BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JUDY DOYLE and RON DOYLE,
Petitioners,

vs.

COOS COUNTY,
Respondent,

and

TERRY LUCE and EVELYN LUCE,
Intervenor-Respondents.

LUBA No. 2005-163

FINAL OPINION
AND ORDER

Appeal from Coos County.

Charles Swindells, Portland, filed the petition for review and argued on behalf of petitioners.

No appearance by Coos County.

Jerry O. Lesan, Coos Bay, filed the response brief and argued on behalf of intervenors-respondent. With him on the brief was Lesan and Finneran.

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

AFFIRMED 03/01/2006

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 for a barn, tractor shed and outbuildings that were constructed in violation of a Coos County Zoning and Land Development Code (LDC) setback requirement.

MOTION TO INTERVENE

Terry Luce and Evelyn Luce (the Luces), the applicants below, move to intervene on the side of respondent in this appeal. There is no opposition to the motion, and it is allowed.

FACTS

The county adopted the appealed decision in response to our remand of an earlier variance decision. *Doyle v. Coos County*, 49 Or LUBA 574 (2005). The relevant facts were set out in our earlier decision and are as follows:

> "The Luces * * * 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.
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> "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.
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> "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. However, all of the disputed structures are less than 35 feet from the centerline of the easement. [T]he LDC 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." 49 Or LUBA at 576-77 (footnotes omitted).

One key additional fact is that petitioners constructed the disputed structures where they are constructed based on erroneous advice from county planning staff. The planning staff erroneously advised the Luces that the LDC required that structures be set back 15 feet from the edge of the existing roadway that is constructed on the easement. In fact the LDC requires that the structures be set back 5 feet from the edge of the easement or 35 feet from the centerline of the easement, whichever is greater. 49 Or LUBA at 578 n 3. While the buildings are set back more than 5 feet from the edge of the easement, they are not set back 35 feet from the easement centerline. The disputed variance relies in large part on planning staff's mistaken advice in finding that the variance approval criteria are satisfied.

FIRST ASSIGNMENT OF ERROR

LDC 5.3.150, prohibits variances to relieve "hardships" that are "self-inflicted."[1] LDC 5.3.150 does not define self-inflicted hardship. Instead it provides a non-exclusive list of examples. One of those examples is "willful or accidental violations" of the LDC. Petitioner argues that "'willful' and 'accidental' describe a comprehensive dichotomy of how [a] violation could have occurred." Petition for Review 6. We understand petitioners to

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[1] LDC 5.3.150 provides:

> "**SECTION 5.3.150. 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."

argue that whether siting the disputed structures in violation of the setback requirement was "willful" or "accidental," it was indisputably a violation, and therefore any hardship is necessarily self-inflicted under LDC 5.3.150. While petitioners' proffered interpretation of "willful or accidental violation" is certainly *possible*, we do not agree it is the *only* possible interpretation. The county engages in an interpretive exercise in which it assigns artificially narrow meanings to "accidental violation," "willful violation" and "manufactured hardship" that are entertaining but bear almost no resemblance any commonly understood meanings of those concepts that we are aware of. However, while much of the county's interpretation of LDC 5.3.150 is problematic, it is clear from the county's interpretation that it does not embrace petitioners' "comprehensive dichotomy" interpretation. Moreover, as petitioners correctly recognize, the county's decision expresses an implied interpretation.

> "At best, the challenged decision could be read to contain an implied interpretation that misplaced reliance on erroneous advice from a county staff member is not an 'action of the applicant' that was 'self-inflicted.'" Petition for Review 6.

We understand the county to have found that it is the violation of the LDC setback provisions that leads to the hardship that justifies the disputed variance. The concept of "accidental violations" certainly could be interpreted to be broad enough to include a violation based on mistaken advice from county planning staff. However, the county interprets that concept, as it is used in LDC 5.3.150, to require that applicant be responsible for the accident. We understand the county to have found that the city, not the applicant, was responsible for the accident. Citing *Walker v. Josephine County*, 46 Or LUBA 777 (2004), *Bruce v. City of Hillsboro*, 34 Or LUBA 820 (1998), *New v. Clackamas County*, 30 Or LUBA 453 (1995), and *City of Grants Pass v. Josephine County*, 25 Or LUBA 722 (1993), petitioners argue that the county cannot rely on erroneous advice from county planning staff to find that the Luces' hardship is not self-imposed.

The cited decision in *Bruce* was LUBA's order awarding attorney fees against the petitioners. In doing so, we concluded the petitioners' argument that they could rely on an erroneous statement by the city planning director to excuse their refusal to serve copies of the notice of intent to appeal on certain persons who were entitled to such service was without merit. 34 Or LUBA at 826. Although one of the parties in *New* argued that a petitioner could not rely on an erroneous statement by the hearings officer to excuse petitioner's failure to pursue an available local administrative remedy, that case does not apply or stand for that principle. In *City of Grants Pass*, we concluded that the petitioner could not rely on erroneous advice from a city planner concerning when a land use decision became final to excuse the petitioner's failure to file a notice of intent to appeal within 21 days after the decision in fact became final. 25 Or LUBA at 728. None of these cases has any direct bearing on whether the board of county commissioners exceeds its interpretive discretion under ORS 197.829(1) and *Church v. Grant County*, 187 Or App 518, 524, 69 P3d 759 (2003) in interpreting "accidental violation," as that concept is used in LDC 5.3.150, to require that the applicant be responsible for the accidental violation.[2]

Our decision in *Walker* is a little closer to the mark, because it did involve a zoning ordinance variance provision that barred variances for self-imposed hardships. In *Walker*, the variance applicant's predecessor in interest applied for a lot line adjustment that reduced the 10+ acre lot to slightly less than 10 acres in size. The lot line adjustment was sought

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[2] ORS 197.829(1) provides, in relevant part:

> "[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:
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> "(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[.]"

because a building constructed on the predecessor's neighbor's adjoining lot encroached onto the predecessor's lot. Following the lot line adjustment, the property could not be divided into two lots that would meet the applicable zoning district's five-acre minimum lot size. The applicant purchased the property with knowledge that the lot was too small to divide, but was told by planning staff that a variance would be an option to allow division of the property. The central issue in *Walker* was whether the applicant's subsequent application for a variance was barred by the county's self-inflicted hardship provision.

LUBA rejected the county's finding that it was the neighbor's construction of the encroaching building that created the hardship. 46 Or LUBA at 785. LUBA concluded that it was the predecessor's choice to seek the lot line adjustment, and the predecessor's failure to maintain the 10+ acre size of the property, that created the arguable hardship. *Id*. LUBA concluded that hardship was self-imposed by the applicant's predecessor. *Id*. The holding in *Walker* does not assist petitioners.[3]

Returning to the county's implied interpretation in this case, the standard of review that we must apply to the county's implied interpretation of LDC 5.3.150 is set out at ORS 197.829(1) and *Church v. Grant County. See* n *2.* Applying that standard of review, we do not see that the county's implied interpretation is inconsistent with the language, purpose or underlying policy of LDC 5.3.150. It avoids the prohibition against variances to relieve hardships associated with accidental violations in a very limited circumstance. While LDC 5.3.150 does not expressly require that the applicant be responsible for the accidental violation, we do not see that it is inconsistent with the language of LDC 5.3.150 to require that the applicant be the party responsible for the accidental violation. Neither do we see that the county's interpretation is inconsistent with the purpose or underlying policy of LDC

[3] Our decision in *Walker* does note a county finding that the variance applicant was advised by county planning staff before he purchased the property that a variance was an option. But that advice from planning staff played no apparent role in the county's or our decision in *Walker*.

5.3.150. The purpose and underlying policy of LDC 5.3.150 presumably is to bar persons from receiving relief from hardships that are of their own making. The county's implied interpretation of "willful or accidental violation" to require that the applicant be responsible for the violation is not inconsistent with that purpose or underlying policy. We defer to the county's implied interpretation.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In their second assignment of error, petitioners challenge the county's findings that the proposed variance complies with the approval criteria for variances set out at LDC 5.3.350.[4] In our prior decision, we rejected petitioners' challenge to the LDC 5.3.350(1)(B) public health, safety and welfare criterion. LDC 5.3.350(1)(A) provides three alternative criteria, only one of which must be satisfied to comply with LDC 5.3.350(1)(A). In the challenged decision, the county found that the proposed variance complies with LDC

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[4] LDC 5.3.350 provides:

> **"Section 5.3.350. <u>Criteria for Approval of Variances.</u>** 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:
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> "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
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> "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
>
> "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."

5.3.350(A)(i) and LDC 5.3.350(A)(ii). Petitioners challenge those findings. Before addressing petitioners' challenge to those findings, we first address the parties' dispute regarding the scope of factors that may be considered in applying those criteria.

A. Factors That May Support A Variance

LDC 2.1.200 sets out specific definitions that apply in the LDC. LDC 2.1.200 provides the following definition of the term "variance:"

> "VARIANCE: A device which may grant a property owner relief from certain provisions of [the LDC] when because of the particular physical surroundings, shape or topographical conditions of the property, compliance would result in a particular hardship upon the owner, as distinguished from a mere inconvenience."

While the meaning of "particular physical surroundings" is somewhat ambiguous, consideration of the shape of the property and the topographical conditions would not appear to include existing structures that have been erroneously sited within required setbacks. However, the county also considered LDC Article 5.3, which is the LDC Article that specifically addresses variances, in determining the scope of factors that could be considered in granting a variance. In particular, the county interpreted LDC 5.3.100 to allow the location of existing structures to be considered. LDC 5.3.100 provides as follows:

> **"SECTION 5.3.100. <u>General.</u>** Practical difficulty and unnecessary physical hardship may result from the size, shape, or dimensions of a site or the *location of existing structures thereon*, geographic, topographic or other physical conditions on the site or in the immediate vicinity, or, from population density, street location, or traffic conditions in the immediate vicinity. Variances may be granted to overcome unnecessary physical hardships or practical difficulties. The authority to grant variances does not extend to use regulations." (Emphasis added).

We understand the county to take the position that the practical difficulty and unnecessary hardship that the applicants face is the cost and effort that would be required either to move or remove the misplaced structures. The county found that it is the location of these existing structures—structures that were misplaced due to the erroneous advice from planning staff—that gives rise to that practical difficulty or unnecessary hardship.

Petitioners challenge the county's interpretation of LDC 5.3.100:

> "The challenged decision concludes that a variance is warranted for intervenor-respondent's misplaced structures because those misplaced structures are themselves an intrinsic or inherent condition of the subject property that create unnecessary physical hardships or practical difficulties to their own proper placement. This interpretation of Article 5.3 is entirely illogical and is not supported by the text of the ordinance. The [LDC] does not provide any textual support for an interpretation that structures erected in violation of setback requirements can (1) constitute 'existing structures' that amount to an intrinsic condition of the subject property, and (2) simultaneously be the very structures for which a variance is sought.
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> "The ordinary, obvious meaning of the term 'existing structures,' read in the context of 'size, shape, or dimensions of the site' or 'geographic, topographic or other physical conditions on the site or in the immediate vicinity,' is structures already in place that can cause undue practical difficulty for placement of new structures for which a variance may be required. * * *" Petition for Review 10-11 (petitioners' underlining).

We agree with petitioners that their interpretation of LDC 5.3.100 is reasonable and consistent with the language of those provisions. In particular, petitioners' interpretive argument that the LDC should not be interpreted to allow the misplaced existing structures to be both the *justification for* and the *beneficiary of* the variance is a particularly compelling argument. But the question is not whether petitioners' offer a reasonable, more reasonable, or even the best interpretation of the LDC 5.3.100; the question is whether the county's contrary interpretation is inconsistent with the language, purpose or apparent intent of LDC 5.3.100. *Just v. City of Lebanon*, 193 Or App 121, 127, 88 P3d 307 (2004); *Church v. Grant County*, 187 Or App at 523-24.

Petitioners suggest that the LDC defines "existing structures" to be limited to structures that predate the LDC. Petition for Review 10. If that suggestion were correct, petitioners' interpretation of LDC 5.3.100 likely would be required. However, there is no reason to believe the county intended the phrase "existing structures" in 5.3.100 to have the same meaning it carries in LDC 3.1.250 (supplemental provision concerning conditional

uses) and in LDC 3.4.100 (grandfathered uses).[5] The LDC provides no generally applicable definition of "existing structures." The disputed misplaced structures are "existing structures" in that they are "structures" and they were "existing" on the date the county adopted the challenged decision.

The language of LDC 5.3.100 simply provides that "[p]ractical difficulty and unnecessary physical hardship may result from * * * the location of existing structures thereon[.]" As far as we can tell, the county interprets LDC 5.3.100 in much the same way that petitioners do, except that the county would recognize the possibility that the location of an existing structure that was located based on erroneous staff advice might give rise to practical difficulties and unnecessary physical hardship if the existing structures had to be removed. That might not be the way petitioners or we would interpret 5.3.100, but it is not inconsistent with the language of 5.3.100. Neither do we see how it is inconsistent with the purpose or underlying policy of 5.3.100, which presumably is to describe and limit the universe of factors that may be considered in granting a variance. As discussed below, the county found that misplacement of structures based on erroneous planning staff advice is an extremely rare occurrence in the county.

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[5] LDC 3.1.250 is included in a chapter of the LDC that is entitled "Supplemental Provisions: Structures, Uses, Lots & Yards. It provides as follows:

> **"SECTION 3.1.250. Existing Structures.** Structures or land uses existing at the time of passage of the Ordinance, and which are delineated as a conditional use within the applied zone, shall be deemed as having an approved conditional use permit for such existing use or structure."

LDC 3.4 is entitled "Grandfather Provisions." LDC 3.4.100 provides, in part:

> "**SECTION 3.4.100. Use and Alteration of Buildings, Structures or Land Existing Prior to the Enactment of this Ordinance.** The lawful use of any building, structure or land at the time of the enactment or amendment of this Ordinance may at the discretion of the owner be continued."

B. Exceptional or Extraordinary Circumstances

One of the findings the county can make to demonstrate that an application for a variance complies with LDC 5.3.350(1)(A) is to find "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." LDC 5.3.350(1)(A)(ii). The city adopted the following findings:

> "* * * Here there is a demonstrated effort by the Applicants to comply with the ordinance and the Board [of Commissioners] interprets the phrase 'exceptional and extraordinary circumstances or conditions' to include the situation where the problem resulted from compliance with the advice obtained [from planning staff]. There was no evidence adduced at the hearing that any other application for a variance has ever been submitted based on the placement of a structure as a result of erroneous advice given by the county's Code Compliance Officer or any other county planning official. The exceptional or extraordinary circumstances or conditions applicable to this property do not apply to other properties in the same zoning district." Record 7-8.

In *Regan v. City of Oregon City*, 39 Or LUBA 672, 682-83 (2001), we rejected the petitioners' challenge to the city's interpretation of its "extraordinary circumstances" variance criterion. The city interpreted that criterion to be satisfied where city planning staff provided erroneous advice that the applicant relied on which later made a variance necessary to subdivide the property. We disagreed with the petitioners that the city's interpretation should be rejected in favor the more restrictive interpretation of that traditional variance criterion that appellate courts have applied in the past. *Id*. at 680-81. In doing so, we noted that the more deferential standard of review required under ORS 197.829(1) means that local governments may be able to adopt interpretations of those traditional variance standards that differ from the way they have traditionally been interpreted. *Id.* at 681-83. There is language in our decision in *Regan* that suggests that the result in that case might have been different, but for the highly deferential formulation of the required standard of review when reviewing local government interpretations of its own land use legislation that was in effect

at the time. *See Zippel v. Josephine County*, 128 Or App 458, 461, 876 P2d 854 (1994) (beyond all colorable defense); *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 217, 843 P2d 992 (1992) (clearly wrong). However, even under the less deferential standard of review that is required under the Court of Appeals' more recent formulation in *Church v. Grant County* of the deference that is appropriate when reviewing such interpretations, we believe it is appropriate to defer to the county's interpretation here.

The second assignment of error is denied.[6]

The county's decision is affirmed.

[6] Petitioners also challenge the county's findings regarding LDC 5.3.350(1)(A)(i), one of the other three optional criteria under LDC 5.3.350(1)(A). Because we reject petitioners' challenge to the county's findings under LDC 5.3.350(1)(A)(ii), the county's findings concerning LDC 5.3.350(1)(A)(i) are not necessary to support its decision, and we need not and do not consider petitioners' challenge to those findings.