

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 GARFIELD deBARDELABEN and MARIAN)
5 deBARDELABEN,)
6)
7 Petitioners,)
8)
9 vs.)
10)
11 TILLAMOOK COUNTY,)
12)
13 Respondent,)
14)
15 and)
16)
17 DARRYL CARTER,)
18)
19 Intervenor-Respondent.)

LUBA No. 95-238
FINAL OPINION
AND ORDER

20
21
22 Appeal from Tillamook County.

23
24 Max M. Miller, Portland, filed the petition for review
25 and argued on behalf of petitioners. With him on the brief
26 was Tonkon, Torp, Galen, Marmaduke & Booth.

27
28 No appearance by respondent.

29
30 Timothy J. Sercombe, Portland, filed the response brief
31 and argued on behalf of intervenor-respondent. With him on
32 the brief was Preston Gates & Ellis.

33
34 LIVINGSTON, Chief Referee; GUSTAFSON, Referee,
35 participated in the decision.

36
37 REVERSED 05/02/96

38
39 You are entitled to judicial review of this Order.
40 Judicial review is governed by the provisions of ORS
41 197.850.

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision of the county board of
4 commissioners approving a five-foot height variance in the
5 county's Low Density Urban Residential (R-1) zone.¹

6 **MOTION TO INTERVENE**

7 Darryl Carter (intervenor) moves to intervene on the
8 side of the respondent in this appeal.² There is no
9 objection to the motion, and it is allowed.

10 **FACTS**

11 **A. Procedural History**

12 On February 24, 1995, intervenor applied for (1) a
13 conditional use permit to allow the construction of an
14 2,100-square-foot addition to the existing structure, 650
15 square feet of which would be used as an accessory
16 apartment; and (2) a variance to increase the allowed height
17 of the proposed addition from 17 to 22 feet.³ Record 16,

¹At the time of application, the property was zoned Neahkahnie Urban Residential (NK-30). However, by the date of the challenged decision, the NK-30 designation had been suspended by remand of the proceedings that legislatively challenged LUO amendments which provided for the NK-30 zone. See Churchill v. Tillamook County, 29 Or LUBA 68 (1995). The zone then reverted to R-1.

²Intervenor Darryl Carter and his wife jointly applied for the variance that is challenged in this appeal. In this opinion we refer to both the Carters jointly and Darryl Carter individually as "intervenor."

³The 17-foot limitation is stated in Tillamook County Land Use Ordinance (LUO) 5.140:

1 249.

2 On May 26, 1995, the county approved intervenor's
3 application administratively. Record 181. Petitioners
4 appealed the approval of the variance to the county planning
5 commission, which denied the appeal on July 31, 1995.
6 Record 129. Petitioners then appealed to the board of
7 county commissioners, which issued a decision on November 7,
8 1995, supported by extensive findings, approving
9 intervenor's variance request. Record 15-31.

10 This appeal followed.

11 **B. Characteristics of House, Property and**
12 **Neighborhood**

13 The subject property comprises 1.47 acres located in
14 the county's R-1 zone. Intervenor's house on the property
15 includes 1,600 square feet of living space, plus additional
16 loft space.⁴ The challenged decision explains:

17 "The existing structure was not built by the
18 applicants. It is situated along the ridge. Its
19 position on the lot is such that there is only one
20 practical option for adding a wing. That is along
21 the northwest portion of the lot in the area
22 sloping away from the ocean (and in the area

"Within the Neah-Kah-Nie community growth boundary, all buildings within five hundred (500) feet of the state beach zone line shall be limited in height to seventeen (17) feet, and to twenty-four (24) feet otherwise. When the five hundred (500) foot measurement line divides a lot, the entire lot is subject to the seventeen (17) foot limitation. Higher buildings may be permitted only according to the provisions of Article 8."

⁴The challenged decision finds the 500 square feet of loft space to be "of limited usefulness because of low pitched ceilings." Record 22.

1 needing a variance.) There is insufficient space
2 to expand the home by a wing of this size at any
3 other connection to the Carters' home, without
4 destroying the existing character, style and
5 orientation of the current structure."

6 "Thus, the location of the existing structure and
7 the lot topography dictate the need for a variance
8 in order to expand at the only practical location.
9 Nearly all property owners in the vicinity enjoy a
10 property right to expand their home away from the
11 ocean. For the Carters to enjoy this same
12 substantial property right, a variance is
13 necessary." Record 20-21.

14 With the proposed addition, the house will increase in
15 size to about 3,700 square feet, if the loft space is not
16 considered. Without a height variance, the expansion over
17 the same land would be limited to 792 square feet,
18 increasing the size of the house to about 2,900 square feet.
19 Record 21. A greater expansion would be possible without a
20 variance, but not in the precise location and configuration
21 intervenor desires.

22 Within one mile of the subject property, there are 27
23 houses (and three under construction) with 3,000 to 4,000
24 square feet of living area.⁵ There are also many smaller
25 houses, some of which are used by seasonal residents. Some
26 year-round residents have recently built houses
27 substantially larger than the houses that established the

⁵The challenged decision does not make a finding regarding how many houses within one mile have square footage more or less than the specified range. Thus there is no context in which to evaluate the finding regarding the 27 houses.

1 normal house size in prior years. The challenged decision
2 finds "the tendency is for newer homes to be substantially
3 larger than the existing beach homes as more year round
4 residents move into the area."⁶ Id.

5 **C. Intervenor's Personal Circumstances**

6 Intervenor's adult son is mentally and physically
7 disabled. The accessory apartment, which will occupy less
8 than half of the proposed addition, is intended to provide
9 housing for a care provider whose assistance is needed to
10 enable the son to live with his parents on the subject
11 property.⁷ Record 16. Because of the son's disability,
12 certain design configurations that are possible without a
13 height variance are much less desirable to intervenor than
14 the proposed design.

15 **FIRST ASSIGNMENT OF ERROR**

16 Petitioners challenge the county's determination that
17 the provisions of the LUO addressing variances are
18 permissive, and contend the county has interpreted those
19 provisions far too permissively. Petitioners challenge
20 specifically the county's interpretation of LUO 8.010.

21 **A. Approval Criteria**

22 Variances are governed by LUO Article VIII. LUO 8.010

⁶The challenged decision does not estimate the ratio of "beach homes" to "year round" homes.

⁷The challenged decision does not say the son will live in the proposed addition.

1 states:

2 "The purpose of a variance is to provide relief
3 when a strict application of the dimensional
4 requirements for lots or structures would cause an
5 undue or unnecessary hardship by rendering the
6 parcel incapable of reasonable economic use. No
7 variance shall be granted to allow a use of
8 property not authorized by this ordinance."

9 LUO 8.030 states the variance review criteria:

10 "A variance shall be granted * * * if the
11 applicant adequately demonstrates that the
12 proposed variance satisfies all of the following
13 criteria:

14 "(1) Circumstances attributable either to the
15 dimensional, topographic, or hazardous
16 characteristics of a legally existing lot, or
17 to the placement of structures thereupon,
18 would effectively preclude the enjoyment of a
19 substantial property right enjoyed by the
20 majority of landowners in the vicinity, if
21 all applicable standards were to be met.
22 Such circumstances may not be self-created.

23 "(2) A variance is necessary to accommodate a use
24 or accessory use on the parcel which can be
25 reasonably expected to occur within the zone
26 or vicinity.

27 "(3) The proposed variance will comply with the
28 purposes of relevant development standards as
29 enumerated in [LUO] 4.005 and will preserve
30 the right of adjoining property owners to use
31 and enjoy their land for legal purposes.

32 "(4) There are no reasonable alternatives
33 requiring either a lesser or no variance."
34 (Emphasis added.)

35 **B. Interpretation of LUO 8.010**

36 The challenged decision states:

37 "[W]e interpret the Land Use Ordinance to state
38 the decisional criteria solely in LUO § 8.030.

1 The purpose of variance relief stated in LUO §
2 8.010 may be relevant in construing the meaning of
3 the decisional criteria, but it does not state a
4 criterion to evaluate the variance itself. To
5 this end, we interpret 'reasonable economic use'
6 as used in LUO § 8.010 to mean the highest and
7 best use of property under its zoning and of an
8 intensity of use consistent with other similarly
9 situated properties." Record 19-20.

10 The county's interpretation of LUO § 8.030 must not
11 only be consistent with the express language of LUO § 8.030,
12 but also with the purpose stated in LUO § 8.010. Therefore,
13 we decide first whether the county's interpretation of the
14 LUO § 8.010 purpose statement satisfies the requirement of
15 ORS 197.829(1)(a) that it not be inconsistent with the
16 express language of the regulation itself. We must defer to
17 the county's interpretation unless it is "clearly wrong."
18 Reeves v. Yamhill County, 132 Or App 263, 269, 888 P2d 79
19 (1995); Goose Hollow Foothills League v. City of Portland,
20 117 Or App 211, 217, 843 P2d 992 (1992).

21 Prior to Clark v. Jackson County, 313 Or 508, 836 P2d
22 710 (1992), we and the appellate courts interpreted local
23 government variance standards that included the traditional
24 "unnecessary hardship" criterion to require that (1) the
25 subject property be virtually useless without the variance;
26 and (2) the hardship arise from conditions inherent in the
27 land which distinguish it from other land in the
28 neighborhood. Lovell v. Independence Planning Comm., 37 Or
29 App 3, 586 P2d 99 (1978); Erickson v. City of Portland, 9 Or
30 App 256, 496 P2d 726 (1972). We made a distinction between

1 such traditional standards and more permissive variance
2 standards adopted by some local governments, noting that no
3 Oregon appellate decision "has limited, on constitutional,
4 statutory or other grounds, the scope of discretion which
5 may be exercised by local governments in establishing
6 standards for the approval of variances." Sokol v. City of
7 Lake Oswego, 17 Or LUBA 429 (1989).

8 However, in view of the latitude in interpreting local
9 ordinances given to governing bodies by Clark and subsequent
10 cases interpreting Clark and ORS 197.829, it is unlikely the
11 Court of Appeals would reach the same result today as it did
12 in Erickson, supra, and its progeny.⁸ Traditional variance
13 standards may now be interpreted without reference to
14 traditional interpretations. Both "traditional" and

⁸ORS 197.829 provides:

"(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.

"* * * * *"

1 "permissive" variance provisions receive the same
2 deferential review.

3 The purpose of a variance is not achieved unless the
4 hardship renders "the parcel incapable of reasonable
5 economic use." The challenged decision interprets
6 "reasonable economic use" to mean "the highest and best use
7 of property under its zoning and of an intensity of use
8 consistent with other similarly situated properties."
9 "Highest and best use" is a term of art most often used in
10 the context of property appraisals; it is the use "to which
11 a property can most profitably be put." STC Submarine, Inc.
12 v. Dept. of Rev., 320 Or 589, 592, 890 P2d 1370 (1995). The
13 value of the property for appraisal purposes is based
14 on the highest and best use. Id.

15 The county's interpretation of "reasonable economic
16 use" encourages rather than discourages variances, and
17 undermines the integrity of the development standards
18 otherwise mandated by the LUO. If the purpose of variances
19 is to put every property to its highest and best use under
20 its zoning, the area limitations imposed by the LUO will be
21 completely subverted. The reference to "intensity of use
22 consistent with other similarly situated properties" is not
23 a limitation, because it is susceptible to numerous
24 interpretations, some of which could be used to justify a
25 variance in any situation.

26 The county's interpretation of LUO 8.010 is clearly

1 wrong. It is impermissible even under the highly
2 deferential standard of review imposed by ORS 197.829 and
3 Clark.

4 The first assignment of error is sustained.

5 **SECOND ASSIGNMENT OF ERROR**

6 Petitioners challenge the county's interpretation and
7 application of LUO 8.030(1). Intervenor contends as an
8 initial point that we cannot consider this assignment of
9 error because certain arguments made by petitioners in the
10 petition for review were not made below. ORS 197.197.835(3)
11 limits our review to issues, not arguments, raised by any
12 participant before the local hearings body. Since
13 intervenor does not contend petitioners did not raise the
14 issues addressed in this assignment of error, we consider
15 all of petitioners' arguments.

16 The challenged decision contains lengthy findings
17 supporting the conclusion that the proposed addition
18 satisfies LUO 8.030(1). The following passage is typical:

19 "[I]t is * * * a 'substantial property right' to
20 own a home with a larger amount of living space
21 than currently is the case with the Carter
22 residence. Certainly, the [immediately adjacent
23 neighbors] enjoy the right to build a home with
24 3,000 to 4,000 square feet of living area.
25 Indeed, the building permit application for their
26 proposed home shows dimensions of * * *." Record
27 21.

28 ORS 197.829(1)(b) states that any local government
29 interpretation of a land use regulation must be consistent
30 with the purpose for the land use regulation. Intervenor

1 argues that LUO 8.010 does not apply to variances granted
2 under LUO 8.030 because LUO 8.030(3) makes reference to the
3 "purposes of relevant development standards as enumerated in
4 [LUO] 4.005."⁹ We disagree. LUO 8.030(3) incorporates
5 additional standards found in LUO 4.005. It does not reject
6 the variance purpose statement in LUO 8.010.

7 We agree with petitioners that the county's

⁹LUO 4.005 states supplementary regulations that apply to residential and commercial zones. It states:

"PURPOSE: In all residential and commercial zones, the purpose of land use standards are [sic] the following:

- "(1) To ensure the availability of private open space.
- "(2) To ensure that adequate light and air are available to residential and commercial structures;
- "(3) To adequately separate structures for emergency access;
- "(4) To enhance privacy for occupants of residences;
- "(5) To ensure that all private land uses that can be reasonably expected to occur on private land can be entirely accommodated on private land, including but not limited to dwellings, shops, garages, driveways, parking, areas for maneuvering vehicles for safe access to common roads, alternative energy facilities, and private open spaces;
- "(6) To ensure that driver visibility on adjacent roads will not be obstructed;
- "(7) To ensure safe access to and from common roads;
- "(8) To ensure that pleasing views are neither unreasonably obstructed nor obtained[?];
- "(9) To separate potentially incompatible land uses;
- "(10) To ensure access to solar radiation for the purpose of alternative energy production."

1 interpretation and application of LUO 8.030(1) is
2 inconsistent with any colorable interpretation of the
3 purpose statement in LUO 8.010. Because intervenor already
4 has a house on the subject property, the parcel is not
5 rendered "incapable of reasonable use without a variance."

6 We also agree with petitioners that the county's
7 interpretation of "substantial property right" is
8 unacceptably expansive. Intervenor contends that in
9 Morrison v. City of Portland, 11 Or LUBA 246, rev'd on other
10 grounds, 70 Or App 437, 689 P2d 1027 (1984), we upheld a
11 permissive interpretation of "property right." Intervenor's
12 reliance on Morrison is misplaced. In Morrison many of the
13 homes near the property at issue predated the setback
14 requirements, resulting in an established pattern of non-
15 conforming development. Numerous variances, a form of
16 property right, had already been granted in the vicinity.
17 Intervenor's situation is not like that in Morrison.
18 Development that has not occurred and that will be governed
19 by the limitations of the applicable zone cannot be used to
20 justify a variance on the basis of "substantial property
21 rights." The county's interpretation is clearly wrong.

22 The second assignment of error is sustained.

23 **THIRD ASSIGNMENT OF ERROR**

24 Petitioners contend the proposed variance does not
25 satisfy LUO 8.030(2), which requires that a variance be
26 "necessary to accommodate a use or accessory use on the

1 parcel which can be reasonably expected to occur within the
2 zone or vicinity." The county interprets this criterion to
3 require "a showing that if the variance is allowed, the
4 expected use will be lawful and a predictable type of use
5 for this zoning." Record 21-22. The county concludes "the
6 variance is necessary to accommodate a use (expansion of
7 living space and fuller residential use) that occurs within
8 the R-1 zoned land in the area." Record 22.

9 As petitioners observe, expansion of living space is
10 not a "use." Intervenor presently uses the subject property
11 for a residence, and that use will not change after the
12 proposed expansion of living space. Intervenor's house can
13 be expanded without a variance. The variance is therefore
14 not necessary under any colorable interpretation of LUO
15 8.003(2).

16 The third assignment of error is sustained.

17 **FOURTH ASSIGNMENT OF ERROR**

18 Petitioners contend that (1) the county erred when it
19 considered the physical needs of the applicant in applying
20 LUO 8.030(4), which requires that "there are no reasonable
21 alternatives requiring either a lesser or no variance"; and
22 (2) even if the county could properly consider the physical
23 needs of the applicant, there are reasonable alternatives
24 that require a lesser or no variance.

25 The challenged decision interprets "'reasonableness' to
26 require consideration of the purpose of the proposed

1 structure or use and the needs of the applicants, together
2 with the costs or burdens caused by alternatives." Record
3 27. The decision contains additional findings showing that
4 it would be more desirable to intervenor to have a variance
5 as requested.

6 Neither the age nor the physical condition of a
7 property owner (or his family) can justify a variance. See
8 Erickson, supra, 9 Or App at 262. Consideration of such
9 personal circumstances, no matter how sympathetic, opens the
10 door to a rapid erosion of applicable land use standards.

11 The fourth assignment of error is sustained.

12 **FIFTH ASSIGNMENT OF ERROR**

13 Petitioners challenge the county's interpretation of
14 LUO 4.005(4), as applied by LUO 8.030(3). Petitioners
15 contend LUO 4.005(4) was applied differently to their 1987
16 application for a variance.

17 LUO 4.005(4) addresses privacy, and privacy in this
18 case depends both on a hedge which may have grown and
19 thickened between 1987 and the date of the challenged
20 decision; and on the relative positions of petitioners' and
21 intervenor's property. We find no basis for reversal or
22 remand in the simple fact that the county reached a
23 different result in the two cases.

24 The fifth assignment of error is denied.

25 Under OAR 661-10-071(1)(c) we must reverse when the
26 challenged decision violates a provision of applicable law

1 and is prohibited as a matter of law. Because there is no
2 colorable interpretation of LUO 8.010 and 8.030 that would
3 permit the requested variance, given the facts found by the
4 county, the county's decision is reversed.