). A  
8 single family dwelling is an outright permitted use in the R-1  
9 zone. The proposed dwelling and subject site are described as  
10 follows:

11 "The proposed dwelling would be located on the  
12 northerly portion of the lot with a side yard ranging  
13 from 8 to 12 feet. \* \* \* Immediately to the west of  
14 Petitioner's lot is a way of travel which was created  
15 by the original plat of the Ocean Crest Subdivision in  
16 1953. The unnamed way of travel, was dedicated for  
17 street purposes in 1953, at the time of recordation of  
18 the Ocean [Crest] Subdivision. The way of travel is  
19 exactly 20 feet in width. \* \* \*" Petition for  
20 Review 3.

21 The planning commission approved the application.  
22 Intervenor-respondent (intervenor) appealed the planning  
23 commission's approval to the city council. The city council  
24 reversed the planning commission's decision and denied  
25 petitioners' building permit because it found the way of travel  
26 to the west of petitioners' lot "to be the equivalent of a  
street" and, therefore, concluded that "the setback requirement  
for the applicants' west yard should be 20 feet." Record 2.  
This appeal followed.

1        ASSIGNMENT OF ERROR

2            "Respondent City erred in overruling the Planning  
3            Commission's approval of the petitioner's building  
4            permit application and denying petitioner's  
5            application for building permit on the grounds that  
6            the west yard was a 'street side yard' requiring a  
7            20 foot setback."

8            The issue in this appeal is whether the yard of the  
9            proposed dwelling adjacent to the unnamed way of travel is a  
10           "street side yard" or a "side yard" under the Yachats Zoning and  
11           Land Use Ordinance (YZO). YZO 2.010.3.B provides:

12           "Yards. The minimum yard requirements in the R-1 zone  
13           shall be as follows:

14           "\*\*\*\*

15           "(2) Each side yard shall be a minimum of either five  
16           (5) feet or one (1) foot for each three (3) feet  
17           of building height, whichever is greater. Corner side yards shall not be used for clothes  
18           lines, incinerators, permanent storage of  
19           trailers, boats and recreational vehicles nor  
20           shall said side yard be used for the regular or  
21           constant parking of automobiles or other  
22           vehicles

23           "(3) The street side yard shall be a minimum of 20  
24           feet.

25           "\*\*\*\*".

26           The YZO does not have a specific definition for "street  
27           side yard." However, the YZO does have specific definitions for  
28           "street" and "yard, side". YZO 17.10 provides:

29           "Street - A way of travel more than twenty feet wide  
30           which has been dedicated or deeded to the public for  
31           public use." (Emphasis supplied.)

32           "Yard, side - An area adajacent to any side lot line  
33           the depth of which is the specified horizontal  
34           distance measured at right angles to the side lot line

and being parallel with said lot line."

YZO 17.10 also provides the following definitions:

"Alley - A minor way for secondary access to properties which abut other streets."

"Lot, Corner - A lot abutting on two (2) or more streets, other than an alley, at their intersection."

"Road - A public or private way created to provide vehicular access to one or more lots, parcels, areas, or tracts of land."

The city council found, and it is not disputed, that the unnamed way of travel is exactly 20 feet wide, and is "neither a street nor an alley as defined by the ordinance." Record 2. The city council determined that the way of travel is not a "street" within the meaning of the YZO because it is not more than twenty feet wide. Id. The city council determined the way of travel is not an "alley" because it "provides primary access to two tax lots that do not abut any other street." Record 1.

The city council concluded that because the YZO intends that an interior lot abut no secondary roadway other than an alley, petitioners' lot must be a "corner lot." The city council applied the "street side yard" setback standard to petitioners' property because "[t]he roadway in question is a way of travel, \* \* \* is platted as a street, and has been dedicated to the use of the public as a public way forever," and the "distinction between 'exactly' 20 feet and 'more than' 20 feet is an insignificant distinction." Id. The city council concluded "[b]ecause the Council finds the way of travel to be the equivalent of a street, \* \* \* the setback requirement for

1 the applicants' west side yard should be 20 feet." Id.

2 Intervenor argues the YZO uses the term "street"  
3 unspecifically, and that "street" actually includes all ways of  
4 travel. Intervenor finds support for this argument in the YZO  
5 definition of corner lot, which refers to streets "other than an  
6 alley." Intervenor argues this use of the term "street" creates  
7 ambiguity in the city's definition of "street" and, therefore,  
8 the city's legislative intent may be considered in interpreting  
9 the term "street." Intervenor suggests that this ambiguity may  
10 be resolved, in the absence of legislative history, by  
11 considering the conclusions of current city officials, citing  
12 Security State Bank v. Luebke, 303 Or 418, 737 P2d 586 (1987).

13 Intervenor also advances various planning policy reasons  
14 why the subject way of travel should be considered a street,  
15 notwithstanding that it does not fit the YZO definition of  
16 "street," including that "[t]he word street in street side yard  
17 setback merely differentiates between the interior side yard and  
18 the side yard abutting a roadway other than an alley."  
19 Intervenor's Brief 7. Intervenor argues that to construe the  
20 ordinance as a whole, giving effect to all of its parts, we must  
21 interpret the term "street" broader than its definition in the  
22 YZO. Intervenor maintains that applying a literal  
23 interpretation of the YZO definition of street is improper  
24 because it will produce an "unreasonable result," citing Pacific  
25 Power and Light v. Tax Commission, 249 Or 103, 437 P2d 473  
26 (1968). Intervenor's Brief 8.

1           Petitioners contend that the YZO provision regarding street  
2 side yard requirements is unambiguous and does not, by the terms  
3 of the YZO, apply here. Petitioners claim that, contrary to  
4 intervenor's argument, the YZO definition of corner lot contains  
5 no ambiguity with regard to the definition of "street," because  
6 under the YZO an alley can also be a street.<sup>1</sup> Accordingly,  
7 petitioners argue that the YZO definition of "street" is a  
8 specific term with unambiguous meaning. Petitioners maintain  
9 that because the YZO definition of "street" is unambiguous, the  
10 city's references to legislative intent are both unnecessary and  
11 inappropriate.<sup>2</sup>

12           Petitioners further contend that classification of their  
13 lot as a "corner lot" has no relevance to determining the  
14 applicable side yard setback requirement in the R1 zone.<sup>3</sup>  
15 Finally, petitioners point out that they should be able to rely  
16 upon the stated YZO requirements for yard setbacks in  
17 determining applicable set back requirements for their proposed  
18 dwelling. Petitioners maintain that the city's decision  
19 constitutes an impermissible attempt to amend the YZO definition

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21           <sup>1</sup>According to petitioners, under the YZO definitions of "street" and  
22 "alley," quoted supra, an "alley" can also be a "street" if it is dedicated  
or deeded to the public and is more than 20 feet wide.

23           <sup>2</sup>Petitioners also claim that the city's references to legislative intent  
24 are unsubstantiated assertions and cannot be relied upon even if reliance  
on legislative intent is otherwise appropriate.

25           <sup>3</sup>Petitioners point out that there is no reference to corner lots in the  
26 YZO provisions establishing side yard requirements in the R1 zone, other  
than a prohibition of certain activities on "corner side yards."

1 of "street" in a quasi-judicial proceeding. Petition for  
2 Review 13.

3 We must decide whether the requirement for "street side  
4 yards" of YZO 2.010.3.B(3) or the requirement for "side yards"  
5 of YZO 2.010.3.B(2) applies to petitioners' lot. Although the  
6 YZO does not contain a definition of "street side yard," it is  
7 undisputed that "street side yard" means a "side yard" adjacent  
8 to a "street," as those terms are used in the YZO. Accordingly,  
9 we must decide whether the YZO definition of "street" is  
10 ambiguous.

11 We might agree with the city's order and with intervenor  
12 that the YZO definition of "street" should not be interpreted  
13 and applied literally, if the YZO used the term "street" in  
14 contexts clearly demonstrating that a "street" can be something  
15 other than what the YZO definition describes. However, the  
16 example cited by intervenor, that the YZO refers to streets  
17 "other than an alley" in the definition of a corner lot, does  
18 not establish that the words and context of the YZO require  
19 application of a definition of "street" that is different than  
20 is specifically provided by the YZO. We see no prohibition, and  
21 we are cited to none, suggesting that an alley could not be  
22 dedicated or deeded to the public or be more than 20 feet  
23 wide.and, thus, also be considered a "street." Intervenor has  
24 not established the existence of an ambiguity in the definition  
25 of street, or elsewhere in the YZO. We conclude that the YZO

1 definition of the term "street" is not ambiguous.<sup>4</sup>

2 The city maintains specific distinctions between different  
3 ways of travel and applies particular requirements to certain of  
4 these ways of travel.<sup>5</sup> While it may be good planning policy to  
5 apply the YZO street side yard requirements as intervenor urges,  
6 the clear language of the YZO precludes their application to  
7 petitioners' lot because the side yard at issue does not adjoin  
8 a "street" as defined.<sup>6</sup>

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11 <sup>4</sup>Accordingly, examination of evidence of what the city actually may have  
12 intended in its definition of "street" is irrelevant. However, even if we  
13 were to find that the term "street" is ambiguous, our inquiry would not be  
14 aided by reference to perceptions of current city legislators any more than  
15 it would be influenced by affidavits from those who were lawmakers at the  
16 time of a challenged enactment. "[I]t is improper to 'try' an issue of  
17 statutory interpretation by taking evidence of legislative history or  
18 remembered intent of legislators either in person or by affidavit; recorded  
19 materials bearing on such an issue are properly presented in legal  
20 memoranda or argument, and the court is not limited to examining the  
21 material presented. \* \* \*". Payless Drug Store v. Brown, 300 Or 243, 247,  
22 708 P2d 1143 (1985). If there is no information which can be utilized to  
23 determine the intended meaning of challenged legislation, then the proper  
24 inquiry is "\* \* \* how the legislature would have intended its statute to be  
25 applied if it had considered the problem." Security State Bank v. Leubke,  
26 303 Or 418, 423, 737 P2d 586 (1987). See also McCoy v. Linn County, 90  
Or App 271, 275-276, 752 P2d 323 (1988).

19 <sup>5</sup>The YZO contains definitions for various ways of travel. These ways of  
20 travel include roads, streets, alleys, accesses, driveways, easements, and  
21 rights of way. Additionally, the YZO "street" provisions authorize the  
22 city to exact from a developer a "public access way" and they also  
23 distinguish between "private streets" and "public roads or streets."

21 For example, YZO 8.020 provides authorization for the creation of  
22 "private streets". This YZO section contains particular yard set back  
23 provisions which apply when a private street is created. This YZO section  
24 recognizes if a way of travel does not constitute a street (as in the case  
25 of a private street which is not dedicated or deeded to the public), street  
26 side yard requirements do not apply. This section establishes that where  
the city intends special treatment for yards abutting ways of travel which  
do not meet the definition of a street, such deviation from the otherwise  
applicable yard provisions is specifically provided for in the YZO.

26 <sup>6</sup>We note that the strict application of the ordinance is not an

1           The city chose in its ordinance, to apply a particular side  
2 yard standard to lots in the R1 zone, which standard is only  
3 deviated from in the case of a "street side yard." In Ash Creek  
4 Neighborhood Association v. City of Portland, 12 Or LUBA 230  
5 (1984), the city had a setback requirement of 16 feet, but only  
6 required a 10 foot setback from the applicant. We said in that  
7 case

8           "the city recognizes that allowance of a parking area  
9 immediately adjacent to the lot line could be  
10 undesirable. Its solution was to impose, on an ad hoc  
11 basis, a requirement that an appropriate side yard  
12 for the parking area would be 10 feet. There is no  
13 authority in the code for the city to impose, ad hoc,  
14 a lesser side yard dimension that [sic] stated in the  
15 code. It appears the city has legislated a particular  
16 side yard requirement for this particular conditional  
17 use. We find no authority for such an action."  
18 (Footnote omitted.) Id at 233.

19           Similarly, in this case, we conclude it was improper for the  
20 city to impose the 'street' side yard requirement. We find no  
21 provision of the YZO which makes the R1 "street side yard"  
22 setback requirement applicable to petitioners' lot.<sup>7</sup>

23           The assignment of error is sustained.

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24           application of the law which produces an unreasonable result. Regardless  
25 of whether we agree with the city's policy of only applying special side  
26 yard setbacks to side yards adjoining "streets," applying the definition of  
the term "street" literally maintains uniformity in the application of the  
side yard requirements, and resists the temptation to legislate into the  
city's ordinance unprincipled distinctions.

<sup>7</sup> Even if we agreed with intervenor and the city that petitioners' lot  
is a "corner lot," there is nothing in the YZO which makes "street side  
yard" setback requirements automatically applicable to corner lots.  
However, in any case, we note that whether a lot is a "corner lot" is  
dependent upon whether it abuts the intersection of two or more streets.

1           The city's decision is remanded.<sup>8</sup>

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<sup>8</sup>Petitioners asked that we reverse the city's decision and order the city to approve their building permit application pursuant to ORS 197.835(9). However, in order for this Board to have authority under ORS 197.835(9) to reverse the city's decision and order the city to approve petitioners' application for a building permit, petitioners must demonstrate as a matter of law that the "\* \* \* record supports only a decision that the permit complies with all applicable criteria." Smith v. Douglas County, \_\_\_ Or LUBA \_\_\_ (LUBA No 88-016, June 15, 1988), slip op 9, rev'd on other grounds, 93 Or App 503, aff'd 308 Or 191 (1988). In this case, the actual size of the applicable side yard setback requirement depends upon the height of the proposed building. YZO 2.010.3.B.(2). The petition for review identifies only that the proposed side yard setback is between 8 and 12 feet. Petition for Review 3. Petitioners have not cited us to evidence in the record which establishes the height of the proposed dwelling and, therefore, have not demonstrated as a matter of law that the side yard setback requirement of YZO 2.010.3.B(2) is met. Accordingly, petitioners' request that we reverse the city's decision and order the city to approve the building permit application is denied.