BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RONALD E. DOYLE and JUDITH A. DOYLE,
Petitioners,

and

GORDON HAYES,
Intervenor-Petitioner,

vs.

COOS COUNTY,
Respondent,

and

TERRY LUCE and EVELYN LUCE,
Intervenor-Respondents.

LUBA No. 2005-034

FINAL OPINION
AND ORDER

Appeal from Coos County.

Ronald E. Doyle and Judith A. Doyle, Myrtle Point, filed a joint petition for review and argued on their own behalf.

Gordon Hayes, Myrtle Point, represented himself.

David R. Koch, Coos County Legal Counsel, Coquille, filed the response brief and argued on behalf of respondent.

Jerry O. Lesan, Coos Bay, filed the response brief and argued on behalf of intervenor-respondents.

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

REMANDED 07/20/2005

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 a county decision that grants a variance from a Coos County Zoning and Land Development Ordinance (LDO) setback requirement.

MOTIONS TO STRIKE

Intervenor-respondents Luce (hereafter the Luces) move to strike two extra-record documents from the petition for review. The first is an Oregon Tax Court decision and the second is a map from the record that petitioners have altered. The Tax Court decision is subject to official notice. We take official notice of that decision, although we do not rely on that decision for any of the findings of fact that are in dispute in this appeal. Intervenor-respondent's motion to strike the Tax Court decision is denied. The motion to strike the altered map from the record is granted.

Petitioners move to strike portions of respondent's and intervenor-respondents' briefs. Item 7 in their motion to strike requests that we strike certain circuit court "Findings of Fact and Conclusions of Law" that are dated May 22, 1947. That document is not included in the record and has no direct bearing on the decision that is before us in this appeal. The motion to strike this document is granted. Petitioners also object to other portions of respondent's and intervenor-respondents' brief and move to strike them. Those remaining objections are without merit, and we reject them without further discussion.

REPLY BRIEF

Petitioners move for permission to file a reply brief to respond to allegedly new matters that are raised in respondent's brief and intervenor-respondents' brief. The motion is granted.

FACTS

The Luces, the applicants below, purchased an eight-acre parcel in 1997. Highway 242 is located west of the Luces' eight acres and provides the nearest public road access. The Luces have access to Highway 242 over an easement that extends east from Highway 242 across an intervening parcel that is owned by a person who is not a party to this appeal. That easement then

continues east across the Luces' property, bisecting their property, and providing access to three more parcels that are located east of the Luces' property. Petitioners own one of those parcels to the east, and their property is used for commercial forest purposes and is also improved with a recreational house.

Over the years since the Luces purchased the subject eight acres in 1997, petitioners and the Luces have had a number of disagreements about petitioners' use of the easement for access for equipment used for forest operations on petitioners' property, and about actions by the Luces that petitioners believe have improperly obstructed their access across the easement. This appeal concerns three structures that the Luces have constructed on their property.[1]

The easement is 20 feet wide and the roadway that is located on that easement is approximately 10 feet wide. That roadway apparently meanders somewhat within the 20-foot easement. None of the disputed structures is located within the 20-foot easement itself.[2] However, all of the disputed structures are less than 35 feet from the centerline of the easement. As we explain later in this opinion, the LDO requires that those structures be set back at least 35 feet from the centerline of the easement. Petitioners asked the county to enforce that setback and require that the Luces remove or move those structures to comply with the setbacks. Instead, the Luces applied for a variance to the setback requirement for the offending structures. The county granted that variance, and petitioners challenge that variance in this appeal.

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[1] Those structures include a 24-foot by 48-foot barn, a 14-foot by 8-foot shed and a 14-foot by 20-foot carport. Petitioners contend that the disputed variance also grants a variance for a 20-foot by 36-foot carport and a small woodshed. However, during the local proceedings the planning director clarified that the application was limited to the barn, shed and carport. Record 24. While there is language in the county's variance decision that can be read to extend the variance approval to other unspecified structures, we accept the county's clarification that the disputed variance is limited to the three structures that were identified by the planning director. A map of the property that shows the property, the easement and the improvements appears at Record 99.

[2] Petitioners suggest that one of the structures may actually encroach into the 20-foot easement, but the county found that such is not the case, and the evidentiary record is sufficient to support that county finding.

INTRODUCTION

The Luces' property is located in the county's Rural Residential-5 Zoning district and LDO 4.4.400(1)(D) requires that structures be set back 35 feet from the centerline of rights of way.[3] As we have already noted, the disputed structures violate that 35-foot setback requirement. The LDO allows variances from LDO requirements. LDO Article 5.3. The approval criteria for variances are set out at LDO 5.3.350 and require that the county adopt at least one of the three alternative findings set out at LDO 5.3.350(1)(A) and also adopt the finding set out at LDO 5.3.350(1)(B).[4]

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[3] As relevant, LDO 4.4.400(1)(D) provides:

> "Setbacks:
>
> "a. All buildings or structures with the exception of fences shall be set back a minimum of thirty-five (35) feet from any road right-of-way centerline, or five (5) feet from the right-of-way line, whichever is greater.
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> "* * * * *."

Given the narrow 20-foot easement, the controlling requirement is the required 35-foot setback from the centerline of the easement. No party questions the applicability of LDO 4.4.400(1)(D) to the private easement that serves the Luces' and petitioners' property, and we do not consider that question on our own. For purposes of this opinion, we assume that LDO 4.4.400(1)(D) requires that buildings or structure be set back at least 35 feet from the centerline of the 20-foot easement.

[4] As relevant, LDO 5.3.350 provides:

> "**Criteria for Approval of Variances.** No variance may be granted by the Planning Director unless, on the basis of the application, investigation, and evidence submitted;
>
> "1. Both findings 'A' and 'B' below are made:
>
> "A. i. that a strict or literal interpretation and enforcement of the specified requirement would result in unnecessary physical hardship and would be inconsistent with the objectives of this Ordinance; or
>
> "A. ii. that there are exceptional or extraordinary circumstances or conditions applicable to the property involved which do not apply to other properties in the same zoning district; or
>
> "A. iii. that strict or literal interpretation and enforcement of the specified regulation would deprive the applicant of privileges legally enjoyed by the owners of other properties or classified in the same zoning district;
>
> "B. that the granting of the variance will not be detrimental to the public health, safety, or welfare or materially injurious to properties or improvements in the near vicinity."

LDO 5.3.150 also imposes a separate threshold prohibition on variances for "Self-inflicted Hardships."[5]

The county's findings regarding each of the variance criteria rely principally on the following findings of fact:

> "5. The road in question has been in existence for a substantial period of time providing access to three parcels of resource land located east of the subject property. The road was in place and relied upon as access when the county approved the partition resulting in the sale of the parcel to the [Luces] and was in place when the structures were constructed. The road right-of-way is a 20 foot wide private easement the unobstructed traveled surface of which is at least 10 feet wide and is located within the easement but not necessarily along the centerline thereof. There is a fence along the north side of the easement where the structures are located. After passing the structures traveling east, vehicles must pass through a gate which is at least 12 feet wide. Historically logging equipment has used the road to access resource land east of the [Luces'] property and must pass through the gate in question. The structures are located at least 15 feet from the traveled surface but are within 35 feet of the centerline of the easement.
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> "6. Applicant, Terry Luce, testified that the structure[s] were placed in their current position after the Applicants consulted with [a] county employee who was on site to investigate potential violations of the county regulations. Luce testified that [they] had prepared a proposed site for the construction of the main barn structure and [were] advised that so long as the structure was 15 feet from the edge of the traveled surface it was properly sited. Luce further testified that as a result of the communication he placed the

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[5] LDO 5.3.150 provides"

> **"Self-inflicted Hardships.** A variance shall not be granted when the special circumstances upon which the applicant relies are a result of the actions of the applicant or owner or previous owners, including but not limited to:
>
> "? self-created hardship
>
> "? willful or accidental violations
>
> "? manufactured hardships
>
> "This does not mean that a variance can not be granted for other reasons."

barn and tractor shed in their present locations.[6] There was not testimony offered to contradict Mr. Luce's testimony.

"7. The evidence establishes that the structures have not prevented any vehicles from being able to safely negotiate passage of the structures along the improved roadway including vehicles such as large trucks, lowboys and trailers hauling equipment. The evidence also establishes that emergency vehicles such as fire trucks, water trucks and ambulances could safely negotiate the existing road past the structures.

"8. There are currently three property owners who own resource land parcels east of the subject property that utilize the road for access. There is currently a road maintenance agreement in effect between all parties who are authorized to use the road except [petitioners]. The agreement provides for the construction and maintenance of a 12 foot wide traveled surface except in the area east of the barn and tractor shed where the maintenance agreement authorizes the traveled surface to be 10 feet wide.

"9. There appears to be ample space within the outer boundaries of the 20 foot easement to allow for an increase in the traveled surface of the roadway to be constructed on the opposite side of the right-of-way from where the structures are located in the event for some reason the traveled surface of the road would need to be widened. There also appears to be no reason at this time based on the present and potential future uses of the road that the traveled surface would need to be widened." Record 6-7.

FIRST ASSIGNMENT OF ERROR

As noted earlier, LDO 5.3.150 expressly provides that "[a] variance shall not be granted when the special circumstances upon which the applicant relies are a result of the actions of the applicant or owner or previous owners." *See* n 5. LDO 5.3.150 further clarifies variances for "willful or accidental violations" are prohibited. Although the meaning of "willful or accidental violations" is not entirely clear, the county's decision assumes that such violations include willful or accidental violations of LDO setback standards and we see no reason to question that assumption. The only county finding that appears to address this criterion is as follows:

[6] The third structure, the carport, was constructed at some later date, presumably based on the same erroneous advice from the county employee.

> "The placement of the structures by the [Luces] was not the result of any self-created hardship, willful or accidental violation or manufactured hardship within the meaning of the ordinance cited above *based on the foregoing facts*."[7] (Emphasis added). Record 8.

As the Luces candidly concede, the county's findings in this matter are "not a model of clarity." Intervenor-Respondent's Brief 11. Clarity aside, the above-quoted finding merely repeats the limitation imposed by LDO 5.3.150 and concludes it does not apply, based on the earlier findings of fact. We assume the key finding of fact that underlies the county's decision regarding LDO 5.3.150 is finding of fact 6, which finds that the Luces located the disputed structures too close to the center of the easement based on erroneous advice from a county staff person. However, what is lacking in the county's decision is any express attempt to provide a reviewable interpretation of "self-created hardship," "willful or accidental violations," and "manufactured hardship," which are the operative terms in LDO 5.3.150.

The absence of an express interpretation of LDO 5.3.150 might not require remand if the county's decision included an adequate implied interpretation. *See Alliance for Responsible Land Use v. Deschutes Cty.*, 149 Or App 259, 266-67, 942 P2d 836 (1997), *rev dismissed as improvidently allowed* 327 Or 555, 971 P2d 411 (1998) (local governing body's interpretation of local legislation need not constitute a "separate 'express' interpretive statement"; reviewing body may determine that the interpretation was "inherent in the way that [the local governing body] applied" the local legislation). While the county's decision comes close to expressing an implied interpretation of why the county believes finding of fact 6 leads to a conclusion that the disputed structures do not constitute a "self-inflicted hardship" or a "willful violation," it does not come close to expressing an implied interpretation that is adequate to explain why the circumstances that led to the structures being sited within the setback do not constitute an "accidental violation." Under *Church v. Grant County*, 187 Or App 518, 524, 69 P3d 759 (2003) and ORS 197.829(1), the

[7] The "foregoing facts" referenced in the quoted findings include findings 5 through 9, which were quoted earlier in this opinion.

board of county commissioners' interpretations of its own land use legislation are entitled to some deference. Also potentially important in this case is the Court of Appeals' decision in *deBardelaben v. Tillamook County*, 142 Or App 319, 922 P2d 683 (1996), which makes it reasonably clear that the county is not necessarily required to interpret and apply those variance terms in the same way similar variance terms may have been interpreted in cases involving other jurisdictions. However, the county must articulate a reviewable interpretation before we can extend that required deference.

In the absence of a needed county interpretation that is adequate for review, LUBA is authorized to interpret LDO 5.3.150 in the first instance. ORS 197.829(2).[8] We might interpret the "self-inflicted hardship" and "willful violation" standards in a way that would not prohibit a variance for structures that are sited in violation of the LDO 4.4.400(1) setback standard based on faulty advice from county staff. However, adopting an interpretation of "accidental violation" standard that would not prohibit such structures is far more problematic.[9] We therefore decline to take on that interpretive task for the county and instead remand the county's decision so that it can adopt a reviewable interpretation of the key terms in LDO 5.3.150 and explain why LDO 5.3.150 does not prohibit granting a variance in the circumstances presented in this case. *See Wilhoft v. City of Gold Beach*, 41 Or LUBA 130, 143-44 (2001) (where proffered interpretation of plan policy is problematic because it appears inconsistent with the language of the policy, LUBA will not attempt interpretation in the first instance).

The first assignment of error is sustained.

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[8] ORS 197.829(2) provides:

> "If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, the board may make its own determination of whether the local government decision is correct."

[9] While perhaps less problematic than the "accidental violation" standard, we have no idea what the "manufactured hardship" standard might add to LDO 5.3.150.

SECOND AND THIRD ASSIGNMENTS OF ERROR

Under ORS 197.835(11)(a):

> "Whenever the findings, order and record are sufficient to allow review, and to the extent possible consistent with the time requirements of ORS 197.830 (14), the board shall decide all issues presented to it when reversing or remanding a land use decision * * *."

Although our resolution of the first assignment of error requires remand, regardless of the merits of petitioners' remaining assignments of error, as required by ORS 197.835(11)(a) we turn to petitioners' remaining assignments of error.

LDO 5.3.350(1)(A) can be satisfied by making any one of the three alternative findings that are set out at LDO 5.3.350(1)(A). *See* n 4. The county found that the Luces demonstrated compliance with LDO 5.3.350(1)(A) in two of the three allowed ways. The county found that requiring that the disputed structures be moved would result in an "unnecessary physical hardship" and that "exceptional or extraordinary circumstances or conditions" apply to the property that do not apply generally to other properties. LDO 5.3.350(1)(A)(i) and (ii). Those findings are set out below:

> "1. * * * The Board * * * finds that the facts further support the conclusion that there are exceptional or extra-ordinary circumstances or conditions applicable to that property which would not otherwise apply to properties in the same zoning district." Record 8.

> "3. To require the Applicants to tear down and move the structures under these circumstances would result in an unnecessary physical hardship within the meaning of the ordinance and would be inconsistent with the objectives of this ordinance." *Id*.

If a traditional interpretation of the "extraordinary circumstances" variance criterion were applied here, it is likely that the requested variance would have to be denied. *Reagan v. City of Oregon City*, 39 Or LUBA 672, 680 (2001). Similarly, if the county's "hardship" criterion were interpreted and applied in the way variance hardship criteria have traditionally been interpreted and applied, the application would likely have to be denied. *Erickson v. City of Portland*, 9 Or App 256, 261, 496 P2d 726 (1972). As we have already explained, while the county may be free to

interpret LDO 5.3.350(1)(A)(i) and (ii) in ways that deviate from the way similar traditional variance criteria have been interpreted and applied, it must articulate an interpretation of those criteria that is sufficient for our review. Because the county failed to do so, we must sustain the second and third assignments of error.

The second and third assignments of error are sustained.

FOURTH ASSIGNMENT OF ERROR

LDO 5.3.350(1)(B) requires that a variance must not be "detrimental to the public health, safety, or welfare or materially injurious to properties or improvements in the near vicinity." *See* n 4. The county adopted the following finding to respond to this criterion:

> "The Board finds that because the placement of the structures does not create an unreasonable risk of hardship or safety problems for vehicles utilizing the road, granting the variance will not be detrimental to the public health, safety or welfare nor materially injurious to properties or improvement[s] in the nearby vicinity where the variance is requested." Record 8.

The above-quoted finding, viewed by itself, is conclusory and likely would be inadequate to explain why the county believes the proposed variance complies with LDO 5.3.350(1)(B). But we understand the county also to be relying on findings of fact 5, 7, 8 and 9, quoted earlier in this opinion. When the above finding is read in conjunction with those findings, it is reasonably clear that the county found several factors to be determinative under LDO 5.3.350(1)(B). First, the gate that petitioners have installed between their property and the Luces' property, which is variously described as being 12 feet wide or 14 feet wide, is the current absolute limiting factor on the width of vehicles that can negotiate that part of the easement. Second, the record shows that large vehicles currently are able to cross the easement, despite the structures that are the subject of the variance.[10] Third, the structures that are the subject of the variance are located 15 feet outside the

[10] Petitioners' complaints in this matter frequently appear to be directed at the Luces placement of vehicles and other temporary obstructions in the shoulders of the easement roadway or the roadway itself. While those actions by the Luces may have constituted violations of petitioners' rights under the easement, the disputed variances do not authorize obstructions in the easement itself. The variance only allows three structures that are

easement and therefore do not limit the ability of large vehicles to cross over the roadway on the easement. Fourth, there is room within the existing 20-foot easement to widen the existing roadway to better accommodate large vehicles and machinery, notwithstanding the location of the disputed structures within the 35-foot setback.[11]

Petitioners point out that the record shows that large vehicles such as fire trucks and heavy equipment and emergency vehicles cannot pass each other in the area of the easement where the offending structures encroach on the setback. However, it appears to us from the record that it is the relatively narrow easement and the narrow roadway that is constructed on that easement that renders it an unsatisfactory carrier of two-way traffic, regardless of the size of the vehicles and regardless of the location of the disputed structures. While the location of the disputed structures may make the easement even more unsatisfactory for two-way travel, by making turnouts difficult or impossible where the easement passes the disputed structures, the county clearly did not find that factor to be a significant "public health, safety or welfare" concern or "injurious to the property or improvements in the near vicinity." Petitioners disagree with the county on that point. However, there is evidence a reasonable person could believe to support the county's conclusion, and petitioners' disagreement with the county's conclusion does not provide a basis for reversal or remand in this matter.

It is worth emphasizing that the impact of the Luces' past placement of obstructions in the easement itself appears to lie at the heart of much of petitioners' complaint that the Luces have interfered with petitioners' use of the easement. However, those impacts must be divorced from the impact of the three structures for which the variance is approved. The county's variance decision does not approve any obstructions that the Luces may have placed in the easement itself in the past or any obstructions that the Luces may place in the easement in the future. Therefore, in applying

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located approximately 15 feet from the edge of the easement but within the 35-foot setback from the easement centerline to remain where they are.

[11] The barn and shed are approximately 15 feet from the edge of the existing roadway. The carport is apparently closer than 15 feet from the edge of the existing roadway.

LDO 5.3.350(1)(B), the county was not obligated to consider what effect any such obstructions in the easement itself may have on the public health, safety or welfare or nearby property improvements.

The fourth assignment of error is denied.

FIFTH ASSIGNEMNT OF ERROR

In their final assignment of error, petitioners contend that the county's decision improperly extends unequal privileges or immunities to the Luces and thereby violates Article I, section 20 of the Oregon Constitution.[12] Petitioners' equal privileges and immunities argument is without merit. Petitioners make no attempt to explain how the only decision that is before us in this appeal—the county's variance decision—could possibly be viewed as a "law" that grants "privileges or immunities." The variance decision is a quasi-judicial decision by the county that *applies* the relevant "law," the variance criteria. We do not understand petitioners to contend that the LDO variance provisions themselves violate Article 1, section 20.

To the extent petitioners contend the county granted the variance without regard to the LDO variance standards to extend an improper privilege or immunity to the Luces, the record does not support that contention. While we remand the county's decision because it does not included needed interpretations of LDO 5.3.150 and 5.3.350(1)(A), the record does not support a contention that the county's decision was anything other than a quasi-judicial land use decision by the county, based on its view of the legal merits of the application.

Petitioners' arguments under this assignment of error include allegations that the county has sided with the Luces and dismissed or ignored petitioners' concerns in the larger, long-running dispute concerning use of the easement that has involved petitioners, the Luces and their neighbors. It seems highly unlikely that those county actions could give rise to an equal privileges and

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[12] Article I, section 20 provides:

> "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

immunities claim. However, even if they could, those actions are not before us in this appeal of the county's variance decision.

The fifth assignment of error is denied.

Based on our resolution of the first, second and third assignments of error, the county's decision is remanded.