BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

AZORE ENTERPRISES, LLC,
Petitioner,

vs.

CITY OF HILLSBORO,
Respondent,

and

MDK INVESTMENTS,
Intervenor-Respondent.

LUBA No. 2007-253

FINAL OPINION
AND ORDER

Appeal from City of Hillsboro.

Bradley M. Ganz, Hillsboro, filed the petition for review and argued on behalf of petitioner.

David F. Doughman, Portland, filed a response brief and argued on behalf of respondent. With him on the brief were Pamela J. Beery and Beery, Elsner & Hammond, LLP.

William A. Monahan, Robert T. Yamachika, Portland, filed a response brief and argued on behalf of intervenor-respondent. With them on the brief was Jordan Schrader Ramis PC.

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

AFFIRMED 04/01/2008

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a decision approving expansion of an existing non-conforming mini-storage business.

MOTION TO INTERVENE

MDK Investments (intervenor) moves to intervene on the side of the city. There is no opposition to the motion and it is allowed.

FACTS

The subject property is an oddly-shaped parcel that is partially developed with a mini-storage business. The main portion of the parcel is a rectangular area approximately 4.5 acres in size that borders on the south side of Cornell Road. A long triangular portion approximately 2.5 acres in size extends to the rear and west of the main rectangular portion. Prior to 2001, the two portions were separate parcels. Pursuant to intervenor's request, in 2001 the city consolidated the two parcels into a single parcel, and assigned it a single tax lot number.[1] Prior to that consolidation, the triangular parcel lacked frontage or direct access to nearby roads.

The existing storage facility on the main rectangular portion of the site was approved and constructed in 1994. Although intervenor's application contemplated that the triangular parcel would be developed as Phase II of the storage facility, intervenor did not apply for or seek approval of Phase II at that time.

In 1997, the tract was rezoned, along with most of the property in the area, to Station Community Business Park (SCBP). Mini-storage units are "restricted uses" within the SCBP zone. New mini-storage facilities are not allowed within 2,600 feet of a light rail station, and

[1] It is somewhat unclear whether the 2001 action consolidated the two parcels into a single parcel or simply combined two separate tax lots into a single tax lot number that includes the two parcels. We assume the 2001 action consolidated two parcels into a single parcel, because the city's final decision refers to a single parcel, and no party contends otherwise.

the subject property is approximately 1,500 feet from the nearest station. The existing mini-storage facility is therefore a nonconforming use in the SCBP zone. However, Hillsboro Zoning Ordinance (HZO) 136.VI.C provides for expansion of a legal nonconforming use up to a maximum of twenty percent of the gross floor area that existed on the effective date of the ordinance, April 14, 1997.[2]

In 2001, intervenor sought and received approval to expand the existing storage facility onto the triangular portion, along with a variance to increase the size beyond twenty percent of the gross floor area of the existing facility. However, intervenor did not complete the proposed expansion and the approval expired after two years. In 2006, intervenor submitted an application for an identical expansion, again seeking a variance to expand the facility beyond the twenty percent allowed under HZO 136.VI.C. In addition, the application included a request to add recreational vehicle and boat storage to the site, but city staff advised that those uses constitute new storage uses and were therefore not permitted. Intervenor modified the application to eliminate the proposed vehicle and boat storage, and reduced the size of the proposed storage units below twenty percent of the gross floor area of the existing facility, thereby eliminating the need for a variance from HZO 136.VI.C.

The city hearings board held a public hearing on the modified application and, on September 5, 2007, issued its written approval. Petitioner appealed the hearings board's decision to the city council. The city council held a hearing on the appeal and, on December

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[2] HZO 136.VI.C provides for "Expansion of Restricted Uses," and provides in relevant part:

> "1. Except for drive-through facilities within 400 feet of a light rail station site and surface parking lots adjacent to light rail transit station sites, a restricted land use lawfully in existence as of the effective date of this Ordinance shall be allowed to increase its size through contiguous expansion up to a maximum of 20 percent (20%) of the gross floor area existing as of the effective date of this ordinance provided the requirements of Section 99, Enlargement or Expansion of Non-Conforming Uses, the requirements Section 133, Development Review/Approval of Plans, and the standards of Sections 137 through 142 are met."

4, 2007, adopted a resolution, supported by supplemental findings, that denies the appeal and upholds the hearings board's decision. This appeal followed.

FIRST ASSIGNMENT OF ERROR

HZO 99 is entitled "Enlargement or Expansion of Nonconforming Use," and provides:

> "*In case of practical difficulty or unnecessary hardship*, the Hearings Board may authorize enlargement or expansion of a nonconforming use up to 20 percent in floor area or, in those cases not involving structures, up to 10 percent in land area, as existing on the effective date of this Ordinance. In no case, however, shall such enlargement or expansion result in an increase in the number of dwelling units in excess of the number permitted for the lot in the zone in which it is located." (Emphasis added.)

Petitioner argues that the phrase "practical difficulty or unnecessary hardship" is borrowed from the variance context, and that that phrase traditionally has been interpreted as a relatively "demanding" standard. *Corbett/Terwilliger Neigh. Assoc. v. City of Portland*, 16 Or LUBA 49, 60-61 (1987), *citing Erickson v. City of Portland*, 9 Or App 256, 496 P2d 726 (1972). Petitioner contends that the city council erred in construing the HZO 99 practical difficulty or unnecessary hardship standard to be a relatively lenient standard. According to petitioner, any nonconforming use could be easily expanded under the city council's permissive interpretation. Petitioner argues that nonconforming use standards should be strictly construed to prevent their continuation or expansion, and therefore the city council should interpret HZO 99 consistent with its traditional, demanding sense.

The city council's findings explain that the city council chose to use the "practical difficulty or unnecessary hardship" language for expansions of nonconforming uses under HZO in lieu of other, more demanding language such as "substantial hardship," because the city did not want a demanding standard for the expansion of nonconforming uses.[3] The

[3] The city council's findings state, in relevant part:

findings state that the standard is met in this case, because intervenor demonstrated that there is no "practical commercial use" of the triangular portion of the property other than expansion of the existing storage facility, given the triangular portion's lack of frontage, direct access, visibility from the street, and other limitations.

The city and intervenor respond, and we agree, that the city council's interpretation of HZO 99 is not reversible under the somewhat deferential standard of review we must apply to a governing body's interpretation of local land use regulations. ORS 197.829(1); *Clark v. Jackson County*, 313 Or 508, 515, 836 P2d 710 (1992); *Church v. Grant County*, 187 Or App

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> "The City chose to use the term 'practical difficulty or unnecessary hardship' rather than apply stricter language. The City Council chose the applicable language that is in the Zoning Ordinance and has interpreted the expansion of nonconforming use language to be a less strict test than would be required in the case of a variance application. * * * The City adopted expansion standards which it intended would allow an increase in size of a nonconforming use under certain circumstances.
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> "* * * The City Council finds that the approval criterion that is applied by the City is less demanding than a variance would require, and the Applicant has shown that it has practical difficulty associated with the property and unnecessary hardship.
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> "* * * * *
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> "The Applicant * * * stated that the proposed use of the irregular shaped parcel for expansion of the storage facility made sense since no other practical commercial use would be visible and apparent to the consumer public that would make use of the commercial offerings from the site. A lack of frontage and access makes marketing of the property to the pedestrian oriented consumer public prohibitive unless the use is associated with the main use of the parcel and similar in use. In addition, the Applicant stated that the undeveloped portion of the property not only has a odd triangular configuration and no frontage except through the developed portion of the property, but also a significant portion of the subject site is either too steep for development and/or contains wetlands which limit development options. As the Planning and Zoning Hearings Board found earlier, the City Council finds that the Applicant demonstrated there is little practical use for the site other than as an expansion of the site or to sell the property to an adjacent landowner.
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> "* * * * *
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> "The City Council finds that the use of the property as an expansion of the existing mini-storage facility is justified given the practical difficulties inherent with the land that make other economic use of the property unrealistic. * * * The Council considered the expansion language that it had created and accepted Applicant's attorney's clarification that the term 'unnecessary hardship' is not the same as other language that it could have selected if it had chosen to create a more difficult test for approval, such as the higher standard of 'substantial hardship.' The City Council rejects Appellant's argument that the City must apply a strict variance standard in reviewing the application for an expansion." Record 27-29.

518, 69 P3d 759 (2003). It is important to recognize that, while the city may have borrowed the "practical difficulty or unnecessary hardship" language from the traditional variance context, HZO 99 is not part of the city's variance provisions, and that language does not function as a variance standard. Indeed, the city's actual variance standards at HZO 107 do not use that language at all. Even if that language were part of the city's variance standards, and the city were interpreting it in the context of a variance application, the city is not necessarily bound by the "traditional" understanding of that language. *deBardelaben v. Tillamook County*, 142 Or App 319, 325, 922 P2d 683 (1996) (LUBA should not reverse an interpretation of a local variance standard simply because it is inconsistent with general principles of variance law).[4] *A fortiori*, the city is even less bound to interpret the "practical difficulty or unnecessary hardship" variance language consistently with general principles of variance law, when that language is not part of the city's variance code and instead serves a different function.

As *deBardelaben* and *Church* instruct, the question under *Clark* and ORS 197.829(1) is whether the city council's interpretation is consistent with the plain language, purpose and underlying policy of HZO 99. Petitioner argues that because nonconforming uses are "generally disfavored," the city must have intended that HZO 99 allow expansion of

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[4] In *deBardelaben*, the Court stated:

> "Throughout its opinion, LUBA focused largely on general principles of variance law and/or on the case law articulating those principles; it then reasoned in effect that, because the county's interpretations of *this ordinance* establish a less restrictive standard for granting variances than is generally followed, the interpretations were clearly wrong. While we do not imply that extrinsic authority dealing with analogous issues cannot be instructive to local decision makers, or to LUBA and us in reviewing local interpretations of local land use legislation, *Clark* and ORS 197.829(1) make clear that, at least where no issues of state law are involved, the principal focus in that review must be on the language, purpose and policy of the local legislation itself. * * *" *Id.* at 325-26.

While *deBardelaben* was decided prior to *Church*, in which the Court reformulated its understanding of the *Clark* standard under which LUBA and the Court review interpretations of local regulations, we believe that *deBardelaben* still supports the proposition that a local government is not bound to interpret local variance standards consistently with "general principles of variance law" or how those standards have traditionally been interpreted.

nonconforming uses only in extraordinary circumstances. However, the city's findings explain that the city in fact deliberately chose the "practical difficulty or unnecessary hardship" language over other language because it wanted a "less strict" standard for expansion of nonconforming uses. We agree with respondents that petitioner has not demonstrated that the city council's interpretation is inconsistent with the purpose or policy underlying HZO 99.

Petitioner next argues that the city council's interpretation of HZO 99 gives little substance to the terms "practical difficulty" or "unnecessary hardship," which are so liberally construed that almost any nonconforming use would be allowed to expand. However, the city council determined that there is no "practical commercial use" of the triangular portion of the property other than expansion of the existing storage facility, due to the triangular portion's lack of frontage, direct access, visibility from the street, and other limitations such as steep slopes and wetlands. Petitioner does not seriously challenge the adequacy or evidentiary support for those findings. Such determinations might well support a finding of at least "practical difficulty" even in a traditional variance context. The city's interpretation that there is a "practical difficulty" or an "unnecessary hardship" when commercially zoned land has no "practical commercial use" if the expansion is not allowed is not inconsistent with the text or context of those terms, and not reversible under ORS 197.829(1).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that the city erred in presuming an implicit "right to expand" under HZO 99. According to petitioner, in addition to considering whether the triangular portion of the site can be used to expand the existing storage facility, or be sold to an adjoining

landowner for some other use,[5] the city should have considered whether leaving the triangular portion vacant and undeveloped is a "reasonable use." Petition for Review 4. In addition, petitioner argues that the city council failed to recognize that the access limitations for the triangular portion are "self-inflicted." Petitioner contends that prior to the 2001 consolidation, the triangular portion presumably enjoyed a right of way of necessity, and that the consolidation eliminated that right of way.

The city and intervenor respond, and we agree, that nothing cited to us in HZO 99 or elsewhere requires the city to consider whether leaving the 2.5-acre triangular portion of the site in its undeveloped and vacant state is a "reasonable use" of the property. The question under HZO 99 is whether there is either a "practical difficulty" or "unnecessary hardship" that would justify using the triangular portion of the site to expand the existing storage facility. As explained above, the city did not err in concluding that the lack of a practical commercial use of the triangular portion is a "practical difficulty," if not an "unnecessary hardship." It is doubtful that any physical expansion of a nonconforming use could be approved, if the city were required to consider the option of leaving the vacant portions of the site unused, as that option is always available and would presumably defeat any application under HZO 99.

We also agree with respondents that nothing in HZO 99 requires consideration of whether the practical difficulty or unnecessary hardship is "self-inflicted." Even if such a requirement existed, petitioner does not explain why the 2001 consolidation increased the difficulty in developing the site for a commercial use unrelated to the storage facility. Both before and after the consolidation, the triangular portion had no frontage on any street and could be accessed by the commercial public only through adjoining developed properties.

[5] The adjoining landowner petitioner refers to is apparently petitioner. The findings indicate that intervenor and petitioner engaged in negotiations to acquire the triangular portion of the site, but could not reach agreement.

Petitioner's arguments under this assignment of error provide no basis for reversal or remand.

The second assignment of error is denied.

The city's decision is affirmed.