

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

| | | |
|------------------------------|---|-----------------|
| GEORGE BOLDT, JANET BOLDT, |) | |
| RICHARD SALE, LITA SALE, and |) | |
| GARY MEYER, |) | |
| |) | |
| Petitioners, |) | |
| |) | |
| vs. |) | |
| |) | LUBA No. 90-147 |
| CLACKAMAS COUNTY, |) | |
| |) | FINAL OPINION |
| Respondent, |) | AND ORDER |
| |) | |
| and |) | |
| |) | |
| JOHN LATTA, |) | |
| |) | |
| Intervenor-Respondent. |) | |

Appeal from Clackamas County.

John Wiley Gould and Ian K. Whitlock, Portland, filed the petition for review. With them on the brief was Lane, Powell, Spears & Lubersky. John Wiley Gould argued on behalf of petitioners.

No appearance by respondent.

William A. Monahan and Timothy V. Ramis, Portland, filed the response brief. With them on the brief was O'Donnell, Ramis, Crew & Corrigan. William A. Monahan argued on behalf of intervenor-respondent.

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

REMANDED 03/12/91

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal the county's approval of a Greenway conditional use permit and a flood plain development permit to construct a floating dock and boathouse.

MOTION TO INTERVENE

John Latta, the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion and it is allowed.

FACTS

Intervenor owns property adjacent to the Willamette River and within the Willamette River Greenway. A dock has been located in the Willamette River adjacent to the subject property for over 20 years. In 1985, intervenor was granted approval to rebuild the existing dock. The county hearings officer decision challenged in this appeal became final on November 7, 1990 and granted intervenor approval to enlarge his dock and construct a boathouse.

There are numerous docks and boathouses in the portion of the Willamette River near the subject property. From the record, it appears that a number of the existing docks and boathouses were approved under the same county Willamette River Greenway standards for approval of such structures that were applied to intervenor's application.¹ However,

¹Because the Clackamas County comprehensive plan and land use regulations have been acknowledged as complying with the statewide planning

most of the existing boat houses are not as large or as tall as the boathouse at issue in this appeal.²

APPLICABLE APPROVAL CRITERIA

The following Clackamas County Comprehensive Plan (plan) policies apply:

"Maintain rivers and streams in their natural state to the maximum practicable extent through sound water and land management practices. Consideration shall be given to natural, scenic, historic, economic, cultural, and recreational qualities of the rivers and adjacent lands." Water Resources Policy 1.0.

"Allow private noncommercial docks and moorages in urban and multiple-use rural portions of the Greenway through the Greenway CU provisions of the Zoning Ordinance which require an extraordinary exception in the rural portion." (Emphasis added.) Willamette River Design Plan Policy 15.6.

Because the subject property is located in the multiple-use portion of the Greenway, the extraordinary exception criteria of Clackamas County Zoning and Development Ordinance (ZDO) 705.03(B) apply. ZDO 705.03(B) provides in relevant part:

"All intensification or change of use, or development within 150 feet of the mean low water line of the Willamette River, in the Rural Greenway, shall require an Extraordinary Exception. * * * An Extraordinary Exception shall be granted only if the applicant demonstrates all

goals pursuant to ORS 197.251, Goal 15 (Willamette River Greenway) does not apply directly to the challenged decision.

²As originally proposed by intervenor, the boathouse was to be 24 feet tall. As approved by the county, the boathouse may not be more than 18.5 feet tall.

of the following:

- "1. That there is an extraordinary, unnecessary and unreasonable hardship which can be relieved only by allowing the intensification or change of use, or development;
- "2. That there are extraordinary circumstances and conditions applying to the land, building or use which do not apply generally to such other lands, buildings or uses in the Greenway;
- "3. That approval of the request will be consistent with the purposes stated in subsection 705.01;^[3]

"* * * * *"

FIRST ASSIGNMENT OF ERROR

"The Hearings Officer failed to adopt findings of fact regarding the 'hardship' and 'extraordinary circumstances' criteria of CZDO § 705.03."

SECOND ASSIGNMENT OF ERROR

"Alternatively, the Hearings Officer's findings regarding the 'hardship' and 'extraordinary circumstances' criteria of the CZDO § 705.03(B) are unsupported by substantial evidence."

³ZDO 705.01 states that the purpose of the Willamette River Greenway is:

- "A. To protect, conserve, enhance and maintain the natural, scenic, historical, agricultural, economic and recreational qualities of lands along the Willamette River;
- "B. To maintain the integrity of the Willamette River by minimizing erosion, promoting bank stability and maintaining and enhancing water quality and fish and wildlife habitats;
- "C. To implement the Willamette River Design Plan described in the Comprehensive Plan."

THIRD ASSIGNMENT OF ERROR

"The Hearings Officer's decision approving the Latta application violates the Extraordinary Exception provisions of CZDO § 705.03(B) in that it improperly concludes that 'hardship' and 'extraordinary circumstances' exist."

In their first three assignments of error, petitioners contend the county improperly interpreted and applied the above quoted extraordinary exception criteria. In particular, petitioners argue, that decisions of this Board and the Oregon Court of Appeals interpreting nearly identical code and administrative rule language have established that the requirements of ZDO 705.03(B)(1) and (2) that there be a demonstration of "extraordinary, unnecessary and unreasonable hardship" and "extraordinary circumstances and conditions" impose stringent approval standards. Petitioners argue the county's findings do not demonstrate compliance with these extraordinary exception criteria. Petitioners further contend there is not substantial evidence to support findings of compliance with those criteria.

A. Waiver

Intervenor argues petitioners are precluded from raising the arguments asserted under the first three assignments of error because they failed to raise those arguments during the local proceedings in this matter. ORS 197.763(1) provides as follows:

"An issue which may be the basis for an appeal to

[LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised with sufficient specificity so as to afford the governing body or hearings officer, and the parties an adequate opportunity to respond to each issue."

ORS 197.835(2) provides that our scope of review is limited to issues "raised by any participant before the local hearings body as provided by ORS 197.763."⁴

Intervenor is correct that testimony during the local hearings focused almost entirely on the appropriateness of approving a boathouse of the size proposed. The county planning staff adopted the following position:

"The Planning Division staff has reviewed the Clackamas County Zoning and Development Ordinance, Clackamas County Comprehensive Plan, Oregon Revised Statutes as they apply to the Willamette River Greenway, and LCDC Goal 15 (Willamette River Greenway). Although these documents do not specify size limitations for structures within the Willamette River Greenway, the Planning Division has interpreted these documents to encourage consistency in the level of any development compared to what is currently located within the Greenway." (Emphasis added.) Record 115.

Most of the testimony offered during the local proceedings addressed whether the proposed boathouse is consistent with the existing boathouses in this stretch of the river or

⁴ORS 197.835(2) provides that a petitioner may raise issues in a LUBA appeal, even if those issues were not raised during local proceedings, in two specified circumstances. Neither circumstance is present in this appeal.

whether, by virtue of its size, it is not consistent. There were almost no references during the local proceedings to the applicable plan policies or to the ZDO extraordinary exception standards quoted above.⁵

It is not clear to this Board exactly what purpose the county intended its "consistency" review to serve. It appears the county believed that compliance with at least some of the applicable plan and ZDO approval standards either required or was influenced by whether the size of the proposed boathouse was compatible with existing boathouses. However, the county did not take the position that "consistency" considerations eliminated the need to demonstrate compliance with the extraordinary exception criteria of ZDO 705.03(B)(1) and (2), because it adopted findings specifically addressing those standards and those findings make no reference to consistency with other boathouses. Record 5.

At no point during the local proceedings did petitioners specifically cite ZDO 705.03(B)(1) or (2).⁶ However, petitioners' attorney did take the position that intervenor had not demonstrated a "hardship" justifying the challenged approval:

⁵Petitioners did refer to Water Resources Policy 1.0. Record 39, 94.

⁶Petitioners' attorney did mention the "extraordinary circumstances and conditions" standard of ZDO 705.03(B)(2) in discussing a county action concerning a different boathouse request. Record 26. However, he did not specifically contend that the challenged boat house violates that standard.

"The applicant has claimed an [sic] hardship because he has been unable to locate covered moorage, and his boat would deteriorate and might be subject to thievery, but that is a self-induced hardship. Living on the river does not come with a guarantee that one can build a boathouse for whatever size vessel he chooses to purchase. The real hardship is on * * * the appellants and others using the river." Record 37.

Later in the proceedings, petitioners' attorney stated:

"You know, as I said earlier, if * * * their problem is considered [the] kind of hardship under the Comprehensive Plan that entitles them to a boathouse of this size, when they voluntarily purchased the boat, then you are saying that anyone who wants a big boat can get a big boathouse. I can't believe that is what the land use planning is all about. I can't believe that is what the LUBA decision said."⁷ Record 96.

At no point did petitioners specifically cite the "hardship" criterion of ZDO 705.03(B)(1) by its ZDO section number, or offer the same legal arguments they present in the first three assignments of error concerning that criterion. However, we do not believe ORS 197.763(1) requires that petitioners have presented the identical arguments during local proceedings that are later presented in the petition for review at LUBA. The purpose of ORS 197.763(1) is to prevent unfair surprise. Petitioners may not fail to raise issues locally and then surprise the local government by raising those issues for the first time at LUBA.

⁷It is not clear from the transcript in the record what LUBA decision is referenced here.

Here, the county clearly understood that ZDO 705.03(B)(1) applies and adopted findings addressing that criterion. In their testimony, petitioners used the operative term "hardship" contained in that criterion and made it sufficiently clear that they believed there was at most a self imposed hardship, and that such a self imposed hardship is not sufficient to comply with applicable approval standards. We conclude that petitioners sufficiently raised the issue of compliance with ZDO 705.03(B)(1) to give the county a chance to respond and, therefore, that petitioners did not waive their right to argue under the first three assignments of error that the application challenged in this proceeding fails to comply with ZDO 705.03(B)(1).

However, with regard to the "extraordinary circumstances" criterion of ZDO 705.03(B)(2), petitioners cite noting in the local proceedings which shows they raised any issue concerning compliance with this criterion. Having failed to raise any issue concerning compliance with this criterion, petitioners may not argue for the first time before LUBA that the challenged boathouse violates ZDO 705.03(B)(2). Accordingly, we limit our review under the first three assignments of error to petitioners' contentions regarding ZDO 705.03(B)(1).

B. ZDO 705.03(B)(1)

The requirement of ZDO 705.03(B)(1) that an applicant

for an extraordinary exception demonstrate "an extraordinary, unnecessary and unreasonable hardship which can be relieved only by allowing the intensification * * * of use" is a stringent standard. As we explained in Olsen v. Columbia County, 8 Or LUBA 152, 171, in reviewing the identical requirement of OAR 660-20-030(1),⁸ the "requirement for an extraordinary, unnecessary and unreasonable hardship" is an exacting criterion, traditionally applied to requests for variances. In cases involving variances, the appellate courts in this state and in other states and this Board have made it clear that the traditional hardship standard is an exacting one. Erickson v. City of Portland, 9 Or App 256, 262, 496 P2d 726 (1972)(difficulty in maintaining property due to age of owner insufficient to demonstrate hardship); Chou v. City of Keiser, 15 Or LUBA 420, 422-423 (1987)(animosity between property owners does not qualify as an unreasonable hardship); Jarvis v. Wallowa County, 15 Or LUBA 390, 394 (1987)("'extraordinary hardship' requires a showing of inability to make profitable use of land without the benefit of the variance * * *"); Patzkowsky v. Klamath County, 8 Or LUBA 64, 70 (1983)(showing of hardship requires

⁸OAR 660-20-005 through 660-20-065 establish Willamette River Greenway boundaries and set out standards governing uses allowed within the Greenway. However, these rules cease to apply where, as here, the applicable comprehensive plan and land use regulations have been acknowledged.

demonstration that without variance there will be no reasonable return from any permitted use); Ludwick v. Yamhill Cty, 3 Or LUBA 271, 279 (1981)(hardship must be inherent in the land and must not be self induced); Faye Wright Neighborhood Planning Council v. Salem, 3 Or LUBA 17, 21 (1981)(inability to put property to more profitable use does not constitute an unreasonable hardship). See 3 Anderson, American Law of Zoning § 20.16 (3d ed. 1986).

The county's finding of compliance with ZDO 705.03(B)(1) is as follows:

"There is an extraordinary, unnecessary and unreasonable hardship which can be relieved only by allowing intensification of the use or development. This finding [sic requirement] must be addressed because the structure will be located within 150 feet of the low water line of the rural Willamette River Greenway. This is a water-dependent use. This type of use must be located on the water and, therefore, within the 150 foot required setback." Record 5.

We agree with petitioners that this finding is inadequate to demonstrate that the requested boathouse is needed to relieve "an extraordinary, unnecessary and unreasonable hardship."

However, intervenor contends that in reviewing the county's decision we should keep in mind that the request is not to place a structure where one does not exist. Rather, the request is simply to intensify the existing dock use. Intervenor contends that, with this in mind, the above finding and the evidence in the record demonstrates the

boathouse is needed to avoid "an extraordinary, unnecessary and unreasonable hardship." We disagree.

First, we fail to see how the fact the proposal is an "intensification" of an existing structure rather than a new structure is important. ZDO 705.03(B)(1) explicitly applies to both intensifications of existing structures and new structures. Second, the evidence in the record does not even come close to demonstrating the kind of hardship required by ZDO 705.03(B)(1). The record indicates intervenor has a large boat with expensive equipment on board. The boat cannot be seen from intervenor's house and therefore may be a tempting target for vandals. In addition, large cottonwoods on the site create boat maintenance problems. Finally, intervenor introduced evidence of a current lack of availability of covered moorage facilities for his boat. These are all good reasons why intervenor might want to construct a boathouse to house his large boat. However, this evidence does not demonstrate "an extraordinary, unnecessary and unreasonable hardship," as that requirement has been interpreted and applied by this Board and the appellate courts of this state and other states.

Finally, citing Parsons v. Board of Zoning Appeals of City of New Haven, 140 Conn 290, 99 A2d 149 (1953); and Scheutz v. Dossey Lumber Co., 195 Okla 439, 158 P2d 720 (1945), intervenor contends that because many of his

neighbors on the river have boathouses and some of them are similar in size to the one proposed by intervenor, the requested extraordinary exception should be granted to permit him to enjoy the same rights currently enjoyed by his neighbors.

In the cases cited by intervenor, the courts found that so many variances had been granted that the original zoning purpose had been lost and that uses permitted under the applicable land use regulations were impractical. The courts concluded that in such circumstances limiting the land owner to the uses permitted under the applicable land use regulations would result in unreasonable hardship. The record does not establish that a similar circumstance is presented in this case.

It does not appear that intervenor's continued use of his property for residential purposes would be impractical without a boathouse. Further, from the record, we cannot tell how many of the existing boathouses predate adoption of the extraordinary exception standards and how many were approved under those standards. Intervenor is not entitled to an extraordinary exception approval for a boathouse simply because boathouses may have been approved for some nearby property owners. See 3 Anderson, American Law of Zoning § 20.25 (3d ed. 1986). If the extraordinary exception criteria impose a higher standard for approval of docks and boathouses than the county believes is appropriate

in this portion of the Willamette River, the appropriate course for the county is to amend the plan and ZDO. See Von Lubken v. Hood River County, 104 Or App 683, 688, ___ P2d ___ (1990), adhered to ___ Or App ___ (March 6, 1991); Lovell v. Independence Planning Commission., 37 Or App 3, 7, 586 P2d 99 (1978); Sunburst II Homeowners v. City of West Linn, 17 Or LUBA 401, 408 (1989); West Hills and Island Neighbors v. Multnomah County, (LUBA No. 83-018, June 29, 1983)(unpublished), slip op 15-16 n 6, aff'd 68 Or App 782, rev den 298 Or 150 (1984).

The first, second and third assignments of error are sustained with regard to ZDO 705.03(B)(1).

FOURTH ASSIGNMENT OF ERROR

"The Hearings Officer's decision approving the Latta application violates the applicable portions of the CZDO, Comprehensive Plan, Goal 15, and Willamette Greenway statute, by approving excessive development."

Petitioners' arguments under this assignment of error allege the effect of the county's decision will be to permit "unrestrained growth in the size of floating structures in the * * * Greenway." These arguments provide no additional basis for reversal or remand, and the fourth assignment of error is denied.

The county's decision is remanded.