

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 DAVID L. MOORE and
5 SHERRI CONYERS MOORE,
6 *Petitioners,*

7
8 vs.

9
10 COLUMBIA COUNTY,
11 *Respondent.*

12
13 LUBA No. 2008-057

14
15 FINAL OPINION
16 AND ORDER

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18 Appeal from Columbia County.

19
20 David L. Moore and Sherri Conyers Moore, Warren, filed the petition for review on
21 their own behalf.

22
23 No appearance by Columbia County.

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

27
28 REMANDED

07/28/2008

29
30 You are entitled to judicial review of this Order. Judicial review is governed by the
31 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a county decision granting a variance to side yard setbacks to remodel and enlarge a garage.

FACTS

The subject property is approximately two-acres in size and is developed with a single-family home with an attached two-car garage. The property is zoned rural residential five-acre minimum (RR-5). The garage is located 30 feet from the property to the south, which is owned by petitioners. The side yard setback in the RR-5 zone is 30 feet. The applicant seeks to remodel and expand the existing garage into a two-story 35-foot wide by 50-foot deep addition. The proposed 35-foot width will encroach 15 feet into the required 30-foot setback. The applicant requested a major variance to the side yard setbacks to allow the expanded garage to be located approximately 15 feet from petitioners' property. The planning commission approved the variance, and petitioners appealed to the board of county commissioners, who also approved the variance. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Columbia County Zoning Ordinance (CCZO) 602.1 provides that single family detached dwellings are permitted uses. CCZO 602.4 provides:

“Structures accessory to permitted uses, when sited in accordance with the following:

“A. If attached to the main building * * *, they shall meet the front and side yard requirements of the main building.”

CCZO 604.6 provides that the side yard setback in a RR-5 zone is 30 feet.

In order to approve the encroachment into the 30-foot side yard setback, the county approved a major variance under CCZO 1504.1, which provides:

“Major Variances: The Planning Commission may permit and authorize a variance from the requirements of this ordinance when unusual circumstances

1 cause undue hardship in the application of it. The granting of such variance
2 shall be in the public interest.”

3 CCZO 1504.1(A) provides that a major variance may only be approved when five
4 “conditions and facts” exist. CCZO 1504.1(A)(5) requires that “[t]he granting of the
5 variance will not adversely affect the realization of the Comprehensive Plan nor violate any
6 other provision of the [CCZO].”¹ Petitioners argue in their first assignment of error that
7 allowing the variance would violate the CCZO 602.4(A) setback, and therefore the variance
8 would also violate CCZO 1504.1(A)(5), because it would violate a provision of the CCZO.

9 Petitioners misunderstand the nature of variances. Granting a variance allows a
10 development that would otherwise be in violation of some applicable provision to proceed
11 notwithstanding that violation. In the present appeal, the proposed variance is to allow a
12 garage expansion that does not comply with the CCZO 602.4(A) 30-foot setback, so if the
13 variance is properly granted then there is no violation of CCZO 602.4(A). Under petitioners’
14 theory no variance could ever be granted because the reason for the variance request would
15 automatically run afoul of CCZO 1504.1(A)(5). Inconsistency with the development
16 standard from which the variance is granted is not a basis for denying the variance.

¹ CCZO 1504.1(A) provides:

“A variance shall be made only when all the following conditions and facts exist:

- “1. The granting of the variance will not be detrimental to the public safety, health, or welfare, or injurious to other property;
- “2. The conditions upon which the request for a variance is based are unique to the property for which the variance is sought and are not applicable generally to other property;
- “3. Approval of the application will allow the property to be used only for purposes authorized by the Zoning Ordinance;
- “4. Strict compliance with the Zoning Ordinance would create an unnecessary hardship;
- “5. The granting of the variance will not adversely affect the realization of the Comprehensive Plan nor violate any other provision of the Zoning Ordinance.”

1 The first assignment of error is denied.

2 **SECOND ASSIGNMENT OF ERROR**

3 CCZO 1504.1(A)(4) requires the county to find that “[s]trict compliance with the
4 [CCZO] would create an unnecessary hardship.” Petitioners argue that requiring the
5 applicant to comply with the side yard setback would not create an unnecessary hardship.

6 The county’s findings state:

7 “Strict compliance with the [CCZO] to maintain a 30 foot side yard setback
8 will result in physical and financial, ‘unnecessary’ hardships for the applicant.
9 Although development of the subject property is not entirely prohibited, there
10 are characteristics of the site that significantly limit development. These
11 characteristics include topography, location of the septic system and
12 narrowness of the lot * * *. The proposed garage expansion area is flat and is
13 located on the only portion of the property not requiring significant
14 modifications to the land for construction. Development of a detached garage
15 to the rear or front of the house is not possible without excavating the site to
16 create a level building area. Furthermore, construction of a detached garage
17 directly west of the house would require the applicant to move the septic
18 system. The applicant could construct a detached garage approximately 110
19 feet west of the existing dwelling, but the slope of the site becomes
20 increasingly greater as the lot nears the western property line and McNulty
21 Creek. If this option were pursued, substantial modifications to the terrain
22 would be necessary to create a buildable area, increasing chances of erosion
23 and/or slide potential given the type and slope of the soils.” Record 50.

24 The term “unnecessary hardship” is not defined in the CCZO, and the county’s
25 decision provides no express or implied interpretation of that term that is adequate for
26 review. ORS 197.829(2). In construing the term, we give words their plain, ordinary, and
27 natural meanings. “Unnecessary” is defined as “not necessary,” and “necessary” is defined
28 as “[an] item[] that cannot be done without: things that must be had (as for the preservation
29 and reasonable enjoyment of life)[.]” *Webster’s Third New Int’l Dictionary*, 1510 (1981).
30 “Hardship” is defined as “suffering, privation; * * * a particular instance or type of suffering
31 or privation[.]” *Id.* at 1033. We agree with petitioners that the county’s findings are
32 insufficient to explain why strict compliance with the CCZO would result in suffering or
33 privation to the applicant. The findings do not explain why it would be a hardship, or cause

1 suffering or privation, for the applicant to be restricted to the existing two-car garage rather
2 than the proposed two-story addition. The findings also state that alternative locations for
3 the proposed garage are available. As far as we can tell from the county’s decision, the fact
4 that it may be more difficult or expensive to build in the alternate locations will result in an
5 inconvenience rather than suffering or privation.

6 In *Kelley v. Clackamas County*, 158 Or App 159, 163, 973 P2d 916 (1999), the Court
7 of Appeals rejected arguments that the inability to construct a pool house in that case,
8 because the pool house would intrude into required setbacks, resulted in a hardship. The
9 Court of Appeals explained that “many consequences that might conceivably ensue from the
10 existence of characteristics or improvements on property that are incompatible with lawful
11 placement of structures on it [do] not come within the plain, natural and ordinary meaning of
12 ‘hardship.’” *Id.* The applicant in this case has a two-car garage but now seeks to construct
13 an expanded garage that would be approximately the same size as his house. Although
14 required setbacks, site constraints and the applicant’s previous construction of improvements
15 on the site may make it more difficult to construct the desired additional garage space in a
16 way that complies with required setbacks, under the Court of Appeals’ reasoning in *Kelley*, it
17 is hard to imagine the court would agree that such difficulties amount to an “unnecessary
18 hardship,” within the meaning of the county’s “unnecessary hardship” variance criterion.
19 The findings the county adopted clearly do not establish that denial of the requested variance
20 will result in an unnecessary hardship.

21 The second assignment of error is sustained.²

² Our resolution of the second assignment of error requires that, at a minimum, the county’s decision must be remanded. Because neither the county nor the applicant have appeared in this appeal to defend the county’s decision we remand rather than reverse. We caution, however, that given the Court of Appeals’ reasoning in *Kelley*, it seems highly unlikely the county could adopt findings that establish that refusing the applicant’s request to site the expanded garage in the side yard setback area will result in an “unnecessary hardship,” within the meaning of CCZO 1504.1(A)(4).

1 **THIRD ASSIGNMENT OF ERROR**

2 CCZO 1504.1 requires that the granting of a major variance “shall be in the public
3 interest.” Petitioners argue that the county’s findings that the proposed variance is in the
4 public interest are inadequate. The county’s findings under CCZO 1504.1(A) merely state
5 that “the granting of the variance will be in the public’s interest and will be discussed
6 further.” Record 46. That further discussion consists entirely of the following sentence:

7 “Minimizing alterations to the terrain is in the public’s interest as it may
8 preclude such problems from impacting neighboring properties and/or the
9 wetlands and creek located west of the site.” Record 47.

10 Petitioners argue that the proposed variance is not in the public interest. While it may
11 be that minimizing alteration to terrain is in the public interest, without any assistance from
12 the county we cannot say that the above findings are adequate to establish that the proposed
13 variance is in the public interest, when viewed in light of petitioners’ challenge.

14 The third assignment of error is sustained.

15 **FOURTH ASSIGNMENT OF ERROR**

16 CCZO 1504.1(A)(1) requires that the granting of a major variance “will not be
17 detrimental to the public safety, health, or welfare, or injurious to other property.” The
18 county’s findings state that the variance meets this requirement in large part because
19 alternative locations of the garage might result in increased erosion. Petitioners argue that
20 the county’s findings about potential erosion are not supported by substantial evidence, and
21 argue that the county has not shown any concern for erosion in the past.

22 The only alleged detriments to the public safety, health, or welfare, or other
23 properties alleged by petitioner is that the large garage would constitute a fire hazard and the
24 design of the garage would lower property values. The problem with that argument,
25 however, is that it applies to the design of the garage itself, and has nothing to do with the
26 location of the garage within the side yard setback – which is what the variance is for. In

1 other words, petitioner has not alleged any detriment that can be attributed to the disputed
2 variance to the side yard standards of CCZO 602.4(A).

3 The fourth assignment of error is denied.

4 **FIFTH ASSIGNMENT OF ERROR**

5 CCZO 1504.1(A)(2) requires that the “conditions upon which the request for a
6 variance is based are unique to the property for which the variance is sought and are not
7 applicable generally to other property.” The county’s findings rely on the steepness of the
8 slopes on the applicant’s property to find that CCZO 1504.1(A)(2) is satisfied. Petitioners
9 argue that the evidence in the record demonstrates that the applicant’s property is not
10 particularly steep and that there are no conditions that are unique to the applicant’s property
11 that would justify a variance. Petitioner raises numerous questions concerning the county’s
12 conclusion that the applicant’s property contains unique conditions justifying a variance and
13 in particular whether the property is any steeper than nearby properties. Without any
14 response from the county, we agree with petitioners that the county’s findings are inadequate
15 and are not supported by substantial evidence.

16 The fifth assignment of error is sustained.

17 **SIXTH ASSIGNMENT OF ERROR**

18 Petitioners argue that the proposed two-story garage is not intended to be used as a
19 garage, but rather as a commercial machine shop. According to petitioners, a commercial
20 machine shop would be in violation of the CCZO. The challenged decision, however, only
21 approves a major variance to build the garage; it does not approve any particular use for the
22 garage. Because the challenged decision does not approve a commercial machine shop,
23 petitioners’ arguments do not provide a basis for reversal or remand.

24 The sixth assignment of error is denied.

1 **SEVENTH ASSIGNMENT OF ERROR**

2 Petitioners again challenge the county’s findings that CCZO 1504.1(A)(4) is satisfied,
3 which requires that in granting a proposed variance that “[s]trict compliance with the
4 [CCZO] would create an unnecessary hardship.” In support of their argument, petitioners
5 cite language from the Columbia County Subdivision and Partition Ordinance (CCSPO), but
6 we do not see that the CCSPO is applicable to the challenged decision.

7 In sustaining the second assignment of error, we already agreed with petitioners that
8 the county has not established that the CCZO 1504.1(A)(4) “unnecessary hardship” standard
9 is satisfied. We do not see that this assignment of error adds anything to the second
10 assignment of error.

11 The seventh assignment of error is denied.

12 **EIGHTH ASSIGNMENT OF ERROR**

13 The eighth assignment of error, as best we can tell, repeats arguments we already
14 denied in the first and fourth assignments of error. We deny these arguments for the same
15 reasons.

16 The eighth assignment of error is denied.

17 The county’s decision is remanded.