BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ELIZABETH KATE BARKER and ELIZABETH KAYE BARKER, Petitioners, vs. CITY OF CANNON BEACH, Respondent, and ALBERT R. ALLEN, Intervenor-Respondent.	LUBA No. 92-136 FINAL OPINION AND ORDER

Appeal from City of Cannon Beach.

Elizabeth Kaye Barker, Tiburon, California, filed the petition for review. Elizabeth Kaye Barker argued on her own behalf.

No appearance by respondent.

Mark J. Greenfield, Portland, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Preston, Thorgrimson, Shidler, Gates & Ellis.

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

AFFIRMED 11/10/92

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioners appeal an order of the city council approving a rear yard setback reduction.

MOTION TO INTERVENE

Albert R. Allen, the applicant below, moves to intervene on the side of respondent in this appeal proceeding. There is no objection to the motion, and it is allowed.

FACTS

Intervenor-respondent (intervenor) applied for a rear yard setback reduction from 15 feet to 3.3 feet for property referred to below as Lot 15. Record 217. The challenged decision states the following additional facts:

> "The applicant * * * is proposing to place a modular dwelling and garage on Lot 15 * * *. The parcel on which the dwelling is to be located is presently vacant and is held in common ownership with Lot 14. A residence and garage are located on Lot 14. As part of the development proposal, [the applicant] is proposing to adjust the lot line between Lot[s] 14 and 15 and to demolish a portion of the existing garage attached to the residence on Lot 14. * * * The proposed parcel size [of Lot 15] is 4,080 square feet. The parcel has frontage on Hemlock Street. The parcel and adjoining properties are designated R-2, Medium Density Residential. * * * Adjacent land uses to the north, south, east and west are single-family residences.
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> "The Planning Commission held a public hearing on the request * * *. [T]he Planning Commission denied the set back reduction request. The [applicant] appealed the decision of the planning

> commission [and] requested that the City Council consider a limited amount of new testimony when considering the appeal. The City Council * * * remanded the matter back to the Planning Commission for consideration of the new evidence. The Planning Commission held a public hearing to consider [the] additional evidence * * *. The Planning Commission adopted findings of fact denying the setback reduction * * *. [The applicant] appealed the decision of the Planning Commission * * *. [The applicant] requested that the appeal be heard on the record." Record 3.

The City Council reversed the decision of the planning commission and approved the setback reduction request for Lot 15.[1] This appeal followed.

FIRST ASSIGNMENT OF ERROR

> "The city's finding that the setback reduction complied with Zoning Ordinance 4.300(4) is unsupported by substantial evidence in the whole record."

City of Cannon Beach Zoning Ordinance (CBZO) 4.300(4) provides:

> "It is the purpose of setbacks to provide for a reasonable amount of privacy, drainage, light, air, noise reduction and fire safety between adjacent structures. Setback reduction permits may be granted where the Planning Commission finds that the above purposes are maintained, and one or more of the following are achieved by the reduction in setbacks: (1) tree protection; (2) the protection of neighboring property's views; (3) the maintenance of a stream buffer or avoidance of geologic hazards or other difficult topography; (4) the provision of solar access; (5)

[1]The decision of the city council is unclear concerning whether the city took any action concerning a lot line adjustment between Lots 14 and 15. We address the question of the lot line adjustment, infra.

> permitting construction on a lot with unusual configuration or (6) rehabilitation of existing buildings where other alternatives do not exist." (Emphasis supplied.)

Petitioners argue the following determinations in the challenged decision reflect an incorrect interpretation of the requirements of CBZO 4.300(4):

> "The applicant's lot has a depth of 100 feet. The proposed dwelling and garage have a depth of 64 feet. The lot has enough lot depth to accommodate the proposed buildings and also meet the fifteen foot front and rear yard setback requirements. However, placing the dwelling and garage within 15 feet of the front lot line would result in the removal of a mature pine tree that is located approximately 25 feet from the front lot line. The placement of the structures as proposed would permit the retention of the tree. * * *.
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> "The property to the east * * * contains a dwelling which has several windows on its west elevation. The southernmost of these windows is located between 24'4'' and 36'10'' from the property's south property line. This window has a view to the west across [the applicant's] property. If the dwelling proposed by [the applicant] were placed in conformance with the 15 foot rear yard setback, the dwelling would obstruct the view available from this window. By providing a 32.7 foot front yard setback, the view from the window is maintained. Thus, the setback reduction maintains a neighboring property owner's view.
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> "The criterion also requires that a setback reduction necessary to protect a tree, or a neighboring view must maintain a reasonable amount of privacy between adjacent structures. The relevant structures for making this determination are the proposed garage and the residence located on the lot to the north * * *. An appropriate standard for judging what separation between structures will result in a 'reasonable amount of

> privacy' is the 30 feet that is required for adjoining rear yards in the R-2 Zone. Therefore, the proposed 60.8 foot separation provides for an adequate amount of privacy between the two structures.
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> "The relevant standard for reviewing the impact on privacy between adjacent structures is the impact on existing structures, not those which may be built at a future date. * * *" Record 5-6.

A. Tree Protection

As we understand it, petitioners argue that under the portion of CBZO 4.300(4) recognizing "tree protection" as justification for a setback reduction, the city must establish that more trees will be protected than will be lost. Petitioners contend the proposal will save only one "common pine" tree, and argue that the city erroneously failed to address petitioners' contentions below that a mature cedar and another pine tree would be lost if the rear yard setback reduction is granted.[2]

Intervenor contends the city's interpretation of CBZO 4.300(4), to allow the proposed rear yard setback reduction to protect one mature pine tree described in the record as a "particularly beautiful evergreen tree" (Record 193), is not clearly contrary to the express terms of CBZO 4.300(4), or to its apparent purpose. Further,

[2]This subassignment of error does not really include a substantial evidence challenge to the city's decision. Rather, its substance is that there is evidence in the record that the city will only be preserving one tree, and the preservation of one tree is not an adequate justification to establish compliance with CBZO 4.300(4).

intervenor argues that the city did address the loss of the cedar tree.[3] Intervenor argues that pursuant to Clark v. Jackson County, 313 Or 507, ___ P2d ___ (1992), this Board must defer to the city's interpretation of its own ordinance.

We agree with intervenor.[4] This subassignment of error is denied.

B. Protection of Neighboring Property's Views

Petitioners also argue that the city improperly determined that the provision of CBZO 4.300(4) recognizing the protection of the views from neighboring property as justification for a setback reduction, was satisfied where any neighboring property's view would be protected through the granting of the proposed rear yard setback reduction. Petitioners argue that under CBZO 4.300(4), the city must find the views to be protected by the proposal are views of oceans, mountains or other "significant" views.

Intervenor argues the city interpreted CBZO 4.300(4) to be satisfied if any view is protected, that this

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[3]Intervenor cites condition 3 of the challenged decision which requires:

> "That laurel or similar shrubs be planted in the northeast corner of the lot to replace the existing cedar tree." Record 8.

[4]The pine tree petitioners contend will be lost if the proposed rear setback reduction is allowed is located on the east side of the subject property and is not within the area affected by the proposed rear setback reduction.

interpretation is not clearly contrary to the express words or context of the city's code and, consequently, we should defer to it. Clark v. Jackson County, supra.

We agree with intervenor.

Further, we note that under CBZO 4.300(4), the city need only determine that one of the listed factors is "achieved" by the proposed setback reduction. Therefore, even if the city improperly interpreted CBZO 4.300(4) to be satisfied by protecting any view, that would not provide a basis for reversal or remand, because we determine above that the city properly interpreted the tree protection factor of CBZO 4.300(4) to be satisfied by the proposal.

This subassignment of error is denied.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

> "The city's finding that its decision complied with Zoning Ordinance 4.300(8) is unsupported by substantial evidence in the whole record."

CBZO 4.300(8) establishes the following approval standard for a setback reduction:

> "Any encroachment into the setback will not substantially reduce the amount of privacy which is or would be enjoyed by an abutting property owner."

Petitioners argue this requirement means that the city must determine whether the proposed setback will substantially reduce privacy associated with all potential future uses of abutting properties. Petitioners suggest

they may choose to construct an "annex" to the existing dwelling on their property and that the structures allowed by the proposed rear yard setback reduction might interfere with the privacy of such potential future annex. Petitioners contend the challenged decision is required to address the impacts of the proposed setback reduction on the privacy of possible future uses of their abutting property.

Petitioners also argue the city's determination that the proposed setback reduction will not have a substantial impact on their privacy is not supported by substantial evidence in the whole record. In particular, petitioners argue there is no evidence in the record to support the city's determination that the garage to be built as a result of the proposed setback reduction will be no greater than 13 feet in height and that it will be screened by vegetation.

The city determined CBZO 4.300(8) is satisfied based on the following findings:

> "This criterion addresses potential impact on privacy both in terms of structures and the use of yards.
>
> "* * * * *
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> "The proposed garage location has the potential to impact not only the privacy available to the residence located to the north, but also to the privacy available in the rear yard of that parcel. The property owners to the north, [petitioners], have stated that they use this rear yard for a variety of activities including: sunbathing, reading, gardening and outdoor games. The characteristics of [the applicant's] site as well as the proposed building and site plan will ensure

> the location of the garage within the required rear yard setback will not substantially reduce the amount of privacy available in the rear yard area of [petitioners' property]. The applicant's rear yard is separated by a laurel hedge with a height of 13 feet and a width of 14 feet. The laurel hedge, with its height of 13 feet can screen the height of the garage, which will have a maximum height of 13 feet. The laurel hedge can provide visual screening for all but one foot of the western 15 feet of the garage's width. The applicant has agreed to plant suitable hedge material to replace the cedar, that will provide screening of the eastern 6 feet of the garage. In time, the hedge can grow to the height of the existing hedge. In addition, [the applicant] has constructed a six foot high fence to provide additional screening. The combination of the existing laurel hedge, the replacement planting and the fence provide visual screening of the garage so that it does not substantially reduce the amount of privacy associated with activities that [petitioners] undertake in their rear yard." Record 6-7.

The findings go on to determine that automobiles could be parked in the applicant's rear yard, regardless of the approval of the proposed rear yard setback reduction. The findings state the proposed new garage will mitigate petitioners' concerns regarding vehicular traffic, noise and fumes, because those impacts will be obscured and mitigated. Finally, the findings conclude:

> "The potential impacts on privacy of car use associated with the garage, such as car fumes, are very limited in duration and are therefore found not to have a substantial impact on privacy. In summary, the proposed garage location will not have a substantial impact on the privacy available in [petitioners'] rear yard." Record 7-8.

Turning first to the interpretative issues, we believe

that the challenged decision interprets CBZO 4.300(8) to require an analysis of the proposed setback reduction's potential impact on the privacy of abutting developed properties. In this regard, the city described (1) current uses of petitioners' developed abutting property, (2) activities that could occur on the applicant's property regardless of the proposed setback reduction, and (3) physical barriers between the two properties, and concluded that the impact on privacy available on petitioners' property would be minimal.

Where abutting property is already developed and where there is no pending development application for abutting property, we believe the city's interpretation is not clearly contrary to the express words or context of CBZO 4.300(8). Here, there is neither an abutting undeveloped lot nor a pending development application for an abutting developed lot. Therefore, the city's interpretation of CBZO 4.300(8) provides no basis for reversal or remand of the challenged decision.

Concerning petitioners' evidentiary challenge, there is evidence in the record to support the city's determination that the proposed garage will be approximately 13 feet in height. Record 181. However, as we read the challenged decision, the precise height of the garage is not essential to the decision. Rather, the essential determination concerning the proposal's compliance with CBZO 4.300(8) is

that the proposed garage will not substantially affect the privacy of petitioners' abutting property. In this regard, there is substantial evidence in the record that a tall, relatively thick hedge separates the applicant's rear yard from petitioners' property line. While there is also contrary evidence, the choice between conflicting credible evidence belongs to the city. Von Lubken v. Hood River County, 18 Or LUBA 18, 36 (1989). Further, there is no dispute that absent the proposed setback reduction and new garage, the applicant could park his cars in the area proposed for the garage. Consequently, we believe a reasonable decision maker could conclude, as the city did, that the proposed setback reduction will not substantially affect the privacy petitioners enjoy in connection with their abutting property.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

> "The city granted the intervenor permission to reduce his substandard lot size and to build on it without providing parties with proper notice of that issue. Even if it did provide proper notice of such an issue, its decision is contrary to the city's zoning ordinance."

Petitioners argue the challenged decision appears to approve a lot line adjustment between Lot 15, which is the subject of the rear yard setback reduction request, and Lot

14, an abutting lot also owned by intervenor.[5] Petitioners contend they did not receive notice that this issue was to be considered by the city, and that they did not have an adequate opportunity to address the issue below.

Intervenor raises a myriad of issues concerning this assignment of error. In this regard, intervenor filed a post oral argument motion to strike this assignment of error on the basis that a lot line adjustment may be approved by the city under clear and objective standards and, therefore, is not a land use decision under ORS 197.015(10)(b). Intervenor also argues that petitioners failed to raise the issue of inadequate notice of the lot line adjustment below and are therefore precluded from raising that issue before this Board. ORS 197.835(2); ORS 197.763(1).[6] Finally,

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[5]As far as we can tell, the lot line adjustment in question would move the line dividing Lots 14 and 15 approximately six feet to the east, reducing the size of Lot 15 from about 4,700 square feet to 4,080 square feet.

[6]ORS 197.835(2) provides that LUBA's scope of review is limited as follows:

> "Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.763. * * *"

ORS 197.763(1) provides:

> "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 * * * and the parties an adequate opportunity to respond to each issue."

intervenor argues that if petitioners can raise the issue before this Board, the issue of a lot line adjustment was discussed early in the local proceedings; and additional notice was not required.

The decision assumes that Lot 15 will be reduced in size to 4,080 square feet. See Record 4, 8 (Condition 4). However, while there are passing references to a proposal for a lot line adjustment, nothing in the caption, findings or decision suggests that the city approved a lot line adjustment. Accordingly, we do not read the challenged decision to approve a lot line adjustment. Therefore, it would serve no purpose to address the parties' arguments concerning a decision that was not made.[7]

The third assignment of error is denied.

The city's decision is affirmed.

[7]We express no opinion concerning intervenor's argument that LUBA would lack jurisdiction to review a city decision approving a lot line adjustment between Lots 14 and 15.