

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 DAVID TONGES and CYNTHIA TONGES,
5 *Petitioners,*

6
7 vs.

8
9 CITY OF MANZANITA,
10 *Respondent.*

11
12 LUBA No. 2004-138

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from City of Manzanita.

18
19 John W. Shonkwiler, Tigard, filed the petition for review and argued on behalf of
20 petitioners. With him on the brief was John W. Shonkwiler, PC.

21
22 William R. Canessa, Seaside, filed the response brief and argued on behalf of
23 respondent. With him on the brief was Moberg, Canessa, Faber and Hooley, PC.

24
25 HOLSTUN, Board Chair; BASSHAM, Board Member; DAVIES, Board Member,
26 participated in the decision.

27
28 REVERSED

12/01/2004

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

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NATURE OF THE DECISION

Petitioners appeal the city’s determination of the required setback from the front lot line for their ocean front lot.¹

FACTS

Petitioners own a vacant, ocean front lot in the City of Manzanita. Petitioners’ rectangular lot has approximately 50 feet of beach frontage and is 100 feet in depth. Due to the city’s requirement for ocean front setbacks and the fact that the subject lot is the smallest lot in the vicinity, petitioners were concerned about the exact location of the ocean front setback line and requested that the city manager render an administrative determination of the ocean front setback line for their lot. The city manager determined that the setback would be on a line from the western edge of the residences on the lots to the north and south of petitioners’ lot. Petitioners contended that the ocean front setback for their lot should be a line that connects the western edge of the patio that adjoins the house on the lot to the north and the western edge of the deck that adjoins the house on the lot to the south. If the ocean front setback is established in that way, it is located several feet farther west than the ocean front setback identified by the city. Petitioners appealed the city manager’s decision to the city planning commission, which denied the appeal. Petitioners then appealed the planning commission’s decision to the city council, which also denied petitioners’ appeal. This appeal followed.

¹ Although the city’s zoning ordinance and the challenged decision speak in terms of setbacks from the front lot line, that terminology is somewhat confusing. The dispute in this appeal actually has to do with an ocean front setback. As explained later in this opinion, that ocean front setback is established under the city’s zoning ordinance by drawing a line between the westernmost point of the foundation of existing adjacent structures. New structures generally must be located east (landward) of that ocean front setback line.

1 **FIRST ASSIGNMENT OF ERROR**

2 Petitioners’ lot is located in the city’s beaches and dunes overlay zone, and the lot
3 abuts the oceanshore. Manzanita Zoning Ordinance (MZO) 3.085 provides in pertinent part:

4 “Standards. Uses and activities permitted outright or conditionally within
5 the beaches and dunes overlay zone shall comply with the following
6 applicable standards:

7 “* * * * *

8 “4. Ocean Front Averaging

9 “a. For lots abutting the oceanshore, the setback from the front lot line for
10 *buildings* hereafter constructed shall be on a direct line with the
11 western *foundations* of existing adjacent *structures* and a direct line
12 between the western foundations where there is no structure.”
13 (Emphases added.)

14 As previously noted, petitioners argued below that the setback line should be drawn
15 from the western edge of the existing, walled patio that is attached to the house on the
16 adjoining lot to the north to the western edge of the deck that is attached to the existing house
17 on the adjoining lot to the south. The city disagreed and interpreted MZO 3.085(4)(a) to refer
18 to the western edge of the “enclosed living area.”

19 “Regarding the ‘western foundation line’, the City Council interprets the
20 Ordinance to mean that the foundation is the edge of the enclosed living area
21 and does not include decks or porches. As the purpose of the provision was to
22 keep the houses in rough alignment, it was appropriate for the City Manager to
23 use the westernmost point of the foundations of the adjacent houses. The City
24 Manager correctly determined the western foundation line described in [MZO]
25 3.085(4)(a).” Record 5.

26 Petitioners argue that the city misconstrued MZO 3.085(4)(a). Under ORS
27 197.829(1), *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), and *Church v. Grant*
28 *County*, 187 Or App 518, 524, 69 P3d 759 (2003), we must sustain a local government’s
29 interpretation of its own legislation unless that interpretation is: (1) inconsistent with the
30 express language of the plan or regulation; (2) inconsistent with the purpose of the plan or
31 regulation; (3) inconsistent with the underlying policy providing the basis for the plan or

1 regulation; or (4) contrary to a state statute, land use goal or rule that the comprehensive plan
2 provision or land use regulation implements.²

3 MZO 3.085(4)(a) requires that the setback for construction of new “buildings” be
4 measured from the “foundations” of existing adjacent “structures.” Although the MZO does
5 not include a definition for “foundation,” it does provide definitions for “building” and
6 “structure.”³

7 “Building. A structure, other than a mobile home, built for the support,
8 shelter, or enclosure of persons, animals, chattels, or property of any kind and
9 having a fixed connection to the ground.” MZO 1.030.

10 “Structure. Structure means anything constructed or built which requires
11 location on the ground or is attached to something having a location on the
12 ground, including covered patios, fences and walls; but not including normal
13 plants and landscaping materials, paved outdoor areas, walks, driveways, and
14 similar improvements.” MZO 1.030.

15 While a building, such as a house or the enclosed living area of a house, is clearly a
16 “structure,” it is also clear that “structures,” as MZO 1.030 defines that term, are not limited
17 to houses or the enclosed living area of a house. As defined by MZO 1.030 “structures”

² Under ORS 197.829(1):

“[LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- “(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
- “(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.”

³ Webster's Third New Int'l Dictionary, 898 (unabridged ed 1981) includes the following relevant definition of “foundation:”

“**4 a** : an underlying natural or prepared base or support * * * **b**: a means of transferring building loads to the soil below: (1) : the supporting part of a wall or structure usu. below ground level and including footings (2) the whole masonry substructure of a building[.]”

1 include such things as “covered patios, fences, and walls.” The patio and deck on the
2 adjacent lots both have foundations.⁴

3 The city’s interpretation that the western foundation line is measured from the edge of
4 the “enclosed living area” has no support in the language of the ordinance. If MZO
5 3.085(4)(a) required that the setback be measured from the “western foundations of existing
6 adjacent *buildings*” then the city’s interpretation would certainly be affirmable. However,
7 MZO 3.085(4)(a) instead requires that the setback be measured from the “western
8 foundations of existing adjacent *structures*.” As the MZO definitions make clear,
9 “structures” are not limited to “buildings.” Under the MZO, things that are not enclosed
10 living areas, such as fences and walls, are “structures.” As defined by the MZO, the attached
11 patio and deck on the adjacent lots are “structures.” If the city wants the MZO 3.085(4)(a)
12 setback line to be measured from the foundation of the “building” or “enclosed living area”
13 portion of adjoining “structures,” it must amend MZO 3.085(4)(a) to say so.

14 The city attempts to defend its interpretation by citing the definition of “subarea”
15 from its Foredune Management Ordinance (FMO), which provides:

16 “A portion of a management unit or units. A subarea shall extend a minimum
17 of 500 feet of continuous shoreline in length. The shoreward (eastern)
18 boundary of a subarea corresponds to the shoreward (eastern) boundary of the
19 Foredune Management Area. This boundary is defined as the western
20 foundation of existing structures and a direct line between the western
21 foundations where there is no structure. Any porch or deck west of the house
22 foundation shall be considered as within the grading zone.” Record 5
23 (underscoring added in city’s decision).

24 According to the city, the MZO 3.085(4)(a) language for the ocean front averaging was taken
25 from the FMO, and because the FMO clearly does not allow porches or decks to be
26 considered in locating the western foundation line, porches and decks should similarly not be
27 considered under MZO 3.085(4)(a).

⁴ The city does not dispute that the adjacent lots’ patio and deck are supported by a foundation.

1 “Two of the City Councilors hearing the appeal were on the Council when the
2 ‘western foundation line’ language was added to the Zoning Ordinance in
3 August of 2001. They recalled that their understanding was that the ‘western
4 foundation line’ was measured from the edge of the enclosed living area of the
5 house, not from the edge of the deck or porch in front of the house. The
6 current City Manager was also in that position at the time the Ordinance was
7 revised and recalls that he explained to the Council that the western
8 foundation line would be measured from the edge of the enclosed living area
9 of the house.

10 “The concept of ‘western foundation line’ used in [MZO] 3.085(4)(a) was
11 taken from the City’s [FMO] * * *.

12 “The language in the [FMO] clearly excludes porches or decks west of the
13 house foundation for purposes of establishing the boundary of the subarea.
14 When [MZO] was being discussed by the Council, it was assumed that this
15 same concept would apply to the setback from the front lot line.” Record 5.

16 The city councilors’ and city manager’s post-enactment recollections about what they
17 believe was intended when MZO 3.085(4)(a) was enacted are not competent legislative
18 history. *DeFazio v. WPPSS*, 296 Or 550, 561, 679 P2d 1316 (1984). We also do not agree
19 with the city’s contention that the above FMO “subarea” definition clearly requires that
20 porches and decks are not to be considered when identifying the management unit subarea.
21 The FMO, like MZO 3.085(4)(a), provides that it is the line connecting the “western
22 foundation of existing structures” that forms the subarea boundary. Therefore, the subarea
23 boundary, like the MZO 3.085(4)(a) ocean front setback, is established by a line that connects
24 the foundations of adjoining “structures.”

25 It is potentially significant that, unlike MZO 3.085(4)(a), the last sentence in the FMO
26 definition of “subarea” quoted above specifically addresses porches and decks. While that
27 might well lend support to the city’s narrow interpretation of the word “structure” in MZO
28 3.085(4)(a), we have no idea what a “grading zone” is. Neither the challenged decision nor
29 the parties’ briefs offer any assistance in understanding what that last sentence means.
30 Perhaps no explanation would be required if the last sentence of the FMO definition of
31 subarea instead said “[a]ny porch or deck west of the house foundation shall not be

1 considered when establishing the eastern boundary of a subarea.”⁵ In that case it would be
2 clear that the city’s narrow interpretation of the word “structures” in MZO 3.085(4)(a) to
3 exclude walled patios and decks would be consistent with the FMO definition of “subarea,”
4 and the consistency of the narrow interpretation and the definition might allow the city to
5 argue that its narrow interpretation should be affirmed because it is consistent with the
6 “purpose” of MZO 3.085(4)(a) and its “underlying policy.” *See* n 2. As it is, the meaning of
7 “shall be considered as within the grading zone” is ambiguous. The city has not provided an
8 adequate explanation for why the FMO definition of “subarea” provides a basis for reading
9 the term “structures” in MZO 3.085(4)(a) more narrowly than MZO 1.030 defines that term.
10 The city’s interpretation is inconsistent with the express language of the ordinance.

11 The first assignment of error is sustained.

12 **SECOND ASSIGNMENT OF ERROR**

13 MZO 3.085(4)(b) provides a procedure for the city to determine an alternative setback
14 from that provided by MZO 3.085(4)(a) under certain circumstances. In their second
15 assignment of error, petitioners argue that the city should have adjusted the setback under this
16 provision. Because we sustain petitioners’ first assignment of error, petitioners’ arguments
17 based on a western foundation line that must be changed are moot.

18 We do not address the second assignment of error.

19 **THIRD ASSIGNMENT OF ERROR**

20 Petitioners argue that the city violated ORS 197.522 by not approving their proposed
21 residence with conditions.⁶ As relevant here, ORS 197.522 only applies to “an application

⁵ If the sentence were worded in that way, it would be clear that the subarea boundary would be a line that connected the westernmost part of the adjoining house foundations and any decks or porches that were located west of the house foundation would not alter the subarea boundary line. In other words, the subarea boundary would be drawn as though the deck or porch did not exist.

⁶ ORS 197.522 provides:

1 for a permit, authorization or other approval” that is required to construct a building on land.
2 In the present case, petitioners applied only for an administrative determination of the
3 location of a setback, which they received; they did not apply for a building permit or any
4 other kind of “permit, authorization or other approval.” Therefore, ORS 197.522 does not
5 apply.⁷

6 The third assignment of error is denied.

7 The city’s decision is reversed.

“A local government shall approve an application for a permit, authorization or other approval necessary for the subdivision or partitioning of, or construction on, any land that is consistent with the comprehensive plan and applicable land use regulations or shall impose reasonable conditions on the application to make the proposed activity consistent with the plan and applicable regulations. A local government may deny an application that is inconsistent with the comprehensive plan and applicable land use regulations and that cannot be made consistent through the imposition of reasonable conditions of approval.”

⁷ Petitioners also argue in their brief that the city violated ORS 227.173(2), which requires that review of certain needed housing permit applications be based on “clear and objective standards.” As with the third assignment of error, this argument fails because petitioners did not submit a needed housing permit application.