

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 ARDEN McCONNELL and
5 HOLGER T. SOMMER,
6 *Petitioners,*

7
8 vs.

9
10 CITY OF GRANTS PASS,
11 *Respondent.*

12 LUBA No. 2007-155

13
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15 FINAL OPINION
16 AND ORDER

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18 Appeal from City of Grants Pass.

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20 Arden McConnell, Grants Pass, Holger T. Sommer, Merlin, filed the petition for
21 review and argued on their own behalf.

22
23 Kris Woodburn, City Attorney, Grants Pass, represented respondent.

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

26
27 RYAN, Board Member, did not participate in the decision.

28
29 AFFIRMED

11/14/2007

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

NATURE OF THE DECISION

Petitioners appeal a decision granting site plan review approval and a variance to construct a third floor on an existing hotel.

FACTS

The subject property, tax lot 4300, is a one-acre parcel zoned General Commercial (GC), and developed with an existing two-story hotel that was constructed in 1964. The property is bordered on the west by SE 7th Street, which provides access to the hotel, and on the south by the Rogue River. North of the subject property is tax lot 4200, which is in common ownership with the hotel and developed with a parking lot and a hotel meeting center. On the east the subject property is bordered by SE 8th Street. Further to the east is a residential area. Petitioner McConnell owns two tax lots developed with a dwelling adjacent to SE 8th Street.

The GC zone requires a 30-foot building setback when commercial uses adjoin residential uses, and a 20-foot landscaped buffer strip. The existing two-story hotel was built approximately 7.5 feet from the eastern property boundary. In 1990, the city approved placement of an above-ground, 4,000 gallon gasoline tank on the eastern side of the existing hotel, located approximately two feet from the property boundary, behind a fence. The gasoline tank is apparently used to fuel jet-boat excursions from the dock adjoining the hotel. The gasoline tank is refueled by trucks that park on SE 8th Street.

In 2003, the city approved construction of a lobby on the north face of the hotel. Apparently, part of that lobby encroaches slightly onto tax lot 4200.

The hotel owner proposes to add a 8,764-square foot third story to the existing footprint of the hotel. In 2004, the city approved a site plan review and variance application for the proposed third story. However, the hotel owner took no action on that approval, and it expired in 2006. In 2007, the owner re-submitted the same applications, resulting in the

1 decision challenged in this appeal. In relevant part, the application seeks a variance to the
2 GC buffer zone requirements, to allow construction of the third story within the footprint of
3 the existing building and reduce the required buffer zone and setback to 7.5 feet from the
4 eastern property boundary. In addition, the application proposes to increase the height of the
5 lobby constructed in 2003, and to add a portico extending to the north. The proposed portico
6 increases the existing encroachment into the southeast corner of tax lot 4200.

7 The city planning commission approved the 2007 applications, granting a variance to
8 the GC buffer zone requirements. With respect to the encroachment onto tax lot 4200, the
9 planning commission imposed a condition requiring that the applicant seek and obtain a
10 property line adjustment between the subject property and tax lot 4200.

11 Petitioners appealed the planning commission decision to the city council, which
12 conducted a hearing and issued a decision on July 18, 2007 upholding the planning
13 commission decision. This appeal followed.

14 **FIRST ASSIGNMENT OF ERROR**

15 Condition C.3 of the challenged decision provides that, prior to issuance of a
16 certificate of occupancy, the applicant must “[s]ubmit an application for Property Line
17 Adjustment between tax lots 4200 and 4300, and obtain a decision, and complete the
18 conditions of approval.” Record 26. The city imposed a similar condition in the 2004
19 variance approval to remedy the slight encroachment of the existing portico into tax lot 4200.

20 Petitioners challenge Condition C.3. According to petitioners, Grants Pass
21 Development Code (GPDC) 3.022 provides that the city shall not grant a development permit
22 for property with an existing development violation, “unless the violation can be rectified as
23 part of the proposed development in a manner provided by this Code.” Petitioners argue that
24 Condition C.3 is inadequate to satisfy GPDC 3.022, because the condition does not correct
25 the encroachment “as part of the proposed development,” that is, as part of the approved site
26 review and variance proposal. Instead, petitioners argue, Condition C.1 requires that the

1 encroachment be corrected as part of a different land use proceeding, a property line
2 adjustment.

3 Petitioners do not identify any means by which the existing encroachment onto tax lot
4 4200 could be corrected “as part of the proposed development,” other than to require the
5 applicant to obtain a property line adjustment as a condition of approving that proposed
6 development. That is precisely what the city did. That approach seems entirely consistent
7 with GPDC 3.022. We understand petitioners to suggest that the city should instead follow
8 a three step approach. First, the city should deny the site review and variance application.
9 Second, the city should require the applicant to obtain approval for a property line
10 adjustment and complete the adjustment. Third, the applicant could then file a new
11 application for site review and a variance. GPDC 3.022 does not require such an approach,
12 and we cannot imagine what purpose would be served by requiring the city to take that
13 approach.

14 The first assignment of error is denied.

15 **SECOND ASSIGNMENT OF ERROR**

16 The city found that the existing hotel structure is located 7.5 feet from the eastern
17 property boundary, and authorized a variance from the GC zone setback requirements to
18 allow the proposed third-story addition on top of the footprint of the existing building.
19 Petitioners contend that the record includes confusing and contradictory testimony regarding
20 the exact location of the existing hotel structure in the vicinity of the eastern boundary of the
21 property.

22 The city council finding that the existing building is located 7.5 feet from the eastern
23 boundary is based on the applicant’s testimony and site plans, and staff testimony.
24 Petitioners note, however, that there is an existing short stairwell attached to the eastern
25 façade of the building that leads down to the basement, and that if that stairwell is considered

1 as part of the existing building, the existing building is actually 3.5 feet from the eastern
2 property line in this area.

3 As far as we can tell, the application does not propose to modify the existing stairwell
4 in any way, or seek or require a variance for any stairwell or other construction beyond the
5 footprint of the existing building. In other words, even if the existing stairwell is properly
6 viewed as part of the footprint of the existing two-story building, the application does not
7 propose to extend that stairwell upward to provide access to the third floor. Access between
8 the second and third floor will be provided elsewhere within the footprint of the existing
9 building and that access will not cause the third floor addition to be closer than 7.5 feet to the
10 east property line. Petitioners do not explain why the existence of a stairwell on the eastern
11 side of the existing two-story building has any significance with respect to the variance
12 application for a third story addition that will not expand the existing stairwell in any way.

13 Next, petitioners cite to various documents in the record, all but one relating to the
14 2004 variance application, in which statements are made that the existing building footprint
15 is located one foot from the eastern property boundary. Petitioners also compare the 2004
16 site plan and the 2007 site plan, and note that the 2007 site plan appears to show a greater
17 distance between the existing building and the eastern property boundary than does the 2004
18 site plan. Petitioners argue this evidence contradicts the evidence the city relied upon to
19 conclude that the existing building is 7.5 feet from the eastern boundary, and that remand is
20 necessary to resolve the confusion.

21 At petitioners' request, much of the 2004 application and decision was included in the
22 record of this appeal. As far as we can tell, all parties to the 2004 decision operated under
23 the belief that the existing building was constructed one foot from the eastern property
24 boundary. The city council apparently approved the 2004 variance with that understanding.
25 For reasons no one bothers to explain, the 2007 site plan and variance application indicate

1 that the existing building is located 7.5 feet from the eastern property boundary.¹ Both the
2 applicant and city staff, including staff from the city engineer's office, submitted testimony
3 to that effect. The only statement to the contrary directed to our attention is a March 8, 2007
4 letter from the applicant's architect stating that "[w]hen originally constructed, the building
5 was placed approximately 1 foot off the 8th Street property line/right of way, which was
6 allowable at the time." Record 312.

7 However, we decline petitioners' suggestion that the decision be remanded to clear
8 up any confusion over the extent to which the existing building encroaches into the eastern
9 setback. Petitioners do not dispute that the 2007 site plan and the undisputed testimony the
10 city council relied upon are substantial evidence that the existing building is located 7.5 feet
11 from the eastern property boundary. Presumably, the documents petitioners cite to from the
12 2004 application and the architect's May 8, 2007 letter might also constitute substantial
13 evidence that the building is actually located one foot from the eastern boundary. Even if that
14 is the case, however, the city is entitled to choose between conflicting believable evidence, as
15 long as a reasonable person could reach the decision the county does, considering the
16 evidence in the record as a whole. *Angel v. City of Portland*, 22 Or LUBA 649, 659, *aff'd*
17 113 Or App 169, 831 P2d 77 (1992); *Wissusik v. Yamhill County*, 20 Or LUBA 246, 260
18 (1990). We conclude that a reasonable decision maker could rely on the site plan and the
19 testimony from the applicant and staff that the existing building is located 7.5 feet from the

¹ The absence of any findings or explanation in the record on this issue is apparently due to the fact that no party raised it as an issue below. Petitioners do not cite to any place in the record of the 2007 application where this issue was raised below, and we find none. The architect's letter at Record 312 is a simple assertion; it does not raise any cognizable issue regarding the setback. If that issue was raised, apparently it was not "raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue." ORS 197.763(1). We note also that petitioners' notice of appeal of the planning commission decision does not include any allegations that the existing building is located only one foot from the eastern property boundary. Record 219-223.

1 eastern property boundary, and the evidence petitioners identify does not render such
2 reliance unreasonable.

3 The second assignment of error is denied.

4 The city's decision is affirmed.