BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JAMES B. McKENNEY,
Petitioner,

vs.

DESCHUTES COUNTY,
Respondent.

LUBA No. 99-115

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Ken Brinich, Bend, filed the petition for review and argued on behalf of petitioner. With him on the brief was Hendrix and Brinich.

Bruce W. White, Assistant Legal Counsel, Bend, filed the response brief and argued on behalf of respondent.

BRIGGS, Board Member; BASSHAM, Board Chair; HOLSTUN, Board Member, participated in the decision.

AFFIRMED 02/24/2000

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioner appeals a county decision denying an application for a residential addition to be located within a stream setback.

FACTS

The subject property is a .75-acre lot located in a rural subdivision on the banks of the Deschutes River. In 1979, Deschutes County zoned the property Rural Residential (RR-10). In the same ordinance that adopted the RR-10 zoning for the property, the county enacted a 100-foot building setback from streams. The setback was adopted to implement a comprehensive plan policy intended to protect sensitive riparian areas. The property is also subject to a Landscape Management overlay zoning designation because of its proximity to the Deschutes River.

In 1980, petitioner's predecessor in interest applied for a variance from the setback requirements to allow the siting of a dwelling within the 100-foot setback. The variance application was approved, provided that the "building structure" was located no closer than 75 feet from the ordinary high water mark (OHWM) of the river. Construction of the dwelling, including an attached deck, was completed in 1981. As constructed, the dwelling and the deck are 77 feet and 54 feet from the river, respectively.

In 1999, petitioner applied for a landscape management permit to construct a 352-square foot addition to the residence. As proposed, the addition extends the dwelling to the edge of the deck, therefore extending the dwelling itself to within 54 feet of the OHWM. As directed by county staff, petitioner filed an application for landscape management site plan approval. During the review process, county staff and the hearings officer reviewing the application determined that, while the application was exempt from the landscape management overlay requirements, it was subject to the county's standards for exceptions from stream setbacks. The notice of public hearing and the review by the hearings officer list

the exception standards as applicable approval criteria.

Petitioner appeared before the hearings officer and presented testimony to show that the dwelling and the deck were approved and have existed in the same location since 1981. Petitioner's wife, a neighbor, and the residential homebuilder who built the residence all testified that the dwelling and deck had been built in compliance with the 1980 variance. Finally, petitioner presented a letter from the hearings officer who approved the 1980 variance permit. According to the 1980 hearings officer, the dwelling itself was to be set back at least 75 feet from the OHWM. However, the hearings officer testified that the variance was intended to allow construction of a deck with a riverbank setback of at least 50 feet.

County staff presented evidence to show that the deck was not constructed in accordance with the setback variance. Staff's evidence indicated that the deck, as built, did not conform to the plans submitted with the variance application, which did not show a deck extending toward the river from the dwelling. County staff took the position that the deck was not legally established.

In reviewing the exception to the setback standards, the hearings officer concluded that the deck was constructed in violation of the county's 1979 100-foot setback requirement. The hearings officer concluded that the 1980 variance, which authorized a *dwelling* setback of 75 feet from the OHWM, did not also include a variance to allow the deck to be constructed less than 75 feet from the OHWM. The hearings officer denied the subject application, because the application failed to satisfy a criterion that required the addition to be constructed no closer to the OHWM than an existing structure. The hearings officer interpreted that criterion to require a showing that the existing structure be legally established prior to approval of an addition to it.

Petitioner appealed the hearings officer's decision to the board of commissioners. The board of commissioners declined to review the hearings officer's decision.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner presents three arguments in this assignment of error. We address each separately.

A. Adequate Notice

Petitioner argues that the county failed to provide him with adequate notice of evidence needed to satisfy the applicable criteria. Petitioner contends that the county's notice failed to indicate that he would have to provide evidence to show that the deck, as well as the dwelling, was lawfully established in order to satisfy the county's requirement that the application comply with Deschutes County Code Section 18.120.030(D).[1] The county responds that its notice of hearing included all of the relevant approval criteria and, in addition, the portion of the staff report addressing the criteria identified the legality of the deck as an issue that needed to be addressed.[2]

We find that the discussion in the county's staff report was sufficient to apprise

---

[1]DCC 18.120.030(D) provides, in relevant part:

> "An addition to an existing residential dwelling which is within 100 feet from the ordinary high water mark along a stream * * * may be constructed provided that the addition is for residential dwelling purposes, no part of the addition is closer to the stream or lake than the existing residential structure, the addition is 900 square feet in area or smaller and does not exceed the area of floor space of the existing structure and the addition conforms with all other setbacks and building limitations."

[2]In addressing DCC 18.120.030(D) the staff report states, in part:

> "[In 1980], the Deschutes County Hearings Officer approved a variance to the 100 [foot] stream setback to allow the original property developer to place the 'building structure' (house) no closer than 75 feet to the OHWM of the river. Staff finds the developer of the existing house had a right to a river setback of 75 feet established by the Hearings Officer's decision * * *. This would allow the applicant to build a 352-square foot addition to the existing house within the 100-foot setback provided it was at least 75 feet from the OHWM or not closer to the OHWM than the existing house. If the existing house is actually farther than 75 feet from the OHWM, then no additional encroachment into the exiting setback would be allowed. As proposed, the addition would extend to the point of the rear deck approximately 54 feet from the OHWM of the river. Staff finds the applicant has not satisfied this criterion because he has not proved he has a right to build an addition approximately 54 feet from the OHWM of the river." Record 111.

petitioner of the county's determination that the legality of the deck would be an issue during the proceedings. Petitioner does not argue that he was not given an opportunity to contact witnesses and prepare testimony to support his contention that the dwelling and deck were legally established on the property, nor does petitioner argue that he was prevented from presenting that testimony before the hearings officer.

This subassignment of error is denied.

B. ORS 215.416(8)

Petitioner next contends that the hearings officer's interpretation of DCC 18.120.030(D) to require that the deck, as part of the residential structure, had to comply with the setback requirements incorporated into the 1980 variance approval for the dwelling, or be subject to its own variance permit, adds an additional approval standard and thus violates ORS 215.416(8).[3] Petitioner contends that because the county's code did not expressly contain a requirement to prove the legality of the existing deck, the county could not impose such a requirement by implication. Petitioner cites to *Lee v. City of Portland*, 57 Or App 798, 646 P2d 662 (1982) for the proposition that an applicable code provision must be clear on its face before it can be the basis for approval or denial of an application.

Petitioner misunderstands the court's holding in *Lee*. In that case, the court responded to the petitioners' challenge that the standards were impermissibly vague under ORS 227.173(1).[4] The court held that, so long as the standards are "clear enough for an applicant to know what he must show during the application process," they satisfy the requirements of

---

[3]ORS 215.416(8) provides, in relevant part:

> "Approval or denial of a permit application shall be based on standards and criteria which shall be set forth in the zoning ordinance * * * and which shall relate approval or denial of a permit application to the zoning ordinance and comprehensive plan for the area in which the proposed use of land would occur and to the zoning ordinance and comprehensive plan for the county as a whole."

[4]ORS 227.173(1) imposes the same requirements on cities as ORS 215.416(8) imposes on counties.

ORS 227.173(1). *Lee*, 57 Or App at 802. Thus, to establish a challenge under ORS 227.173(1) or ORS 215.416(8), a petitioner must demonstrate that the standard is so vague that an applicant is unable to determine whether, or how, approval may be granted.

Although DCC 18.120.030 does not expressly impose the obligation that the county interpreted it to impose, we do not agree with petitioner that DCC 18.120.030, as interpreted in this case, violates ORS 215.416(8). *See Gutoski v. Lane County*, 155 Or App 369, 373, 963 P2d 145 (1998) (petitioners are expected to anticipate and present evidence and argument to address plausible interpretations of applicable code at the initial proceedings before the local government). We note that, in this case, petitioner was aware that county staff, at least, interpreted DCC 18.120.030 to require that petitioner show that he was legally entitled to build the existing deck as close as 54 feet from the OHWM. Indeed, petitioner presented evidence and argument on this very issue.

This subassignment of error is denied.[5]

C. Remedies for Siting an Illegal Structure

Petitioner contends that even if the deck was constructed illegally, the process for remedying the error is to initiate an enforcement action, not to deny a permit for the addition. According to petitioner, there is nothing in DCC 18.120.030(D) that requires an applicant to demonstrate that the dwelling itself was legally sited on the property prior to requesting approval for an addition to it. Petitioner also argues that, even if the legality of the structure is a relevant approval criterion, he demonstrated that the deck was legally established as a matter of law.

The county argues that it has an interest in promoting scenic views and protecting "sensitive values in stream corridors" and that the county's code should be interpreted to

[5]Petitioner also argues under this subassignment of error that even if DCC 18.120.030 requires that the deck be lawfully established, petitioner showed that either (1) the deck was lawfully established, or (2) the deck was not subject to any regulation at the time it was constructed, and therefore, it is a lawful pre-existing nonconforming use. We address those arguments later in this opinion.

promote those goals. Response Brief 4. The county contends that if we accept petitioner's argument, we frustrate the county's ability to ensure that the exceptions to the county's protective ordinances are limited.

The county also contends that the hearings officer has the authority to interpret the code provisions to ensure that the minimum exception possible is granted. The county further argues that the present situation is analogous to nonconforming uses, which may be allowed only if the applicant can demonstrate that the use was legal when established. From the county's perspective, it is entirely permissible for the hearings officer to interpret the code in such a way as to prevent the expansion of an illegal use. According to the county, it makes no sense to permit an addition, if the main structure is not sited legally.

The situation in this case is similar to the situation presented in *McKay Creek Valley Assoc. v. Washington County,* 24 Or LUBA 187 (1992). In *McKay Creek Valley Assoc.*, the petitioner appealed the county's approval of a dwelling, arguing that before the county could approve the dwelling, the county had to determine whether the parcel was legally created. LUBA affirmed the county's conclusion that its code did not require that the property on which a dwelling is to be located be "legally" created. In doing so, we drew a distinction between prior government approvals and the substantive correctness of those approvals, and indicated that the existence of the former could be re-explored in connection with subsequent application, while the latter question could not. The Court of Appeals agreed with that analysis. *McKay Creek Valley Assn. v. Washington County*, 118 Or App 543, 549, 848 P2d 624 (1993). Thus, in the absence of a county code provision establishing a requirement that an applicant prove that a parcel on which a dwelling is proposed to be sited is legally created, a local government may not use a later, unrelated land use proceeding to correct any mistakes made in prior, final land use decisions regarding the establishment of the parcel itself.

In this case, the parties dispute whether the 75-foot setback approved by the 1980 variance applied to the deck as well as the dwelling. The hearings officer in this case

concluded that the deck is part of the "residential structure," and therefore, the final placement of the deck was subject to the 75-foot setback approved in the 1980 variance and construction of a deck without that setback would have required a separate variance. Because the required approvals did not exist, the hearings officer denied the application. Thus, the hearings officer's decision turned on the first prong of the *McKay Creek Valley Assoc.* analysis—the existence of required approvals, and not the correctness of the approval given—to determine that the applicants had failed to demonstrate that the relevant criterion had been met. We conclude that the hearings officer's interpretation of the code to require a demonstration that the structure that justifies the location of an addition within the setback was lawfully established, *i.e.*, was subject to county approval, is reasonable and correct. Because the deck justifies the location of the proposed addition, the county correctly required petitioner to demonstrate that the deck was lawfully established.[6]

D. Legality of Deck

We now turn to petitioner's argument that he demonstrated that the deck was sited legally as a matter of law. During the 1980 proceedings, the plans submitted to support the variance did not show a deck. The hearings officer granted the variance, based on the evidence, but required that the proposed "building structure" not be placed "closer than 75 feet to the high-water mark or line." Record 115. According to the testimony of the hearings officer, it was not unusual for building plans to be submitted without showing the location of a deck. He testified that in those circumstances, he granted a variance to 75 feet from the water's edge, anticipating that a deck would be constructed to within 50 feet. Record 79.

According to the builder

> "The home was designed with two wings projecting toward the river with a deck between the wings. We * * * applied for a variance to 50 [feet] from the

[6]Petitioner does not challenge the hearings officer's interpretation of "residential structure" to include the deck attached to the dwelling, and therefore, we need not decide whether that interpretation is correct.

> high water line. * * *The 50 [foot] variance was approved with the stipulation that the house be placed 75 [feet] from the high water line. We moved the house back, enclosed the space between the wings as an additional room and built the deck to the 50 [foot] variance. * * *The house plans submitted as required for building permits included the decks and attached garage." Record 120.

The hearings officer in the current proceeding relied on the testimony of the builder and the hearings officer in the 1980 proceedings to reach the conclusion that the existing deck was not authorized by the original variance. Petitioner does not argue with this point. However, petitioner does contend that it was not *necessary* for the deck to be included or authorized by the original variance. According to petitioner, all of the parties at the time knew that a deck would probably be added at some point. In addition, the county did not object to the inclusion of the deck in the subsequently filed building plans. Petitioner argues that this clearly indicates that the county acquiesced to the establishment of the deck in its present location.

The difficulty we have with petitioner's argument is that the parties' unspoken knowledge that a deck might be added does not establish that the deck was in fact lawfully approved or could be constructed without approval. Petitioner offers no basis to dispute the hearings officer's conclusion that, under the law applicable in 1980 and today, construction of the deck in its current location required the county's approval of a variance from the setback. Therefore, we cannot say as a matter of law that petitioner prevails.

In the alternative, petitioner argues that the deck is a legal pre-existing nonconforming use. The county responds that it established the setback standards in 1979, and the deck was constructed in 1980. The county argues that because the standards pre-date the construction of the deck, petitioner cannot show that the deck is a legally established nonconforming use. We agree.

This subassignment of error is denied.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the addition could be approved under either the county's exceptions to the setback standards or through a verification of a nonconforming use. Petitioner contends that by failing to inform him of the option to apply for a verification of a nonconforming use, and failing to process the dual application, the county violated ORS 215.416(2) and caused petitioner to be subject to "oppressive serial application procedures."[7] Petition for Review 10.

The county argues that petitioner has not demonstrated how the county's failure to process combined applications prejudiced petitioner's substantial rights. The county also argues that petitioner's argument is not sufficiently developed for our review.

We do not believe that ORS 215.416(2) obligates the county to prescribe the process for the applicant to follow to achieve his goals. Rather, the statute provides that if the applicant chooses to submit a consolidated application, the county must have a procedure available to review the consolidated application as a whole.

The second assignment of error is denied.

The county's decision is affirmed.

---

[7]ORS 215.416(2) provides, in relevant part:

> "The governing body shall establish a consolidated procedure by which an applicant may apply at one time for all permits or zone changes needed for a development project. * * * The consolidated procedure shall be available for use at the option of the applicant no later than the time of the first periodic review of the comprehensive plan and land use regulations."