

LAND USE
BOARD OF APPEALS

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

OCT 12 6 15 PM '88

JOSEPH L. LOVEJOY,)
)
Petitioner,)
)
vs.) LUBA No. 87-120
)
CITY OF DEPOE BAY) FINAL OPINION
) AND ORDER
Respondent.)

Appeal from City of Depoe Bay.

Dennis L. Bartoldus, Newport, filed the petition for review and argued on behalf of petitioner.

Evan P. Boone, Newport, filed the respondent's brief and argued on behalf of respondent. With him on the brief was Minor, Beeson & Boone, P.C.

SHERTON, Referee; BAGG, Chief Referee; and HOLSTUN, Referee, participated in the decision.

AFFIRMED 10/12/88

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

1 Opinion by Sherton.

2 NATURE OF THE DECISION

3 Petitioner appeals an order of the Depoe Bay City Council
4 (council) denying petitioner's application for variances to
5 reduce a front yard setback and a side yard setback.

6 FACTS

7 Petitioner owns an undeveloped triangular shaped 2300
8 square foot lot (Lot 9), designated Residential in the City of
9 Depoe Bay (city) Comprehensive Plan and zoned R-4. The R-4
10 zone has a 5000 square foot minimum lot size for a single
11 family dwelling.¹ In addition, the R-4 zone imposes a
12 building height limit of 35 feet, a front yard setback
13 requirement of 20 feet, a street side yard setback of 10 feet
14 and a side yard setback of either 5 feet or 1 foot for each 3
15 feet of building height, whichever is greater.

16 Lot 9 is surrounded by other property designated and zoned
17 for residential use, much of which has been developed with
18 single family residences. Lot 9 is adjoined to the west
19 (front) by Alsea Avenue, to the southeast by Sunset Street and
20 to the north by another undeveloped lot (Lot 10).

21 Petitioner proposes to construct on Lot 9 a three story
22 single family dwelling, 31.5 feet high and containing 1000 to
23 1100 square feet of living space. Petitioner's proposed
24 building would require a variance to the front yard setback
25 from 20 feet to 14.6 feet, and a variance to the side yard
26 setback from 10.5 feet to 5 feet.²

1 Petitioner's application for variances to the front yard
2 and side yard setback requirements was denied by the Depoe Bay
3 Planning Commission. Petitioner appealed that denial to the
4 city council, which conducted a de novo review and denied the
5 variances by an order dated December 21, 1987. This appeal
6 followed.

7 FIRST ASSIGNMENT OF ERROR

8 "The City's findings and conclusions denying the
9 variance requested by Mr. Lovejoy are not supported by
10 substantial evidence in the record. The record in fact
11 demonstrates that each criteria [sic] to grant a
12 variance was met."

13 Section 8.020 of the DBZO lists five criteria and provides
14 that a variance may be granted only in the event that all of
15 these criteria are satisfied.³ Petitioner argues that "the
16 applicant presented substantial evidence to support each one of
17 these criteria" and describes the facts which he believes
18 constitute such substantial evidence. Petition for Review
19 6-10. Petitioner also argues that the findings and conclusions
20 on which the city based its denial are not supported by the
21 record; and, therefore, the city's decision is not supported by
22 substantial evidence.

23 LUBA has stated on numerous occasions that challenges to
24 denials of discretionary land use approvals on evidentiary
25 grounds must overcome a substantial legal burden. See e.g.,
26 Smith v. Douglas County, ____ Or LUBA ____ (LUBA No. 88-016, June
27 15, 1988), slip op. 12; McCoy v. Marion County, ____ Or LUBA ____
28 (LUBA No. 87-063, December 15, 1987) slip op. 10; Chemeketa

1 Industries Corp. v. City of Salem, 14 Or LUBA 159, 163-164
2 (1985); Weyerhauser v. Lane County, 7 Or LUBA 42, 46 (1982).

3 A substantial evidence challenge to a denial of development
4 approval will be successful under ORS 197.835(8)(a)(C)⁴ only
5 if we can say that the applicant for development approval
6 sustained, as a matter of law, his burden of proof to
7 demonstrate compliance with applicable criteria. McCoy v.
8 Marion County, supra; Jurgenson v. Union County Court, 42 Or
9 App 505, 510, 600 P2d 1241 (1979). In Weyerhauser v. Lane
10 County, supra, we said the following with regard to the burden
11 borne by a petitioner making such an evidentiary challenge:

12 " * * * In other words, the proponent's evidence must
13 be so strong and so convincing that the [local
14 government's] findings of fact, reasons and
15 conclusions for denying the requested change cannot be
16 upheld. There need not be evidence in the record
17 supporting the [local government's] findings so long
18 as there is some reasonable basis by which the [local
19 government] could find the proponent's evidence was
20 not convincing. Jurgenson, supra. It is not enough
21 for the proponent to introduce evidence supporting
22 affirmative findings of fact and conclusions on all
23 applicable legal criteria. The evidence must be such
24 that a reasonable trier of fact could only say the
25 evidence should be believed."

26 With this scope of review in mind, we will consider
petitioner's evidentiary challenges to each of the two bases
relied upon by the city in its order denying the requested
variances.⁵

24 A. Material Detriment to Property in the Vicinity

25 DBZO 8.020(3), in relevant part, establishes the following
26 criterion for approving a variance:

1 "The variance would not be materially detrimental to
2 * * * property in the same zone or vicinity in which
the property is located, * * * "

3 One of the two bases for the city's denial of the requested
4 variances was that the proposed side yard variance would be
5 materially detrimental to property in the vicinity,
6 particularly Lot 10, adjacent to the north. The relevant city
7 findings and conclusions state:

8 "G. Although the property to the north is currently
9 vacant, the adjacent property could be developed
10 in the future. It is desirable to provide as
11 much separation between adjacent structures as
possible, to lessen the impact an existing
structure could have upon the placement and
design of a future structure on the adjacent
property."

12 " * * * * *

13 "K. The Council finds that it has not been convinced
14 that another configuration of the residence,
15 preserving approximately 1000 square feet of
16 living space, would not be possible. The
17 applicant has presented only plans for a three
18 story residence, presumably for the purposes of
19 maintaining as much space as possible from the
20 residence to Alsea St., at the detriment to the
21 side yard setback and to the property to the
north. A two story residence would impose less
intrusion and detriment for the adjoining
property, and it may be possible for the applicant
to redesign the residence as a two story
residence, preserve the side yard setback area,
and encroach into the front yard setback area no
more than other houses in the surrounding area.

22 "L. The Council finds that, in weighing the detriment
23 to the adjoining property or to the front yard
24 setback area, the side yard setback requirement
25 should be preserved to a greater degree than the
26 front yard setback requirements. The applicant
has failed to show how the detriment to the
adjoining property could be minimized by further
encroachment into the front yard setback area.
* * *

1 " * * * * *

2 "N. The City Council finds and concludes that one of
3 the purposes for the side yard setback
4 requirement to increase as the height of the
5 building increases, is to prevent adverse
6 aesthetic impact on the neighboring property.
7 The City Council concludes that the granting of
the requested side yard variance would be
materially detrimental to property in the
vicinity in which the property is located, and
would therefore not comply with Section 8.020(2)
[sic 8.020(3)]." Record 6-7.

8 Petitioner argues (1) there is no evidence in the record
9 which addresses the need for a side yard setback, and (2) the
10 opponents of the variances did not argue that the proposed
11 reduced side yard setback was not adequate. Petitioner argues
12 that planner Emmett Dobey presented expert testimony that the
13 variance criteria were met by petitioner's proposed
14 development. Petitioner also argues architect Ed Kontz
15 presented expert testimony that, after reviewing the site, he
16 judged the side yard setback to be less critical than the front
17 yard and street side yard setbacks. Petitioner claims the
18 expert testimony by these two witnesses was uncontroverted.

19 The city argues, to the contrary, that petitioner cites no
20 evidence in the record as to why the side yard setback should
21 be considered less critical than the front yard setback. The
22 city also points to comments made by council members during the
23 council's deliberations as evidence that the council was
24 concerned about adverse impacts on the property to the north of
25 Lot 9 due to the proposed side yard setback variance.

26 The only relevant evidence in the record to which we are

1 cited by either party is the testimony of Dobey and Kontz at
2 the hearing before the city council.⁶ The essence of Kontz's
3 testimony is that, because he judged the side yard setback to
4 be the least critical setback, he designed the proposed
5 building to minimize the need for variances to the front and
6 street side yard setbacks. This was done to lessen the visual
7 impact of the proposed building on people in the street rights
8 of way. Record 41. Dobey stated that petitioner's variance
9 requests "are proportional and are very reasonable for that
10 particular area" and concluded that the requests satisfied the
11 applicable criteria. Record 42.

12 This expert testimony is not sufficient to establish, as a
13 matter of law, that the proposed variances will not be
14 materially detrimental to Lot 10 or other property in the
15 vicinity. Kontz's testimony does not address whether the
16 proposed variances would have a detrimental effect on property
17 in the vicinity. Dobey's statement that the proposed variances
18 are "proportional" and "reasonable" is not the equivalent of
19 saying they would not be detrimental to other property in the
20 vicinity. Finally, Dobey's unexplained, unsupported conclusion
21 that the variance criteria are satisfied is not evidence such
22 that a reasonable decisionmaker could only find that the
23 proposed variances would not have a materially detrimental
24 effect on property in the vicinity. Weyerhauser v. Lane
25 County, supra.

26 This subassignment of error is denied.

1 B. Minimum Variance Required

2 DBZO 8.020(4) sets out, in relevant part, the following
3 criterion for approving a variance:

4 " * * * the variance requested is the minimum variance
5 which would alleviate the hardship."

6 The other of the two bases for the city's denial of the
7 requested variances was that the proposed side yard variance
8 was not the minimum required to alleviate the applicant's
9 hardship. The relevant city findings and conclusions state:

10 "I. The existing development in the neighborhood
11 shows that the side yard area between structures
12 in the neighborhood and their respective property
lines have not been compromised as much as the
front yard setbacks.

13 "J. The Council finds that it would be preferable to
14 preserve as much of the side yard setback area as
15 possible, even if it means that the front yard
16 setback would be reduced beyond that proposed by
the applicant. The applicant has proposed
reduction of the side yard setback requirement by
50% and reduction of the front yard setback by
25%.

17 "K. The Council finds that it has not been convinced
18 that another configuration of the residence,
19 preserving approximately 1000 square feet of
living space, would not be possible. The
20 applicant has presented only plans for a three
21 story residence, presumably for the purposes of
maintaining as much space as possible from the
22 residence to Alsea St., at the detriment to the
side yard setback and to the property to the
23 north. A two story residence would impose less
intrusion and detriment for the adjoining
24 property, and it may be possible for the
applicant to redesign the residence as a two
25 story residence, preserve the side yard setback
area, and encroach into the front yard setback
26 area no more than other houses in the surrounding
area.

1 "L. The Council finds that, in weighing the detriment
2 to the adjoining property or to the front yard
3 setback area, the side yard setback requirement
4 should be preserved to a greater degree than the
5 front yard setback requirements. The applicant
6 has failed to show how the detriment to the
7 adjoining property could be minimized by further
8 encroachment into the front yard setback area.
9 As noted above, the applicant's proposed
10 encroachment into the front yard setback area
11 would still result with the applicant having the
12 greatest front yard setback [in the
13 neighborhood], but encroaching into the side yard
14 setback area by 4 ft., which is almost 50%
15 reduction of the side yard setback requirement.

16 "M. The Council therefore concludes that the
17 applicant has failed to show that the variances
18 requested are the minimum necessary to alleviate
19 the hardship of the irregular shape of the lot,
20 but not be materially detrimental to surrounding
21 property."

22
23 Petitioner again argues there is no evidence in the record
24 that the side yard setback area is more important than the
25 front setback area or that the proposed reduced side yard
26 setback was not adequate. Petitioner also argues that planner
Doby concluded that the requested variances were the minimum
required and architect Kontz presented expert testimony that
(1) the side yard setback is less critical than the street side
yard setback; (2) it would not be practical to make the house
smaller; and (3) "the design [of the proposed building], while
conforming to the lot, was necessary to make it architecturally
sound." Petition for Review 12. Finally, petitioner points
out that by granting the requested variances, the buildable
area of Lot 9 would be increased from 124.7 square feet only to
544 square feet. Petitioner argues this area is only 23.65% of

1 the total lot area, and the 1000 to 1100 square foot size of
2 the proposed dwelling is similar to or smaller than other
3 houses in the vicinity.

4 The city responds that petitioner bore the burden of
5 proving that the requested variances were the minimum necessary
6 to protect petitioner's property rights. The city was not
7 convinced that petitioner could not design a 1000 to 1100
8 square foot residence for Lot 9 with a lesser or no variance to
9 the side yard setback requirement and an encroachment into the
10 front yard setback area similar to that of other houses in the
11 vicinity. According to the city, "there should be supporting
12 evidence or rationale, or at least a demonstration that other
13 design configurations were considered to show that the
14 requested variances * * * were the minimum variances that would
15 alleviate the hardship." The city also argues that the
16 testimony by petitioner's witnesses to the effect that the
17 front yard setback should be considered more critical than the
18 side yard setback was "less than conclusive," and the city
19 council simply reached the opposite conclusion. Respondent's
20 Brief 7.

21 Once again, the only evidence in the record to which we are
22 cited by petitioner is the testimony of planner Dobey and
23 architect Kontz. Dobey's testimony does not explain why the
24 variances requested are the minimum required to allow the
25 construction of a 1000 to 1100 square feet residence on Lot 9.
26 Kontz's testimony includes the following:

1 " * * * If the Planning Commission or the Council felt
2 that the side yard was more critical than the street
3 side yard, for example, you could take that triangle
4 [the buildable area to be occupied by the structure]
5 and scoot it south and you could make it work. I made
6 the judgment that the side yard was the least critical
7 and then I chose to maintain the street side yard
8 [setback area] just for physical distance from the
9 paving edge of the street over to where the building
10 is. Likewise in the front yard [setback area].
11 * * * " Record 41.

12 Thus, Dobey's testimony does not support petitioner's
13 position, and Kontz's testimony supports the city's position
14 that the required side yard setback variance can be lessened by
15 relocating the proposed dwelling further south on the lot.⁷
16 Petitioner, therefore, has not shown that the city erred in
17 concluding he had not demonstrated that the variances requested
18 are the minimum necessary to alleviate the hardship.⁸

19 This subassignment of error is denied.

20 The first assignment of error is denied.

21 SECOND ASSIGNMENT OF ERROR

22 "The City failed to define the property right to be
23 preserved which would grant to the applicant the right
24 substantially similar to that which other property
25 owners in the zone vicinity possess."

26 DBZO 8.020(2) establishes the following criterion for
approval of a variance:

"The variance is necessary for the preservation of a
property right of the applicant substantially the same
as owners of other property in the same zone or
vicinity possess."

Petitioner argues the city failed to determine whether the
requested variances are necessary for the preservation of a

1 property right substantially the same as that enjoyed by other
2 property owners in the vicinity. Petitioner further argues
3 that, without making a threshold determination defining the
4 property right to be protected, the city does not have a proper
5 basis for rendering a decision on his request for variances.

6 The city's decision does not rely on failure to comply with
7 DBZO 8.020(2) as a basis for denial of the requested
8 variances. The city's order states that the proposed amount of
9 living area for the residence (1000 to 1100 square feet) is
10 similar to other residences in the area, and is based on the
11 premise that constructing a residence of 1000 to 1100 square
12 feet on Lot 9 is the "property right" which petitioner enjoys.
13 Record 5,6. The order takes issue only with the location of
14 the proposed dwelling on the lot and its potential impacts on
15 adjacent property.⁹

16 Since the city did not deny the requested variances for
17 failure to comply with DBZO 8.020(2), we have no basis for
18 upholding this assignment of error.

19 The second assignment of error is denied.

20 THIRD ASSIGNMENT OF ERROR

21 "The City erred in not describing what criteria it
22 would apply in considering the variance, and in
23 particular, not determining how it would determine the
"minimum variance necessary to alleviate the hardship."

24 Petitioner in essence argues that if the city denies his
25 variance request, but holds out hope that it is possible to
26 obtain approval for the variances necessary to construct a 1000

1 square foot residence on Lot 9, the city must explain in more
2 detail what it is necessary for petitioner to do to obtain such
3 approval. Petitioner maintains, in particular, that the city
4 should have specified how it would apply the "minimum variance
5 necessary to alleviate the hardship" standard. Petition for
6 Review 19. Petitioner's concern is that he not be trapped in
7 an endless round of applications and denials with constantly
8 changing goalposts.

9 The city replies that its order adequately identifies how
10 it will determine whether petitioner has requested the "minimum
11 variance necessary to alleviate the hardship." According to
12 the city, compliance will be determined by whether "the
13 property right to be protected (in this case, a single family
14 dwelling of approximately 1,000 sq. feet), [could] be otherwise
15 located on the property so that less of a variance would be
16 necessary." Respondent's Brief 18.

17 In Commonwealth Properties v. Washington County, 35 Or App
18 387, 400, 582 P2d 1384 (1978), the court held that in denying
19 tentative subdivision plan approval a county must either (1)
20 articulate the grounds for denial in sufficient detail to give
21 the applicant reasonably definite guidance as to what it must
22 do to obtain approval, or (2) inform the applicant it is
23 unlikely that a subdivision will be approved. In another
24 appeal of a tentative subdivision plan denial, we stated that
25 our role, under the reasoning of Commonwealth, is "to determine
26 whether the reasons expressed in the city's [denial] decision

1 are adequate to inform the applicant what it must do to obtain
2 tentative subdivision approval." Philippi v. City of
3 Sublimity, 6 Or LUBA 233, 241 (1983).

4 Assuming the court's reasoning in Commonwealth Properties
5 applies equally to local government decisions denying
6 discretionary development approvals other than subdivisions, we
7 nevertheless conclude that the city's order in this case meets
8 the standard established in Commonwealth Properties and
9 Philippi v. City of Sublimity.

10 Fairly read, the order informs petitioner that he must
11 redesign or relocate the proposed dwelling so that the
12 requested side yard setback variance is eliminated or at least
13 lessened to the extent that it will not have a materially
14 detrimental effect on Lot 10 to the north.¹⁰ See findings
15 quoted under the first assignment of error, supra; Record 6-7.
16 The order recognizes that such changes will necessitate an
17 increase in the magnitude of the requested front yard setback
18 variance. However, the order indicates that an increased front
19 yard setback variance will be acceptable so long as (1) it is
20 the minimum necessary to enable the side yard setback to be
21 lessened or eliminated while still providing for a house of
22 1000 to 1100 square feet, and (2) the encroachment into the
23 front yard setback area is no greater than that of other houses
24 in the area. Record 6.

25 The third assignment of error is denied.

26 //

1 FOURTH ASSIGNMENT OF ERROR

2 "Procedures before the City were flawed by the
3 participation of Rosalie Dumbeck, both as a planning
4 commissioner hearing the case originally, and by
5 hearing the case on appeal as a member of the City
6 Council."

7 Rosalie Dumbeck was a member of the planning commission at
8 the time it heard and denied petitioner's variance request.
9 Dumbeck voted against approval of the variances. Dumbeck was a
10 member of the city council when the council held its
11 November 16, 1987 hearing on petitioner's appeal of the
12 planning commission decision. At the beginning of the hearing,
13 the city attorney asked if the council members had any
14 conflicts of interest and none were disclosed. Record 30.
15 During council deliberations, Dumbeck made a comment with
16 regard to need for the side yard setback and voted, along with
17 the other council members, in favor of remanding the matter to
18 the planning commission for review of the changes proposed
19 proposed by the applicant at the November 16 hearing.
20 Record 54.

21 On November 17, 1987, petitioner sent a letter to the city
22 attorney objecting to Dumbeck's participation in the
23 proceedings and asking that she remove herself from any further
24 participation. Petitioner's letter expressed concern that
25 Dumbeck "may have already poisoned the well of Council
26 sentiment on this matter behind the scene" and requested a
27 determination on whether "such a procedural problem now exists
28 that the only fair resolution would be to overrule the Planning

1 Commission and grant the variance." Record 92.

2 When the council resumed its deliberations at its
3 December 7, 1987 meeting, Dumbeck announced she would refrain
4 from further participation in order to expedite the appeal.
5 She added she did not have a financial interest in the property
6 or area subject to petitioner's appeal, and therefore did not
7 believe she had a conflict of interest. She also stated that
8 she had not discussed the requested variances with any other
9 council members. Record 25, 92. No other statements or
10 challenges were made during or after the December 7 meeting.

11 Petitioner argues that Dumbeck's participation in the
12 variance proceedings as both a planning commissioner and city
13 council member violated his right to a fair trial before a fair
14 tribunal, a "fundamental requirement of due process." Petition
15 for Review 20. Petitioner claims that an administrative body
16 charged with a duty to render a quasi-judicial decision "should
17 do so with the outward indicia of fairness as well as the
18 actuality thereof." Campbell v. Bd. of Medical Exam., 16 Or
19 App 381, 395, 518 P2d 1042 (1974).

20 According to petitioner, a council member who voted as a
21 planning commission member only weeks earlier to deny a
22 requested land use action should be considered inherently
23 biased and, at a minimum, be required to state on the record
24 why he or she now believes in his or her ability to make an
25 unbiased decision. Furthermore, petitioner argues that in the
26 present situation, where there was some participation by the

1 former planning commissioner, other council members should be
2 required to state on the record what influence, if any, the
3 other member's participation had on the eventual decision.

4 Petitioner knew, at the start of the city council hearing
5 on November 16, 1987, that Dumbeck participated in the planning
6 commission's decision to deny the requested variances. By not
7 objecting to Dumbeck's participation in the city council
8 proceeding at that time, petitioner waived his right to object
9 to her participation in that hearing. See Slatter v. Wallowa
10 County, ___ Or LUBA ___ (LUBA No. 87-105, April 15, 1988), slip
11 op. 8; Union Station Business Community Assoc. v. City of
12 Portland, 14 Or LUBA 556, 558-559 (1986).

13 Similarly, after Dumbeck's withdrawal from further
14 participation at the beginning of the city council's
15 December 7, 1987 deliberation, petitioner did not object to
16 proceeding further without the other council members disclosing
17 on the record whether they had been influenced by Dumbeck in
18 the matter on appeal.¹¹ Therefore, petitioner has also
19 waived his right to object to participation in the decision by
20 the other council members.

21 There is another basis for rejecting this assignment of
22 error. We agree with respondent that in order to obtain
23 reversal or remand under this assignment petitioner must show
24 "actual bias" on the part of the decision makers, rather than
25 merely a lack of the "appearance of fairness." 1000 Friends of
26 Oregon v. Wasco County Court, 304 Or 76, 82-85, 742 P2d 39

1 (1987). Personal bias sufficiently strong to disqualify a
2 public official must be demonstrated in a clear and
3 unmistakable manner. Petitioner has the burden of showing
4 clearly that a public official was incapable of making a
5 decision based on the evidence and argument before him.
6 Schneider v. Umatilla County, 13 Or LUBA 281, 284 (1985).

7 In this case, petitioner points to no evidence in the
8 record that the other council members were biased against his
9 application. On the contrary, the record contains only
10 Dumbeck's statement that she did not discuss the proposed
11 variances with the other council members. Record 25, 90.
12 Furthermore, petitioner has not requested an evidentiary
13 hearing to introduce evidence of bias not in the record,
14 pursuant to ORS 197.830(11)(c).

15 The fourth assignment of error is denied.

16 FIFTH ASSIGNMENT OF ERROR

17 "The City required excessive deposits of the applicant
18 both for the original application and the appeal."

19 DBZO 10.040 imposes a \$75.00 filing fee for a variance or
20 an appeal and requires a \$275.00 deposit with a variance
21 application and a \$375.00 deposit with an appeal. This section
22 also provides:

23 "Any funds remaining of the deposit after all expenses
24 of the City (attorneys, planner, architect, etc.) have
been paid shall be refunded to the applicant."

25 Petitioner argues that this section of the ordinance is not
26 sufficiently specific with regard to the costs to which the

1 deposit may be applied. According to petitioner, without more
2 specific guidelines, the amount withheld from applicants'
3 deposits could differ, because each applicant could be charged
4 for different items. Petitioner claims that DBZO 10.040
5 delegates too much discretion without sufficient guidelines.
6 Petitioner asks that we invalidate this section of the
7 ordinance and order his deposits returned.

8 In this assignment of error, petitioner challenges the
9 validity of DBZO 10.040. However, the subject of this appeal
10 is the city's December 21, 1987 order applying the DBZO to
11 petitioner's variance request, not the DBZO itself. The notice
12 of intent to appeal in this case did not identify DBZO 10.040
13 as the subject of the appeal and was not filed within 21 days
14 of the adoption of DBZO 10.040. We, therefore, conclude that
15 the petitioner may not challenge DBZO 10.040 in this appeal.
16 City of Corvallis v. Benton County, ____ Or LUBA ____ (LUBA No.
17 87-115, March 21, 1988), slip op. 6.

18 The fifth assignment of error is denied.

19 The City's decision is affirmed.
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FOOTNOTES

1

Under the city's ordinances, although Lot 9 is only 2300 square feet in size, a variance to the 5000 square foot minimum lot size for a single family dwelling in the R-4 zone is not required for the proposed building. Lot 9 is part of a subdivision which was platted in 1928. In its decision, the city concluded that Section 5.020 of the Depoe Bay Zoning Ordinance (DBZO) creates a general exception to minimum lot size requirements for lots held in single ownership as recorded in the office of the County Clerk at the time the DBZO was adopted, "but only if developed 'subject to the other requirements of the zone,' including the setback requirements." Record 5.

2

During the course of the hearing before the council, petitioner proposed a modification reducing the proposed building height to 27 feet. Record 2. This change would reduce the required side yard setback to 9 feet. However, petitioner's variance application was not amended to reflect this proposed modification.

3

DBZO 8.020 provides:

"A variance may be granted only in the event that all of the following circumstances exist:

"1. Exceptional or extraordinary circumstances apply to the property which do not apply generally to other properties in the same zone or vicinity, and result from lot size or shape, legally existing prior to the date of this ordinance, topography, or other circumstances over which the applicant has no control.

"2. The variance is necessary for the preservation of a property right of the applicant substantially the same as owners of other property in the same zone or vicinity possess.

"3. The variance would not be materially detrimental to the purposes of this ordinance, or to the property in the zone or vicinity in which the property is located, or otherwise conflict with the objectives of any City plan or policy.

1 "4. The hardship is not self-imposed and the variance
2 requested is the minimum variance which would
3 alleviate the hardship.

4 "5. The hardship asserted as a basis for the variance
5 does not arise from a violation of the Zoning
6 Ordinance."

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14 ORS 197.835(8)(a)(C) provides, with regard to LUBA's scope
15 of review:

16 "(8) * * * the board shall reverse or remand the land
17 use decision under review if the board finds:

18 "(a) The local government or special district:

19 " * * * * *

20 "(C) Made a decision not supported by
21 substantial evidence in the whole record;"

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27 As will be explained more fully in the text, infra, the
28 city based its denial of the variances only on determinations
29 of noncompliance with portions of DBZO 8.020(3) and (4). The
30 city's order does not include specific determinations of
31 compliance with the other variance approval criteria
32 (DBZO 8.020(1), (2) and (5), and the other portions of 8.020(3)
33 and (4)). In addition to challenging the city's determinations
34 of noncompliance with portions of DBZO 8.020(3) and (4),
35 petitioner also argues that there is substantial evidence in
36 the record to support a determination of compliance with these
37 other criteria. However, in the subassignments below we uphold
38 both city determinations of noncompliance. Therefore, no
39 useful purpose would be served by determining whether the
40 evidence in the record requires, as a matter of law, a
41 determination of compliance with these other criteria, since a
42 proper determination of noncompliance with one mandatory
43 approval criterion is sufficient to support a denial. McCoy v.
44 Marion County, supra, slip op. 3.

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51 As we have pointed out on numerous occasions, in evaluating
52 an evidentiary challenge, LUBA reviews only that evidence in
53 the record to which it is cited by the parties. LUBA will not
54 search through the entire record to uncover evidence supporting
55 a party's argument. Bergstrom v. Klamath County, ___ Or

1 LUBA ____ (LUBA No. 87-099, February 25, 1988), slip op. 11-12;
2 Bowman Park v. City of Albany, 11 Or LUBA 197, 214 (1984). See
3 City of Salem v. Families for Responsible Gov't, 64 Or App 238,
4 249, 668 P2d 395 (1983).

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6 Of course, such relocation would probably mean an increase
7 in the variance required to the front yard setback standard.
8 However, the evidence in the record does not establish, as a
9 matter of law, that the front yard setback is more critical
10 than the side yard setback. As we determined under the
11 previous subassignment of error, petitioner has not
12 demonstrated error in the city's conclusion that the requested
13 variance to the side yard setback would be materially
14 detrimental to adjacent property.

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16 We note the city's reasons supporting its conclusions of
17 noncompliance of the requested variances with DBZO 8.020(3) and
18 (4), as set out in this and the preceeding subassignment of
19 error, are directed primarily at the requested side yard
20 variance. The city's reasons for denying the requested front
21 yard variance, as well, are expressed in the following finding:

22 "The applicant has presented the requests for variance
23 for the side yard setback area and front yard setback
24 area as interrelated -- both must be granted in order
25 for the applicant to build the type of house
26 proposed. If the house is redesigned, the City would
27 need to determine if the redesigned structure would
28 create any material detriments to the purposes of the
29 zoning ordinance, or to property in the zone or
30 vicinity in which the property is located prior to
31 approval of one of the variances requested.
32 Therefore, the Council finds that if one of the
33 variances should be denied, the other variance should
34 be denied." Record 7.

35 We also note that petitioner does not ask us to reverse or
36 remand the city's denial of his request for a front yard
37 setback variance independently of our decision on the city's
38 denial of his requested side yard setback variance. We will
39 therefore treat the two variance requests as being inseparable,
40 as have the parties to this appeal.

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42 Furthermore, the city concedes in its brief and oral
43 argument that petitioner has a "property right," substantially

1 similar to that which has been enjoyed by other property owners
2 in the vicinity, to construct a residence of 1000 to 1100
square feet on Lot 9. Respondent's Brief 16-17.

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5 The city's order also indicates that it would find a two
6 story residence less intrusive and detrimental to the adjoining
7 property than the proposed three story residence and states
8 that it might be possible for the applicant to eliminate the
9 side yard setback variance by redesigning the proposed dwelling
10 to be two stories. The order does not, however, establish a
change to a two story design as a mandatory requirement for the
approval of necessary variances. We note that in the R-4 zone
there is a relationship between building height and side yard
setback requirements, in that reducing the height of a building
reduces the required side yard setback. However, as long as a
proposed dwelling is within the R-4 zone's 35 foot height
limitation, height alone would not be a proper basis for
denying requested variances.

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13 Under the circumstances of this case, where there is no
14 evidence in the record of actual bias on the part of the other
council members, we are unaware of any legal requirement that
the other council members make such a disclosure.