

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 RONALD M. NORDLUND,
5 *Petitioner,*

6
7 vs.

8
9 CLACKAMAS COUNTY,
10 *Respondent.*

11 LUBA No. 2011-101

12
13 FINAL OPINION
14 AND ORDER

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17 Appeal from Clackamas County.

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19 William R. Cloran, Portland, filed the petition for review and argued on behalf of
20 petitioner. With him on the brief was Yazbeck, Cloran and Bowser PC.

21
22 Rhett Tatum, Assistant County Counsel, Oregon City, filed the response brief and
23 argued on behalf of respondent.

24
25 RYAN, Board Chair; BASSHAM, Board Member; HOLSTUN, Board Member,
26 participated in the decision.

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28 AFFIRMED 02/21/2012

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

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NATURE OF THE DECISION

Petitioner appeals a decision by the county denying his application for a variance to applicable building setback standards for a partially constructed addition to an existing house.

FACTS

Petitioner owns a .23 acre parcel zoned Rural Residential Farm Forest-5 (RRFF-5) that is located in the Paradise Park subdivision. The subject property is comprised of one tax lot (Tax Lot 4200) that is made up of two Paradise Park subdivision lots and is improved with an existing dwelling that was built in 1973. Petitioner applied for and received a floodplain review permit and building permits to, as relevant here, remodel and expand the existing dwelling on the property by adding 18 foot extensions or wings to each side of the existing foundation and replacing a deck in the rear of the dwelling. The existing foundation that is being added onto is not exactly parallel with the front, rear and side property lines. According to petitioner, that angled placement of the existing foundation was not known when the wing additions and deck were designed and construction commenced on those additions.¹ Had the existing foundation been parallel with the front, rear and side property lines, as petitioner assumed, the expanded dwelling would have come close to but would not have intruded into the front and side setbacks. As a result of the skewed alignment, the expanded dwelling intrudes slightly into the front and side setbacks. After petitioner started construction of the additions, the setback encroachment was discovered and the county subsequently issued a stop work order on the building permit.

¹ The minimum side yard setback in the RRFF-5 zone is 10 feet, and the minimum front yard setback is 30 feet. The southeast corner of the addition to the dwelling encroaches by approximately 2 feet into the side yard setback and the southwest corner by approximately .5 feet into the side yard setback. The northeast corner encroaches by approximately 3 feet into the front yard setback. Record 115.

1 Petitioner applied for a variance to the side, front and rear yard setback standards and
2 the planning director denied the application. Petitioner appealed the denial to the hearings
3 officer, who denied the variances. This appeal followed.

4 **ASSIGNMENTS OF ERROR**

5 **A. Applicable Law and the County’s Decision**

6 Clackamas County Zoning and Development Ordinance (ZDO) 1205.02 sets out the
7 approval criteria for a variance, and provides in relevant part as follows:

8 “The Planning Director may approve a variance from a requirement or
9 standard of this Ordinance, pursuant to Subsection 1305.02, if the applicant
10 provides evidence substantiating the following:

11 “A. Compliance with the applicable requirement or standard of this
12 Ordinance would create a *hardship due to* one or more of the following
13 conditions:

14 “1. *The physical characteristics of the land, improvements, or uses*
15 *are not typical of the area.* When the requested variance is
16 needed to correct an existing violation, that violation shall not
17 be considered as a condition ‘not typical of the area.’”
18 (emphases added.)

19 In *Kelley v. Clackamas County*, 158 Or App 159, 162-163, 973 P2d 916 (1999), a case that
20 also involved ZDO 1205.02(A) , the Court held that ZDO 1205.02(A) “allows the granting of
21 a variance only if one of the four conditions described in its numbered paragraphs is present
22 *and results* in a ‘hardship.’” (italics in original). As applied to the circumstances of this
23 appeal, in order for petitioner to comply with ZDO 1205.02(A)(1), petitioner is required to
24 demonstrate that there are “physical characteristics of the land, improvements, or uses” that
25 are “not typical of the area” and that those characteristics have created a hardship for
26 petitioner. We discuss each of these requirements in more detail below.

27 **B. “Physical Characteristics of the Improvements”**

28 During the proceedings below, petitioner argued that the consequences to him that
29 would result from mandating compliance with the setbacks, consequences which we discuss

1 below, are “due to” a “physical characteristic of the * * * improvements * * * not typical of
2 the area.” Namely, he argued that the slight angle of the existing foundation was not known
3 when the 18-foot wing additions and replacement deck were designed or when construction
4 of them was commenced, and that angled existing foundation causes the 18-foot wing
5 additions and the deck to fall slightly within the setbacks.

6 The planning director rejected those arguments. He reasoned that the angled location
7 of the *existing* foundation might be a “physical characteristic of the * * * improvements,” but
8 that even if that were the case, any consequences to petitioner from having to comply with the
9 setbacks are not “due to” the existing angled foundation location, but rather are due to
10 petitioner’s addition of the 18 foot wing additions and the deck to the existing foundation so
11 that they would extend to or very close to the setbacks, without confirming that the existing
12 foundation is parallel to the front, rear and side property lines. The hearings officer agreed
13 with that conclusion:

14 “There does not appear to be a real dispute over whether the original
15 foundation should be considered part of the subject property. The
16 disagreement is over whether that old foundation necessarily dictates the size
17 and configuration of the remodeled home. At the * * * hearing, the hearings
18 officer asked [a planning staff member] whether the original foundation could
19 have been used as part of a structure that complied with the setbacks. He
20 answered that it could have been. This conclusion is not disputed by
21 [petitioner.]

22 “ * * * * *

23 “[Petitioner’s] own written testimony show[s] that violation of the setback
24 standards, and the concomitant desire for a variance, are related to the new
25 parts of the foundation which extend out from the original foundation. Those
26 wings are new construction. If the skew of the old foundation had been
27 known prior to the time that the new parts of the slab were poured, [petitioner]
28 could have scaled the size of the additions to meet the setback requirements.

29 “* * * * *

30 “As to ZDO 1205.02(A), I find that the appellant has failed to articulate a
31 hardship due to the specific conditions set forth in ZDO 1205.02(A)(1 & 2).
32 The appellant has also failed to show that the physical characteristics of the

1 subject property, improvements, or uses are not typical of the area under ZDO
2 1205.02(A)(1).” Record 8-10.

3 In a portion of his first assignment of error, we understand petitioner to argue that the
4 hearings officer misconstrued applicable law in concluding that the angled location of the
5 existing foundation is not a “physical characteristic[] of the existing improvements” that
6 causes the consequences that petitioner claims are hardships. Petition for Review 11, 14. We
7 understand petitioner to argue that the angled location of the existing foundation *requires* the
8 wing additions and deck to encroach within the setbacks.

9 The county responds, and we agree, that the hearings officer correctly concluded that
10 petitioner had failed to demonstrate that the consequences to him were “due to” a “physical
11 characteristic of the * * * improvements * * *.” Petitioner conceded during the proceedings
12 below that he could build smaller versions of the wing additions and the deck in compliance
13 with the setback requirements and still use the existing angled foundation. Therefore, the
14 hearings officer did not err in concluding that the consequences to petitioner are due to
15 petitioner’s desire to build the wing additions and deck in the location where they have been
16 designed and partially constructed, and are not due to the slight angle of the existing
17 foundation.

18 **C. “Physical Characteristics of the Land”**

19 During the proceedings below, petitioner also argued that the small size of the subject
20 property (.23 acres) in a zone in which the minimum lot size is five acres is a “physical
21 characteristic of the land * * * not typical of the area” that causes the consequences that he
22 claims are hardships. The planning director rejected petitioner’s argument that the small lot
23 size is a “physical characteristic of the land * * * not typical of the area” because he
24 concluded that the size of Tax Lot 4200 is typical of other combined lot development sites in
25 the Paradise Park subdivision and that the topography in the subdivision is similar to the
26 subject property. The hearings officer agreed with those conclusions:

1 “The hearings officer agrees with the Planning Director that the most relevant
2 area for comparison is an area where the lots are similar in size and
3 configuration to the subject property. The record demonstrates that Paradise
4 Park is largely composed of lots identical in size to the subject property. The
5 record also shows that topography in Paradise Park is fairly similar to that of
6 the subject property. Most importantly, the record shows that many of the lots
7 in Paradise Park contain dwellings that comply with the setbacks required by
8 [the RRF-5 zone setback requirements.] * * * The record shows that
9 [petitioner’s] property is typical of those in the area.” Record 7.

10 In a portion of his first assignment of error, petitioner argues that the hearings
11 officer’s finding that petitioner’s two lots are similar in size and configuration to others in
12 Paradise Park and therefore are “typical of the area” is not supported by substantial evidence
13 in the record. Petitioner points to a current tax lot map in the record that petitioner argues
14 demonstrates that lots in Paradise Park are not uniform in size and configuration due to
15 consolidation of multiple lots over time. The county responds that the same tax lot map and
16 planning staff testimony provide substantial evidence from which the hearings officer could
17 reasonably conclude that Tax Lot 4200 is typical of other developed sites in Paradise Park
18 subdivision. Record 120, 121, 123.

19 Substantial evidence is evidence a reasonable person would rely on in making a
20 decision. In reviewing the evidence, LUBA may not substitute its judgment for that of the
21 local decision maker. Rather, LUBA must consider all the evidence to which it is directed,
22 and determine whether based on that evidence, a reasonable local decision maker could reach
23 the decision that it did. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262
24 (1988). We agree with the county that the record includes substantial evidence from which
25 the hearings officer could determine that the size of Tax Lot 4200 is “typical” of other
26 development sites in the Paradise Park subdivision.

27 In a portion of his first assignment of error, petitioner also argues that the small size
28 of the subject property is not typical of the RRF-5 zone because the RRF-5 zone generally
29 requires a five-acre minimum lot size for development. Petition for Review 12. The
30 hearings officer rejected the argument, concluding first that the argument amounted to a

1 challenge to the underlying zoning of the property, and second that even if the relevant area
2 for comparison is the RRFF-5 zone, petitioner had not established that the property's size
3 within that zone "causes" the negative consequences that he claims are hardships. The
4 hearings officer's did not err in so concluding. ZDO 1205.02(A)(1) requires a comparison
5 between the subject property and other property "in the area," not all property that shares the
6 same zoning. The county found that the relevant area is the Paradise Park subdivision, which
7 the record shows consists of combined lot development sites similar in size to petitioner's
8 Tax Lot 4200. Further, as with the angled orientation of the foundation, petitioner has not
9 demonstrated that the size of his property causes the alleged hardship or prevents him from
10 constructing a dwelling similar to those existing on surrounding properties.

11 Finally, in a portion of his second assignment of error, we understand petitioner to
12 argue that the hearings officer misconstrued applicable law when he failed to rely on past
13 county decisions that found that small lot sizes in Paradise Park were "physical
14 characteristics of the land * * * not typical of the area" in approving variances for Paradise
15 Park lots. Petition for Review 15. The county responds that nothing in the ZDO requires the
16 hearings officer to give precedential effect to past decisions by county planning staff,
17 particularly when those staff decisions do not contain more than cursory explanations of the
18 facts and analysis of the applicable law. We agree with the county.

19 **D. "Hardship"**

20 During the proceedings below, petitioner described the consequences that would
21 result from mandating compliance with the setbacks as "* * * the cost to redesign the
22 structure, loss of the utility of the game room and deck on the south extension of the house
23 and the loss of aesthetic balance in the design as seen from the street." Record 115. In the
24 petition for review, petitioner additionally argues that compliance with the setback
25 requirements would be difficult and costly, and that it would be damaging to move the

1 existing foundation and columns to be perpendicular to the property line in order to build the
2 addition as designed. Petition for Review 11.

3 In portions of the first and second assignments of error, we understand petitioner to
4 argue that the hearings officer misconstrued applicable law when he determined that no
5 hardship exists, and also to argue in the alternative that the hearings officer found that a
6 hardship exists and that having so found, the hearings officer was required to approve the
7 variance. Petition for Review 10, 14. Because we deny the portions of the first and second
8 assignments of error that argue that the county erred in determining that none of the
9 circumstances outlined in ZDO 1205.02(A)(1) are present, and under *Kelley* a claimed
10 hardship must be “due to” one of those circumstances, we need not determine whether the
11 county properly concluded that the consequences to petitioner of complying with the setbacks
12 do not amount to a “hardship.”

13 Finally, in a portion of his second assignment of error, petitioner points to a portion of
14 the hearings officer’s decision that refers to two other decisions that are not included in the
15 record in which the hearings officer denied a requested variance. Record 4-5. Petitioner
16 argues that the hearings officer committed a procedural error that prejudiced his substantial
17 rights by referencing those other decisions because they are not included in the record of this
18 variance proceeding. We understand petitioner to argue that the decisions constitute evidence
19 and that he is entitled to respond to and rebut that evidence.

20 The portion of the decision in which the hearings officer refers to and quotes other
21 county decisions that denied variance applications is the portion of the decision that contains
22 his legal analysis of how the law of variances applies in the context of petitioner’s application
23 that attempts to remedy existing violations of applicable standards. In the decision, the
24 hearings officer takes the position that “[a]ttempting to use the County’s variance procedures
25 to remedy existing code violations is very difficult. * * * [T]he variance process is not a
26 waiver process where minor transgressions of the ZDO can be ‘fixed’ simply because the

1 violations are indeed minor.” Record 4. The hearings officer then refers to and quotes
2 portions of other decisions that denied variances in similar circumstances in support of that
3 legal analysis. Nothing in the decision suggests that the hearings officer relied on those other
4 decisions as “evidence” to support his conclusion that petitioner has not demonstrated that
5 ZDO 1205.02(A)(1) and (2) are met, as opposed to legal reasoning based on consideration of
6 prior cases decided under the same law. In these circumstances, we do not think that
7 referring to and quoting the legal conclusions from those other decisions amounts to
8 improper reliance on evidence not in the record. Accordingly, we reject petitioner’s
9 argument that the hearings officer committed a procedural error that prejudiced petitioner’s
10 substantial rights.

11 The assignments of error are denied.

12 The county’s decision is affirmed.