BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RAYMOND E. SPOONER
and JUDY E. ARMSTRONG,
Petitioners,

vs.

CITY OF SALEM,
Respondent,

and

SILVER FALLS BANK,
Intervenor-Respondent.

LUBA No. 2005-146

FINAL OPINION
AND ORDER

Appeal from City of Salem.

Raymond E. Spooner Salem, filed the petition for review and argued on his own behalf. Judy E. Armstrong, Salem, represented herself.

Richard D. Faus, Assistant City Attorney, Salem, filed a joint response brief and argued on behalf of respondent. With him on the brief were Mary Carter, Kris J. Gorsuch and Saalfeld Griggs, PC.

Mary Carter and Kris J. Gorsuch, Salem, filed a joint response brief on behalf of intervenor-respondent. With them on the brief were Richard D. Faus and Saalfeld Griggs, PC. Kris J. Gorsuch argued on behalf of intervenor-respondent.

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

REMANDED 02/01/2006

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

Opinion by Davies.

NATURE OF THE DECISION

Petitioners appeal a city decision granting approval of a variance request to vary the maximum floor area of an accessory structure.

MOTION TO INTERVENE

Silver Falls Bank (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is zoned RS (Single Family Residential) and, at approximately .48 acres, is significantly larger than the minimum lot size provided for in the RS zone. The western boundary of the property abuts Stoneway Drive, and the property slopes downward to the east away from Stoneway Drive. The record reflects that the elevation at the street is 350 feet and that there is a flat area located on the eastern portion of the property that is approximately 323 to 327 feet in elevation.

Intervenor repossessed the property after a loan default by the previous owners, who had begun construction of a single family dwelling and an accessory structure on the property. The dwelling was anticipated to be approximately 3,200 square feet and located on the western side of the property facing Stoneway Drive. The proposed accessory structure, approximately 2,100 square feet, was to be located on the lower flat portion on the eastern side of the property. There is no dispute that construction of the buildings was begun without the required city permits or approvals.

The Salem Revised Code (SRC) limits the size of the accessory structure on the subject property to 1,000 square feet. SRC 131.180(b).[1] Accordingly, after intervenor acquired the

[1] SRC 131.180 provides:

property, it filed an application seeking approval of a variance to that maximum size limitation for the accessory structure. The city hearings officer held a public hearing on the application on June 22, 2005, and on June 30, 2005 issued a decision granting the variance. Petitioners appealed the hearings officer's decision to the Salem Planning Commission, which held a public hearing on August 16, 2005. On September 20, 2005, the planning commission affirmed the hearings officer's decision, adopted findings and granted the variance. This appeal followed.

FIRST ASSIGNMENT OF ERROR

The criteria for granting a variance are set forth in SRC 115.020.[2] Both the hearings officer and the planning commission addressed each of the applicable criteria in their respective

---

"Except in the RA (Residential Agriculture) zone, the maximum floor area of detached residential accessory buildings for single family dwellings and duplexes shall meet the following standards:

"(a) Main buildings less than 1,200 square feet of gross floor area may have an accessory structure, or multiple accessory structures, not to exceed, in the aggregate, 600 feet of gross floor area;

"(b) Main buildings greater than 1,200 square feet of gross floor area may have an accessory structure, or multiple accessory structures, not to exceed an aggregate maximum gross floor area of 50 percent of the main building gross floor area or 1,000 square feet of gross floor area, whichever is less."

[2] SRC 115.020 provides:

"The hearings officer may grant the degree of variance from any of the development standards imposed on a particular subject property under the provisions of this zoning code which is reasonably necessary to permit development for an otherwise lawful use upon finding that each of the following criteria is met:

"(a) There are special conditions applying to the land, buildings, or use referred to in the application, which circumstances or conditions do not apply generally to land, buildings, or uses in the same district, and which create unreasonable hardships or practical difficulties which can be most effectively relieved by a variance. Nonconforming land, uses, or structures in the vicinity shall not in themselves constitute such special conditions, nor shall the purely economic interests of the applicant. The potential for economic development of the subject property itself may, however, be considered among the factors specified in this subsection.

"(b) Granting a variance will not be unreasonably detrimental to the public welfare or to property or improvements in the neighborhood of the subject property;

findings. Intervenor and respondent (hereafter respondents) argue, initially, that petitioner's first assignment of error is not sufficiently developed for review. *Deschutes Development v. Deschutes County*, 5 Or LUBA 218, 220 (1982). Although we agree that petitioners' argument under the first assignment of error is difficult to follow, we will address the one dispositive issue that is sufficiently developed for review.

This case turns on the city's findings of compliance with SRC 115.020(a).[3] Although the findings are set forth in the margin, we will briefly summarize them here. The city concludes that the

---

"(c) Granting a variance will not, under the circumstances of the particular case, unreasonably affect the health or safety of persons working or residing in the neighborhood of the subject property; and

"(d) Granting a variance will be consistent with the comprehensive plan and with the intent and purpose of this zoning code."

[3] The hearings officer's findings addressing SRC 115.020(a) provide:

"This was the most difficult criterion for the Hearings Officer to determine if it had been satisfied. The Hearings Officer is not persuaded by the negative financial impact of removing a building that has been built, contrary to existing local ordinances. A variance after the fact would be condoning actions in violation of existing ordinances, i.e., building the structure without the appropriate permits. Therefore, the Hearings Officer turned to other aspects of this situation to determine if circumstances or conditions apply to it, different from other land in similar situations. It is the finding of the Hearings Officer that this criterion is satisfied based on the unique size of the lot. The lot is approximately five (5) times the minimum lot size required in this zone. The lot is approximately 20,900 square feet; generally, single family lots throughout Salem are between 5,000 and 8,000 square feet. If the variance is allowed, the existing house of 3,200 square feet with an accessory building of 2,100 square feet would have lot coverage of approximately 25% of the lot. The combined lot coverage is significantly less than would be allowed under Chapter 146 for lot coverages. Furthermore, while financial impact was not the criterion the Hearings Officer relied upon, it is certainly more financially feasible to allow the variance to the standard and it supplements the findings that this criterion has been satisfied." Record 72.

The planning commission findings provide, in relevant part:

"For comparison purposes, if the applicant had submitted building plans that attached the accessory building to the dwelling unit, there would not be a limit of 1,000 square feet to the size and could have the potential of increasing the lot coverage by greater than the proposed 25 percent.

"Again, for comparison purposes, a combined structure (dwelling unit with an attached accessory structure) needs to meet the following setbacks:

"* * * * *

unusually large size of the lot and the topography of the site are "special conditions," pursuant to SRC 115.020(a), that justify varying the maximum accessory structure size limitation.[4] Although the code limits *detached* accessory structures in this instance to 1,000 square feet, the combined lot coverage of the main dwelling and the proposed 2,100 square foot structure is far below the maximum lot coverage that would be permitted for a dwelling and an *attached* accessory structure, pursuant to SRC 146.110.[5] Apparently, the steep slopes just east of the main dwelling limit or preclude a large attached accessory structure at that location. The city reasons that because the lot coverage of the dwelling and the accessory structure falls well below the maximum lot coverage limitation applicable to attached accessory structures, and apparently because the subject property is so large that it can accommodate the larger detached accessory structure, SRC 115.020(a) is satisfied.

> "d. Lot coverage. The usable area structure can potentially cover is 60 percent and as an example on the subject property Attachment F outlines an approximate area for construction ('hashed line').
>
> "Another area that the applicant can use for justification to constructing two separate buildings is that the topography on the lot places limitations upon constructing a combined building. According to submitted site elevations and building footprints, the elevation at the street adjacent the property is 350 and the easterly side of the house is 336 to 338. The elevation on the westerly side of the accessory structure is 323 to 327.
>
> "As additional information for this public hearing, it should be noted that the property is also large enough to allow for the creation of at least one additional lot and potentially two under a flag lot(s) configuration. The subject property is of sufficient area to allow for additional square footage of either dwelling units and/or accessory structures." Record 64.

[4] It is not clear whether or to what extent the city relied on the financial impact on the applicant of requiring it to alter or remove the existing accessory structure. In any event, the city and intervenor, in their joint brief, argue that the city did not rely on the economic interests of intervenor or the existence of the accessory structure, and we take them at their word.

[5] 146.110 provides:

> "LOT COVERAGE. Within an RS district: no single family dwelling, including attached accessory structures, shall occupy more than 60 percent of the lot area. No main building other than a single family dwelling shall occupy more than 30 percent of the lot area, except where an accessory building is attached to the dwelling unit or main building, in which case 35 percent of the lot area may be occupied by such dwelling unit or main building."

Petitioners contend that the city, "in its efforts to justify the illegally constructed structure," fails to demonstrate that the proposed variance is "reasonably necessary to permit development." Petition for Review 5.[6] They contend that the variance did not "permit development" because the structure was already built. Although petitioners' argument narrowly misses the point, we believe that it, when read in conjunction with the remainder of the petition for review, can fairly be read to present the following argument: that the challenged approval fails to demonstrate that the variance from the development standard, SRC 131.180(b), is reasonably necessary to permit development for an otherwise lawful use.

We recognize that each local government provides its own variance criteria, and that the local governing body's interpretations of those criteria are entitled to deference. *Clark v. Jackson County*, 313 Or 508, 514-15, 836 P2d 710 (1992); *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003); *deBardelaben v. Tillamook County*, 142 Or App 319, 325, 922 P2d 683 (1996). However, any such an interpretation must be consistent with the express words, purpose or policy of the criteria. The challenged findings in this case do not provide an interpretation of the hardships provision, SRC 115.020(a), to which we are required to defer. However, we have upheld an interpretation of the city council that SRC 115.020(a) requires, at least, a demonstration that it is "extremely difficult" to develop the property without the requested variance. *See Salem Golf Club v. City of Salem*, 28 Or LUBA 561, 582 (1995). Accordingly, we adopt the interpretation previously adopted by the city council that was subsequently affirmed by this Board in *Salem Golf* as a reasonable interpretation of SRC 115.020(a).

We do not see that the findings support a conclusion that it is "extremely difficult" to develop the property, or even to construct a detached accessory structure, without the requested

---

[6] SRC 115.020 provides:

> "The hearings officer may grant the degree of variance from any of the development standards imposed on a particular subject property under the provisions of this zoning code *which is reasonably necessary to permit development for an otherwise lawful use* upon finding that each of the following criteria is met * * *."

variance. If the applicant's predecessor had applied, initially, for a building permit to construct a 1,000-square-foot accessory structure in conformance with SRC 131.180(b), there is no indication in the record that such a permit would not or could not have been issued. In other words, the subject property could just as easily accommodate a 1,000-square-foot detached accessory structure, in compliance with SRC 131.180(b), as it could a 2,100- square-foot detached accessory structure. Accordingly, the variance was not "reasonably necessary" to permit development for an otherwise lawful use because an accessory structure that complied with the applicable maximum size limitation could have been built.

We also do not see how the fact that the combined lot coverage of the main dwelling and the accessory structure is far less than the 60% maximum lot coverage allowed for combined *attached* structures justifies a variance in this case. Stated another way, the special conditions do not *create* "unreasonable hardships or practical difficulties which can be most effectively relieved by a variance," as is required by the code. Although the large size of the subject property would allow a larger accessory structure to be accommodated on the site, the large size of the property does not create a hardship that "can most effectively be relieved by a variance" to SRC 131.180(b). As previously explained, the subject property, even with the steep slopes, could easily accommodate a 1,000 square foot detached accessory structure. If a structure that complies with SRC 131.180(b) can be built on the property notwithstanding the alleged "special conditions," it is difficult to understand how those special conditions *create* an "unreasonable hardship or practical difficulty" that requires a variance from the development standards.

Our rules provide that the Board shall reverse a land use decision where the decision violates a provision of applicable law and is prohibited as a matter of law. OAR 661-010-0071(1)(c). In this instance, the city and intervenor contend that the city did not rely on the existence of the illegally constructed accessory structure, or the financial hardship to intervenor of requiring alteration or removal of that structure, to justify the variance. Accordingly, we understand the city to rely exclusively on the size of the lot and the topography of the subject property as the

special conditions justifying the variance. As explained above, we agree with petitioners that those special conditions are not adequate to support the city's conclusion of compliance with SRC 115.020(a). However, we cannot say, as a matter of law, that the city could not approve the requested variance on the subject. Accordingly, remand, not reversal, is appropriate.

The first assignment of error is sustained.[7]

SECOND ASSIGNMENT OF ERROR

Petitioners assert that the city's failure to accurately cite SRC 225.020(b) *verbatim* renders the challenged findings inadequate.[8] The only difference that petitioners argue is material is the city's use of the term "public health and safety" instead of the language in the code: "public welfare."

First, the mere fact that the city misquotes the criterion does not, in and of itself, provide a basis for reversal or remand. *Compare Premier Development, LLC v. City of McMinnville*, ___ Or LUBA ___ (LUBA No. 2005-065, December 20, 2005) slip op 12 (findings supporting a zone change are inadequate where they fail to address portions of the applicable approval criterion because the findings misquote the applicable zone change approval criterion, omitting language that refers to needed housing and that requires that added emphasis be given to the comprehensive plan's housing policies); *see also* ORS 227.173(3) (requiring approval or denial of permit to be accompanied only by a "brief statement" that explains the relevant criteria). Petitioners must demonstrate how the "summary" of the applicable provision makes the findings inadequate or how the city misapplied the criterion. Petitioners do not explain how the city's findings that the challenged variance will not be detrimental to the public health and safety or improvements in the neighborhood are not also adequate to demonstrate that the variance will not be detrimental to the

---

[7] Although we remand based on the first assignment of error, we also address petitioners' remaining assignments of error in the interests of judicial efficiency.

[8] The hearings officer's decision quotes the criterion as follows: "Granting the variance will not be detrimental to the *public health or safety* or improvements in the neighborhood." Record 72 (emphasis added). The planning commission findings provide as follows: "Granting the variance will not be unreasonably detrimental to the *public health or safety* or improvements in the neighborhood of the subject property." Record 64 (emphasis added). *Compare* language of SRC 115.020(b), n 2.

"public welfare."[9] All petitioners assert is that they "view [the city's] granting the requested variance to be detrimental to the public welfare." Petition for Review 7. However, mere disagreement with the city's position does not provide a basis for reversal or remand. *Henry v. City of Portland*, 18 Or LUBA 440, 459 (1989).

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioners also argue that the city's findings regarding SRC 115.020(c) are inadequate because they do not accurately quote the applicable criterion.[10] In this instance, the city's "summary" of the criterion omits nothing that alters the meaning of the criterion in any way. Petitioners do not indicate how that "summary" provides a basis for reversal or remand, and we do not see that it does.

Petitioners also argue under this assignment of error that there is no indication that the hearings officer read one of their written submissions. As respondents note, petitioners do not identify the submission that they assert the hearings officer never read. Petitioners cite only to Record 34, which is a submission to the planning commission that makes the same assertion; *i.e.*,

---

[9] With regard to this criterion, the hearings officer's findings provide:

> "It is the finding of the Hearings Officer that this criterion is satisfied. From the testimony that was provided, the Hearings Officer could not see how the granting of the variance would impact public health or be detrimental to other property improvements in the neighborhood. The property is almost a half acre in size. The lot coverage, by buildings, is significantly lower than that which could have been allowed. Had the request been made prior to building the structure, it would have not been a factor that the Hearings Officer could foresee would impact the other improvements in the neighborhood, particularly in view of the fact that a much larger house could have been placed on the property." Record 72.

[10] The hearings officer's summary of SRC 115.020(c) and its findings addressing this criterion provide:

> "**c) Not unreasonably affect the health or safety of persons working or residing in the neighborhood of the subject property.**
>
> "Again, it is the finding of the Hearings Officer that this criterion has been satisfied. The addition of a condition to the variance requiring revised building plans which must be submitted and approved by the applicable City departments serves the health and safety of the persons working or residing in the neighborhood." Record 72.

that "[t]here is no indication that [the hearings officer] either read or considered the written opponents' submission."

Respondents argue that the hearings officer's imposition of the condition of approval requiring the submittal and approval of building plans was intended to assure the health and safety of persons working and residing in the neighborhood during construction, in direct response to the opponents' concerns regarding this approval criterion.[11] While this may or may not be true, we do agree with respondents that petitioners' speculation that the hearings officer did not read or consider a written submittal provides no basis for reversal or remand.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners argue that the city's findings do not adequately address SRC 115.020(d), which requires a demonstration that the variance is "consistent with the comprehensive plan and with the intent and purpose of this zoning code."[12] Petitioners' specific argument related to this criterion is

---

[11] That condition of approval provides:

> "Submit for review and approval by the applicable City departments, a building permit based upon the current construction of the accessory structure, and complete the building permit process as required, including arranging for required inspections." Record 73.

[12] The hearings officer's findings provide, in pertinent part:

> "It is the finding of the Hearings Officer that this criterion has been satisfied. The staff identified Chapter 4, Salem Urban Area Goals and Policies (E): Residential Development, I) establishing uses: (1) the location of and density of residential uses shall be determined after consideration of several factors: the character of the existing neighborhood based upon height, bulk, and scale of existing and proposed development in the neighborhood applies to the request. The subject property is located in an area where lots well exceed the minimum required lot size of 4,000 square feet, and the accessory structure is being placed upon this lot that is nearly five times larger than the lots that are allowed. Therefore, this is consistent with the Comprehensive Plan.
>
> "An opponent testified that the staff report failed to address consistency with the intent and purpose of the zoning code. However, as noted in the applicant's written presentation, granting the variance would not impact the use of the site from a use that would be allowed within the zoning map or comprehensive plan. Therefore, the application is consistent with the zoning code and the Hearings Officer so finds. However, it must be emphasized that use of the accessory structure must comply with the all-applicable sections of the zoning code, including SRC Chapter 124 (Home Occupations)." Record 73.

impossible to decipher. In any event, the city adopted findings addressing not only the intent and purpose section of the zoning code, SRC 110.020, but also the intent and purpose statement for variances, SRC 115.010. To the extent petitioners do raise arguments in this assignment of error, we believe they are adequately addressed in our discussion of the other assignments of error.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Petitioners' fifth assignment of error asserts that the city violated SRC 131.180(b) and SRC 110.020(b), (c) and (d) in granting the challenged variance. Once again, SRC 131.180(b) includes the provisions from which intervenor seeks a variance. Petitioners' assertion that the challenged decision violated that provision does not provide a basis for reversal or remand. *Papadopoulos v. Benton County*, 48 Or LUBA 600, 604-05 (2005) (the code provision from which a variance is sought is not an applicable approval criterion for granting the variance). Petitioners do not even attempt to explain how the other cited provisions were violated.

Although seemingly unrelated to the assignment of error alleged, petitioners mention that two planning commissioners had previous connections with intervenor. They point out that the resolution signed by the planning commission, which was sent to petitioners, states:

"**Planning Commission Vote**

"**Yes 7 No 0**" Record 13.

If seven commissioners actually voted, then that would indicate that the two planning commissioners voted on the matter. The tally of the vote included in the resolution, however, was a clerical mistake. The two planning commissioners in fact recused themselves during the August 16, 2005 meeting. Record 49. The minutes of the September 20, 2005 meeting indicate that the two members recused themselves, and abstained from voting. Record 10. Petitioners do not in fact assign any error to this clerical mistake, and we do not see that the clerical mistake provides a basis for remand.

The fifth assignment of error is denied.

The city's decision is remanded.