

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 HOLGER T. SOMMER,
5 *Petitioner,*

6
7 vs.

8
9 JOSEPHINE COUNTY,
10 *Respondent,*

11
12 and

13
14 DARREL MILLER,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2006-033

18
19 FINAL OPINION
20 AND ORDER

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22 Appeal from Josephine County.

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24 Holger T. Sommer, Merlin, filed the petition for review and argued on his own
25 behalf.

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27 No appearance by Josephine County.

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29 James R. Dole, Grants Pass, filed the response brief and argued on behalf of
30 intervenor-respondent. With him on the brief was Cauble Dole and Sorenson.

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

33
34 DAVIES, Board Member, did not participate in the decision.

35
36 AFFIRMED

06/29/2006

37
38 You are entitled to judicial review of this Order. Judicial review is governed by the
39 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a county decision approving a variance to lot line setback requirements

FACTS

The subject property is .78-acres in size, rectangular in shape, with a width of 87 to 90 feet, developed with a single-family dwelling and garage. In 2005, the applicant (intervenor) obtained a lot line adjustment for the subject property that moved the north lot line 70 feet further north in order to provide room for a septic repair drain field. Intervenor also owns the parcel north of the subject property, as well as the other surrounding properties.

When intervenor obtained the lot line adjustment the subject property was zoned Rural Residential – 1 Acre Minimum (R-1) and the parcel to the north was zoned Exclusive Farm (EF). Because county ordinances would have required a comprehensive plan and zone change to reduce the size of the EF-zoned parcel, intervenor agreed as a condition of approval imposed by the county to rezone the R-1 parcel to EF. The zone change from R-1 to EF increased the sideyard setback requirements from 10 feet to 30 feet.

Intervenor later sought a variance to locate an RV storage building/shop with only a 10-foot setback from the west lot line, northwest of the existing septic drain field and a garage. The proposed RV storage building/shop is 36 feet wide and 44 feet long. The planning director approved the variance, and petitioner appealed that decision to the board of county commissioners. The board of county commissioners approved the variance but increased the setback to 15 feet. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Josephine Rural Land Development Code (RLDC) 44.030 provides the approval criteria for variances. RLDC 44.030(B) provides that a variance may be granted where:

1 “Strict adherence to the development standard(s) will result in a hardship to
2 the property owner by substantially preventing or denying a development
3 option contemplated by the applicable zoning district. The hardship shall not
4 be self-imposed, but adverse economic or financial consequences may be used
5 to support the hardship as long as the consequences result from a condition in
6 the land * * *.”

7 Petitioner argues that by voluntarily seeking the prior lot line adjustment that resulted
8 in a zone change that increased set back requirements, intervenor created the hardship and it
9 is therefore “self-imposed.” The county rejected that argument, finding as follows:

10 “The [county] finds that the hardship is not self-imposed because [intervenor]
11 requested a property line adjustment to include more land for septic system
12 and repair areas * * *.

13 “We * * * find that it was not [intervenor’s] proposal to change the zone
14 boundaries, but was a requirement imposed on the request by the planning
15 department. * * *

16 “We agree the application was a voluntary act. However, we also see the line
17 adjustment as an ordinary land use opportunity granted by the RLDC to
18 landowners in all zones. We think it is unreasonable to blame the present
19 property owner for the location of zoning boundaries that have existed for
20 decades, or to deny him privileges otherwise available to other landowners.”
21 Record 5-6.

22 The county commissioners determined that the relevant “hardship” stems from the
23 rezone to EF, which was required by the county, and not from the lot line adjustment, and
24 therefore the hardship was not self-imposed. That determination is a mixed question of law
25 and fact. Depending on how the hardship is characterized, the county could reasonably
26 conclude either that the hardship was self-imposed or not self-imposed.

27 Under *Church v. Grant County*, 187 Or App 518, 524, 69 P3d 759 (2003) and ORS
28 197.829(1), we may only overturn a governing body’s interpretation of its own ordinances if
29 that interpretation is inconsistent with the express language, purpose, or policy of the
30 ordinance.¹ While the county certainly could have interpreted the RLDC as petitioner

¹ ORS 197.829(1) provides, in relevant part:

1 suggests and concluded that the hardship was self-imposed, petitioner has not demonstrated
2 that the interpretation made by the county is inconsistent with the express language, purpose,
3 or policy of the ordinance. Petitioner does not address the county’s findings or
4 interpretation, but merely asserts his contrary view that by seeking the lot line adjustment
5 intervenor imposed the “hardship” on himself. However, the question is whether the
6 county’s interpretation is inconsistent with the language, purpose, or policy of the RLDC, not
7 the merits of petitioner’s contrary interpretation.

8 The first assignment of error is denied.

9 **SECOND ASSIGNMENT OF ERROR**

10 Petitioner argues that there is no hardship under RLDC 44.030(B) because there is an
11 alternate location for the storage shop further north on the subject parcel, in the part that was
12 incorporated into the parcel in the lot line adjustment.

13 The county found that the area petitioner suggests for an alternative location is
14 reserved for the septic repair field. Petitioner argues that there is no legal requirement that
15 the subject property have a septic repair field. That may be so, but the county found that
16 intervenor’s desire to fully develop his septic system is a legitimate use of his property and
17 the reason for the lot line adjustment. Record 5. It is hard to imagine why intervenor would
18 go through the process of adjusting property boundaries to make room for a repair field, if a
19 repair field were not necessary. Petitioner does not explain why intervenor must be required
20 to choose between two legitimate uses of his property, a septic repair field and the proposed

“[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[.]”

1 accessory structure, or why a repair field must be legally required in order to disqualify the
2 suggested alternative location and constitute a hardship for purposes of RLDC 44.030(B).
3 Further, we note that the parcel is only 87 to 90 feet wide at the alternative location petitioner
4 suggests for the storage shop. The storage shop is 36 feet wide. Therefore, contrary to
5 petitioner’s apparent presumption, with 30-foot setbacks on each side intervenor cannot build
6 the storage shop in the suggested alternative location without a variance, even if he sacrificed
7 the repair field.

8 The second assignment of error is denied.

9 **THIRD ASSIGNMENT OF ERROR**

10 RLDC 44.030(C) allows a variance where “[t]he approved variance will result in the
11 minimum departure from the development standard(s) needed to alleviate the hardship.”

12 Petitioner argues that the approved variance does not comply with RLDC 44.030(C)
13 because a “10 foot setback” is “by no means a minimum.” Petition for Review 3. We do not
14 understand the argument. The board of commissioners reduced the amount of the setback
15 variance from 10 feet to 15 feet. The county’s findings state that 15 feet is the minimum
16 necessary to alleviate the hardship, and petitioner does not cite to or challenge those findings.
17 The arguments under this assignment of error do not demonstrate reversible error under
18 RLDC 44.030(C).

19 The third assignment of error is denied.

20 **FOURTH ASSIGNMENT OF ERROR**

21 Petitioner argues that the variance will have a “significant impact on the
22 neighborhood” in violation of RLDC 44.030(D), which provides:

23 “The location, size, design and use of the proposed structure or facility will
24 not result in a significant impact(s) on the neighborhood that cannot be
25 reasonably mitigated through the imposition of special conditions of approval
26 by the review body.”

1 Petitioner’s entire argument is based on assertions that intervenor is engaged in
2 improper commercial activity on other parcels and petitioner’s suspicions that the “proposed
3 structure will be used for commercial purposes.” Petition for Review 4. The county’s
4 findings state:

5 “The [county] finds there are no adverse impacts associated with the variance.
6 [Intervenor] owns all of the adjoining tax lots. [Opponents] do not own
7 property in the area and offered no reasons why the variance results in adverse
8 impacts to any of their property interests.” Record 7.

9 Petitioner does not acknowledge or challenge the county’s findings. Petitioner’s
10 speculation provides no basis for reversal or remand.

11 The fourth assignment of error is denied.

12 **FIFTH ASSIGNMENT OF ERROR**

13 Petitioner cites to statements made by one of the county commissioners indicating
14 that the commissioner believed the variance application violated the “letter of the law” but
15 not the “spirit of the law.” According to petitioner, by nonetheless voting in favor of the
16 application, the county commissioner somehow contradicted himself.

17 Even were we to agree with petitioner that the county commissioner had contradicted
18 himself, petitioner does not explain why oral statements by one of the decision makers that
19 conflict with the later written decision provide a basis for reversal or remand. We review the
20 written findings made in support of a decision not statements made during public hearings.

21 The fifth assignment of error is denied.

22 The county’s decision is affirmed.