

JUN 3 12 43 PM '87

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

3	BETTY CHOU,)	
4	Petitioner,)	
5	vs.)	FINAL OPINION
6	CITY OF KEIZER,)	AND ORDER
7	Respondent,)	LUBA No. 87-017
8	and)	
9	TOM GWYNN,)	
10	Respondent-)	
11	Intervenor.)	

12 Appeal from the City of Keizer.

13 Betty Chou, Keizer, filed the petition for review and
14 argued on her own behalf.

15 Tom Gwynn, Keizer, filed a response brief and argued on his
16 own behalf.

17 No appearance by the City of Keizer.

18 BAGG, Referee; DuBAY, Chief Referee; participated in the
19 decision.

20 REVERSED 06/03/87

21 You are entitled to judicial review of this Order.
22 Judicial review is governed by the provisions of ORS 197.850.
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1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioner appeals a City of Keizer decision granting a
4 variance to Thomas and Beth Gwynn reducing the minimum
5 side-yard required in the RS (Residential) Zone from 5 feet to
6 0 feet on the east side of the Gwynn property. Petitioner
7 requests we reverse the decision.

8 FACTS

9 On September 21, 1986, the applicant constructed a
10 fiberglass shed which attaches to his house and to a fence
11 along the east side of his residence. The fence is on or near
12 the line adjoining petitioner's property.

13 In late September, the City of Keizer notified the
14 applicant his structure was in violation of setback
15 requirements in the city's zoning regulations, and the
16 applicants were advised to either remove the shed or apply for
17 a variance. On October 14, 1986, the applicants applied for a
18 variance. The hearing was held on November 18, 1986, and on
19 December 11, 1986, a written decision was issued by the city's
20 hearings officer granting the variance.

21 Petitioner appealed the variance to the Keizer City
22 Council. On January 19, 1987, the city council considered the
23 matter. A written decision upholding the variance was issued
24 on February 9, 1987. This appeal followed.

25 FIRST ASSIGNMENT OF ERROR

26 "Respondent City of Keizer erred in allowing a

1 variance which does not meet 'the land use criteria'
2 and, therefore, is in violation of the applicable
3 zoning regulations."

4 Petitioner argues the applicant failed to show any hardship
5 or practical difficulty as required under the variance code.
6 Petitioner claims the city justified issuance of the variance
7 on the ground there is "extreme animosity between these two
8 neighbors." Petitioner argues this is insufficient reason to
9 grant a variance. Petitioner argues that in order to make the
10 requisite finding of hardship, the hardship must be found to
11 relate to physical conditions of the land, not personal
12 problems of neighbors. The difficulties between the neighbors
13 is not a condition peculiar to the land, nor do they arise out
14 of conditions inherent in the land.

15 Included in the city's decision is a statement of criteria
16 and standards explaining that the city's new zoning code,
17 including variance procedures, went into effect January 20,
18 1987. The order states

19 "[t]he council has expressed its intention that
20 matters who's applications were completed pending on
21 January 19, 1987 should be decided according to the
22 standards and criteria prior to that date.

23 "Therefore, the standards and criteria relevant to
24 this application are found in the Marion County Zone
25 Code and the Salem Area Comprehensive Plan. Of
26 particular important [sic] in this application
27 proceeding are the standards and criteria contained in
28 Marion County Zoning Ordinance, Chapter 131.060 and
29 Chapter 122.020."¹

30 The parties do not argue that this determination is in error.
31 Therefore, we apply the variance standards found in the Marion

1 County Zoning Ordinance as cited.

2 Marion County Zoning Ordinance (MCZO, Sec. 122.020)
3 requires, in part, that the applicant show

4 "(a) That there are unnecessary, unreasonable hardship
5 or practical difficulties which can be relieved
6 only by modifying the literal requirements of the
7 ordinance."

8 The order states there is animosity between the neighbors.
9 Construction of the offending structure "appears to be an
10 attempt to mitigate the situation." Record at 16. The city
11 found construction of the shed will help separate the two
12 parties. The city's order states

13 "[t]he applicants have met the burden of proving that
14 only by modifying the literal requirements of the
15 setback ordinance can the structure be built to house
16 firewood, cover garbage cans and provide some physical
17 separation between these two neighbors." Record Id.

18 A variance is not personal to the property owner, but goes
19 with the land. The personal preference of the owner is not a
20 subject for a variance under the language in this code. 3 R
21 Anderson, American Law of Zoning, Sec. 20.30 (3d ed, 1986).
22 Under the standard used by the city, the applicant must show
23 that the condition is one arising out of the property itself,
24 not out of something personal to the owners. Lowell v.
25 Independence Planning Commission, 27 Or App 3, 586 P2d 99
26 (1978); Faye Wright Neighborhood Planning Council v. City of
Salem, 3 Or LUBA 17 (1981).

The fact that the applicants and the petitioner have argued
over the course of several years does not create an unnecessary

1 or unreasonable hardship or practical difficulty as required in
2 the ordinance.

3 The first assignment of error is sustained.

4 SECOND ASSIGNMENT OF ERROR

5 "Respondent City of Keizer granting the side yard
6 variance has abused City's authority and therefore,
7 City is in violation of ORS 215.130(a) and City
8 ordinance 83-002."

9 Petitioner's argument is confusing. Petitioner apparently
10 argues that a letter to her from the Marion County legal
11 counsel, allegedly explaining that a variance should not be
12 granted, was not heeded.² Petitioner also complains that the
13 hearings officer's decision was wrong because it followed an
14 erroneous staff report.

15 We find no error as alleged. Whether or not particular
16 public officials may personally approve or disapprove of a
17 proposed action, and whether or not a local government staff
18 report recommends a decision which later may be found erroneous
19 is not grounds for reversal or remand. Our inquiry is to the
20 adequacy of the city's order, not to individually held views.
21 See ORS 197.830. Citadel Corporation v. Tillamook County, 9 Or
22 LUBA 61 (1983).

23 The second assignment of error is denied.

24 THIRD ASSIGNMENT OF ERROR

25 "Respondent City of Keizer erred in allowing personal
26 problems not relating to the land use issue to be
presented by the applicant and other individuals at
two different public hearings (November 18, 1986, and
January 19, 1987) and, therefore, is in violation of
Keizer City Public Hearings Procedures."

1 We understand this assignment of error to simply restate
2 the complaint made in the first assignment of error, and we see
3 no reason to discuss it further. We add that the city's
4 allowance of a broad range of comments is not error. The city
5 is entitled to control its procedure, and a relatively open
6 hearing process is less likely to prejudice the substantial
7 rights of individuals than one severely restricted. In this
8 case, the city's acceptance of evidence on the relations
9 between the parties was relevant to the inquiry whether a
10 variance was an appropriate remedy.

11 The third assignment of error is denied.

12 FOURTH ASSIGNMENT OF ERROR

13 "Respondent City of Keizer is in violation of the
14 Fourteenth Amendment of the U.S. Constitution in
15 granting the side yard variance to the applicants."

16 Petitioner argues the Oregon and U.S. Constitutions require
17 equal protection of the laws. Petitioner claims that the
18 city's decision shows preferential treatment to the applicants,
19 and the city therefore denied petitioner equal protection.

20 The fact the city errs in granting a variance does not mean
21 the city violated the Oregon or the U.S. Constitutions.
22 Nothing in this record suggests that the approval of the
23 variance was based upon anything other than the city's
24 understanding of the applicable ordinance requirements.
25 Petitioner's aversion to the city's decision is understandable,
26 but she has not developed a claim showing constitutional

1 violation or supported her argument with any facts suggesting
2 the city's decision was impermissible in substance or procedure
3 under the Oregon and U.S. Constitutions.

4 The fourth assignment of error is denied.

5 FIFTH ASSIGNMENT OF ERROR

6 "Respondent City of Keizer accepted false personal
7 information provided by the applicants. Respondent
8 City of Keizer used this false personal information
9 not relating to the land use criteria as a basis for
10 granting the variance without verifying the accuracy
11 of the information. This is not in compliance with
12 applicable standards as required by ORS 227.173."

13 Petitioner's argument is as follows:

14 "City Council has accepted the applicants' false
15 personal information as the basis for granting the
16 variance. The applicant said he built the mailbox for
17 the petitioner. The evidence has proved that was not
18 true (R 143-144). The litter issue brought up by the
19 applicants was another example of falsification and an
20 inflammatory story used by the applicants to defame
21 the petitioner. Mr. Cannon's letter dated 1/6/87
22 (R-160) explained the the [sic] applicants' false
23 accusation had no standing in this variance case.

24 "City Council's decision is based upon the above
25 information, therefore, the decision is not in
26 compliance with applicable standards as required by
ORS 227.173."

We understand this argument also to be a restatement of the
argument made under the first assignment of error, that the
city has failed to address the applicable criterion. We will
not repeat our holding here. To the extent the petitioner is
suggesting the decision is not supported by substantial
evidence, we deny petitioner's claim. Petitioner is asking us
here to reweigh the evidence and reach a conclusion different
from that reached by the city. Our function is not to reweigh

1 the evidence. LaPine Pumice Co. v. Deschutes Co., 13 Or LUBA
2 242 (1985); aff'd 75 Or App 691, 707 P2d 1263 (1986).

3 The fifth assignment of error is denied.

4 SIXTH ASSIGNMENT OF ERROR

5 "Respondent City of Keizer erred in stating, 'No
6 objections have been raised...' under Section 5
7 'Objections' of the City Order (R-6).'"

8 Petitioner is apparently referring to a finding that "[n]o
9 objections have been raised on alleged conflicts of interest."
10 Record at 6. The issue of whether or not petitioner made an
11 objection to alleged conflicts of interest was not relied upon
12 by the city in its approval of the variance application.

13 Further, petitioner makes no allegation that a member of the
14 city council was subject to any conflict of interest resulting
15 in a bias nor does she explain how her substantial rights were
16 violated by this alleged omission. See ORS 197.835(8)(a)(B).

17 This assignment of error is denied.

18 The city's grant of a variance is reversed.
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FOOTNOTES

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1
The city used the Marion County Zoning Ordinance to control land uses prior to adoption of its own zoning code on January 20, 1987.

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The letter does not express a view on the merits of the variance request but is about an objection petitioner made to information placed in the staff report. Record 160.