BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RANDY BATES,
*Petitioner,*

vs.

CITY OF CASCADE LOCKS,
*Respondent.*

LUBA No. 99-172

FINAL OPINION
AND ORDER

Appeal from City of Cascade Locks.

Daniel C. Lorenz, Portland, filed the petition for review and argued on behalf of petitioner.

No appearance by respondent.

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

REMANDED 07/06/2000

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**

Petitioner appeals a city decision granting a front yard setback variance.

**FACTS**

The subject property is located in the city's Medium Density Urban Residential (R-5) zone and is 75 feet wide and 100 feet deep. It is improved with a dwelling and an accessory building in the rear yard. The applicant for the disputed variance began construction of a second accessory building in the front yard without first obtaining a building permit from the city. The owners of the subject property plan to operate a salon as a home occupation in the new accessory building. The new accessory building is set back 15 feet from the front property line.

The city has adopted a revision to the City of Cascade Locks Community Development Code (CDC) to reduce the front yard setback in the R-5 zone from 20 feet to 15 feet. However, the challenged decision explains that the amendment will "only take effect after the CDC has been approved by the state."[1] Record 3. Because the CDC currently in effect requires a 20-foot setback, the applicant sought a variance to allow a 15-foot setback for the new accessory building. The city planning commission granted the requested variance, and on appeal the city council affirmed the planning commission's decision. This appeal followed.

**FIRST AND SECOND ASSIGNMENTS OF ERROR**

CDC 5.6 requires that an applicant for a variance show that four circumstances exist before the variance may be granted. The first of those circumstances is set out at CDC 5.6(1):

[1]We assume without deciding that the challenged decision is correct that the newly adopted front yard setback is not yet effective.

> "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, topography or other circumstances over which the owners of [the] property since enactment of this ordinance have had no control."

Petitioner argues under the first and second assignments of error that the city's findings fail to demonstrate compliance with CDC 5.6(1). The city's findings addressing this criterion are as follows:

> "The property slope, shape, and yard are representative of many other lots in the vicinity and the city generally. The applicant demonstrated at the hearing that the front yard location was the only reasonable means to accommodate the proposed salon. In addition, the adoption of the new CDC setback provisions creates an exceptional circumstance because following approval of the CDC by the state, a variance will not be necessary to locate the building as proposed. The new CDC was originally scheduled to be reviewed in the spring. However, the state has been slow to review the CDC, and this is a situation which is beyond the control of the applicant and the city." Record 4.

We agree with petitioner that the first sentence quoted above establishes that there is nothing exceptional or extraordinary about the subject property's slope, shape or yard and that the property is similar to other properties in the vicinity and city. Viewed alone, that sentence establishes that CDC 5.6(1) is *not* met.

We also agree with petitioner that even if the applicant has established that the front yard location is "the only reasonable means to accommodate the proposed salon," as stated in the second sentence of the findings quoted above, that fact has no apparent relevance to the standard imposed by CDC 5.6(1). The city does not explain why any inability to reasonably accommodate the salon on the subject property in other ways is the result of lot size, lot shape, topography or other circumstances that are beyond the control of the owners. The city also does not explain why inability to accommodate a salon on the property as a home occupation constitutes an "exceptional or extraordinary" circumstance. The "exceptional or extraordinary circumstances" standard is a demanding, traditional variance standard. *See Wentland v. City of Portland*, 22 Or LUBA 15, 25 (1991) (exceptional or extraordinary

circumstances standard is not satisfied "simply because the particular intensity of use the applicant proposes would otherwise be frustrated"). Under ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), the city has some latitude to interpret and apply CDC 5.6(1) in a more lenient manner than the courts and LUBA have required for similarly worded traditional variance standards. *deBardelaben v. Tillamook County*, 142 Or App 319, 325-26, 922 P2d 683 (1996). However, if the city wishes to interpret the language of CDC 5.6(1) to impose a less stringent standard it must articulate and adopt such an interpretation. The challenged decision does not do so.

Finally, with regard to the remaining findings quoted above, the existence of the new CDC provisions does not demonstrate compliance with CDC 5.6(1). We question whether such a change in law could ever qualify as an "exceptional or extraordinary circumstance." Even if it could, as petitioner correctly notes, the expected change in law will also apply to "other properties in the same zone or vicinity" and for that reason cannot be relied upon to demonstrate compliance with CDC 5.6(1).

The city's findings are not sufficient to demonstrate compliance with CDC 5.6(1). The first and second assignments of error are sustained.

**FOURTH ASSIGNMENT OF ERROR**

CDC 5.6(2) establishes a second variance criterion:

> "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's findings do not demonstrate compliance with CDC 5.6(2).

The city's findings addressing this criterion are as follows:

> "As soon as the new CDC is approved by the state, other residential properties in the area will be able to develop with a 15-foot front yard setback. Allowing the variance now is consistent with the property right all residential property owners will have once the new CDC is approved by the state." Record 4.

Neither the applicant nor the other property owners in the same zone currently have a right to build with a front yard setback of 15 feet. Both the applicant and the other property owners in the same zone will have a right to build with a front yard setback of 15 feet after the new CDC is approved by the state. We agree with petitioner that the city's findings do not identify a property right that "owners of other property in the same zone or vicinity possess" that the applicant does not possess. Therefore, the city's findings do not demonstrate compliance with CDC 5.6(2).

The fourth assignment of error is sustained.

**THIRD ASSIGNMENT OF ERROR**

CDC 5.6(3) establishes a third variance criterion:

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

Petitioner argues the city's findings do not demonstrate compliance with CDC 5.6(3). Those findings are as follows:

> "As noted above, the proposed accessory building meets all other city standards. The applicant agreed to address the potential slope/retaining wall issue with the Public Works Supervisor." Record 4.

Petitioner argues the city's findings are not adequate to address two issues that were raised by petitioner below. First, the city imposed a condition requiring onsite parking for two vehicles, but petitioner argues the challenged decision does not "adequately address the traffic impact on the neighborhood." Petition for Review 10. Second, according to petitioner, a home occupation (1) may not be conducted in a structure other than the dwelling and (2) may not "give the appearance of a business."[2] *Id*.

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[2]Home occupations are allowed in the R-5 zone as a permitted use. CDC 3.5(1)(d). CDC 1.3 defines "home occupation" as follows:

> "Any lawful activity, not otherwise specifically provided for in this ordinance, commonly carried on within a dwelling by a member or members of a family, no employee or other

Because neither the city nor the applicant appeared in this appeal, no party disputes petitioner's claim that he raised these issues below. We therefore assume that he did. Traffic impacts on the neighborhood appear to be a relevant concern under CDC 5.6(3). The challenged decision requires two parking spaces, but does not address traffic impacts on the neighborhood. Both the Oregon Court of Appeals and LUBA have pointed out on numerous occasions that when a legitimate issue is raised concerning a relevant approval criterion during a quasi-judicial land use proceeding, the local decision maker is obligated to address that issue in the findings that support the decision in such proceedings. *City of Wood Village v. Portland Metro. Area LGBC*, 48 Or App 79, 87, 616 P2d 528 (1980); *Hillcrest Vineyard v. Bd. of Comm. Douglas Co.*, 45 Or App 285, 293, 608 P2d 201 (1980); *Allen v. Umatilla County*, 14 Or LUBA 749, 755 (1986). The city's failure to address the issue of possible traffic impacts on the neighborhood is error.

The questions petitioner raises about the proposed home occupation raise a related issue. The challenged decision grants a request for a variance. Since home occupations are a permitted use, it is not entirely clear that the challenged decision actually approves the planned home occupation. However, the city's finding addressing one of the other variance criteria specifically finds that "[t]he proposed home occupation, which will occupy the building, is consistent with the home occupation provisions in the Zoning Ordinance, as well as the city's past interpretation and administration of home occupations." Record 4. In view of that finding, we believe the challenged decision does approve the proposed home occupation, whether or not it was necessary to do so in approving the disputed variance.

Although we express no view concerning petitioner's position that the proposed home occupation is inconsistent with the CDC, if the city wishes to approve the proposed

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person being engaged in the same and in which said activity is secondary to the use of the dwelling for living purposes. A home occupation is one that is conducted in such a manner as not to give the appearance of a business [and] not to infringe upon the right of neighboring residences to enjoy the peaceful occupancy of their homes."

home occupation as part of the challenged variance decision, it must support its approval of the proposed home occupation with findings that address the issues raised by petitioner. The city's failure to do so is error.

The third assignment of error is sustained.

**FIFTH ASSIGNMENT OF ERROR**

Under his fifth assignment of error petitioner argues that the city has "a fiduciary responsibility to protect the interests of the City with respect to its own dedicated streets * * *." Petition for Review 12. Petitioner argues the challenged decision fails to protect city streets, because it imposes the following condition:

> "The stability of the public street right-of-way shall be protected by a retaining wall, 2:1 slope, or other means approved by the Public Works Supervisor." Record 2.

According to petitioner, the record includes a letter that shows the Public Works Supervisor is not qualified to make decisions concerning retaining walls and the condition therefore constitutes error.

We do not agree that the letter petitioner cites in the record shows the Public Works Supervisor is not qualified to carry out the condition. The letter explains how to construct a 2:1 slope and explains that a permit from the "Hood River Building Dept." will be required for a retaining wall, because the Public Works Superintendent himself is not qualified to approve a retaining wall design. Record 26. In any event, unless the alleged failure to protect the right of way implicates one or more of the variance approval standards, it provides no basis for remand. Petitioner does not identify the variance criterion that he believes the alleged failure implicates. Accordingly, the fifth assignment of error provides no basis for reversal or remand.

The fifth assignment of error is denied.

**RELIEF REQUESTED**

Petitioner argues that the challenged decision must be reversed because "there are no facts in the record which could, under any circumstances, justify the issuance of the land use decision issued by the City of Cascade Locks." Petition for Review 13.

OAR 661-010-0071(1)(c) provides that reversal rather than remand is appropriate where "[t]he decision violates a provision of applicable law and is prohibited as a matter of law." In *Koo v. Polk County*, 33 Or LUBA 487, 499 n 10 (1997), we explained: "[r]eversal, rather than remand, is appropriate only when the local decision is wrong as a matter of law and cannot be legally corrected."

Although we are inclined to agree with petitioner that CDC 5.6(1) (exceptional or extraordinary circumstances) and CDC 5.6(2) (preservation of a property right) may well be impossible to satisfy in this case based on our understanding of the facts, neither the county nor the applicant appeared in this proceeding, and we are not prepared to say that the standards cannot be satisfied as a matter of law. In addition, although the city's conclusion that the proposed home occupation is consistent with the CDC is not adequately explained in the city's findings, petitioner has not shown that the conclusion is erroneous as a matter of law.

The city's decision is remanded.