BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LAURA HORSEY and STANLEY HORSEY,
Petitioners,

vs.

CITY OF WEST LINN,
Respondent,

and

ALMA COSTON and WILLIAM COSTON,
Intervenors-Respondents.

LUBA No. 2008-051

FINAL OPINION
AND ORDER

Appeal from City of West Linn.

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

No appearance by City of West Linn.

David J. Petersen, James K. Hein, Portland, filed the response brief. James K. Hein argued on behalf of intervenors-respondents. With them on the brief was Tonkon Torp LLP.

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

REMANDED 10/07/2008

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners appeal a decision by the city approving a design review and water resource area permit for a 4,200 square foot office building.

FACTS

Intervenors applied for design review approval to construct an approximately 4,200 square foot office building with twelve parking spaces on a 12,700 square foot lot zoned Office-Business Commercial. Ten of the proposed parking spaces are located below the first floor of the building, and two parking spaces are located in the rear of the building. The subject property is located at the north end of Hood Street, a dead-end street that terminates north of the northeast boundary of the subject property. The property is located completely within the protected water resource area of Maddax Creek and parts of the property contain steep slopes.

The planning commission approved the permits, and petitioners appealed the planning commission's decision to the city council. A city council vote to uphold the planning commission's decision failed, and the planning commission's decision approving the permits was considered affirmed and became the final city decision on the application.[1] This appeal followed.

FIRST ASSIGNMENT OF ERROR

In the first assignment of error, petitioners argue that the city erred in determining that CDC 32.090(A) is satisfied. CDC 32.090(A) allows development on properties located entirely within a water resource area, subject to certain conditions:

[1] West Linn's Community Development Code (CDC) 99.300(B) provides that if a majority of the city council does not vote to affirm, reverse or remand a planning commission decision, then the planning commission's decision is considered affirmed. In the present appeal, a motion to affirm the planning commission's decision failed, and the decision of the planning commission was considered affirmed. Record 8.

> "Lots located completely inside the water resource area. Development may occur on lots located completely within the water resource area that are recorded with the County Assessor's Office on or before the effective date of this ordinance. *Development shall disturb the minimum necessary area to allow the proposed use or activity, and in any situation no more than 5,000 square feet of the water resource area, including access roads and driveways,* subject to the erosion and sediment control standards in CDC Chapter 31, and subject to a finding that the proposed development does not increase danger to life and property due to flooding and erosion." (Emphasis added.)

Petitioners maintain that there is no evidence that the area that will be disturbed by the development is limited to "no more than 5,000 square feet of the water resource area, including access roads and driveways * * *." Petitioners argue that the city failed to consider the square footage of a sidewalk that runs along the south side of the building, and if that square footage had been considered, the area disturbed by the development would have exceeded the 5,000 square foot maximum set forth in CDC 32.090(A). Petitioners also maintain that the city erred in failing to consider the additional area that will be developed in order to allow stormwater facilities to be constructed.[2]

Intervenors initially respond that petitioners failed to raise any issue regarding the sidewalks below and thus the issue "was not preserved for appeal." Intervenors-Respondents Brief at 6. We understand intervenors to argue that under ORS 197.763(1) and ORS 197.835(3), petitioners are precluded from raising an issue for the first time on appeal to LUBA. Petitioners answer that the issue was raised at Record 46-47. We agree with petitioners that the statements at Record 46-47 were sufficient to raise the issue.

Intervenors next respond that the development plans do not show that the space between the south side of the building and the southern boundary of the property is developed. Intervenors also respond that even if that area is to be developed with a walkway or sidewalk, CDC 32.090(A) requires that "access roads and driveways" be included in the

[2] Intervenors apparently proposed installation of a silt-box filtration catch system, but the location of the system is not identified on a site plan. Record 37.

calculation, but is silent regarding walkways or sidewalks, so that the city was correct in excluding that area from the square footage calculation. In response to petitioners' argument that the city erred in failing to include the area that will be disturbed in order to construct stormwater facilities, intervenors respond that because the facilities are to be constructed underground, they need not have been included in the calculation of the area disturbed by the development.

First, we disagree with intervenors that the development plans do not show a walkway south of the south side of the building. Intervenors-Respondents' Brief App. 16. The plans show development of the walkway, and the walkway shown on intervenors' plans appears to fit within the CDC definition of "development" found at CDC 02.030:

> "Development. Any man-made change defined as the construction of buildings or other structures, mining, dredging, paving, filling, grading or site clearing, and grubbing in amounts greater than 10 cubic yards on any lot or excavation. * * *."

If, as appears to be the case, the sidewalk constitutes development and that development will "disturb the * * * [water resource] area," that disturbed area must be considered in determining whether "development" will disturb no more than 5,000 square feet under CDC 32.090(A).

Regarding the proposed stormwater drainage system, the stormwater facilities also appear to fit within the definition of "development," even if they are ultimately located underground. It may be that the city could interpret "development disturb[ance]," within the meaning of CDC 32.090(A) to include only permanent disturbances to the surface of the water resource area, but the challenged decision does not adopt such an interpretation. It may also be that the facilities are located entirely within other developed areas that are already included in the square footage calculation. If so, the city must provide that explanation on remand.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

CDC 21.070(A)(4)(c) requires "minimum yard dimensions or minimum building setback area" of 25 feet from the rear lot line.[3] As noted, the proposed development includes a parking area with two parking spaces in the rear of the building, in an area that extends from the western wall of the building to approximately five feet from the western boundary of the property, with a 10-foot retaining wall in the northwest corner of the parking area. In their second assignment of error, petitioners argue that the city erred in determining that CDC 21.070(A)(4)(c) was satisfied, because, petitioners argue, the parking area and the retaining wall in the northwest corner of the parking area are impermissibly located within the 25-foot setback.[4]

Petitioners' theory for why the parking area and retaining wall are impermissibly located within the 25 foot setback relies on the definitions of "building" and "structure" found in CDC 2.030. CDC 2.030 defines "building" as:

> "Any structure used or intended for supporting or sheltering any use or occupancy."

"Structure" is defined as:

> "Something constructed or built and having a fixed base on, or fixed connection to, the ground or another structure, and platforms, walks, and driveways more than 30 inches above grade and not over any basement or story below."

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[3] CDC 21.070(A)(4)(c) provides in relevant part:

> "The minimum yard dimensions or minimum building setback area from the lot line shall be:
>
> "* * * * *
>
> "c. For a rear yard, 25 feet;"

[4] Although petitioners do not discuss it, it appears that the development includes another retaining wall above the parking area to the south and west. Intervenors-Respondents' Brief App. 16.

We understand petitioners to argue that the parking area and the northwest retaining wall are "structures" under CDC 2.030 and as such, their location within the setback violates CDC 21.070(A)(4)(c).

Intervenors respond that the city correctly found that the parking area, retaining wall and building are one "structure," that the setback requirements apply to the structure as a whole, and that because the main body of the building is not built within the setback no violation of the setback requirement occurred. Intervenors rely on a theory posited below that the setback requirements are calculated based on how the building's height is calculated:

> "First one must start with the premise that the elevated office building and parking area (including retaining wall) together constitute one 'structure' as explained above. * * * The setback requirements thus apply to the structure as a whole. Next, the structure height is calculated from a base point at grade in front of the whole building, which is essentially at the same elevation as the parking area surface. * * * *Because height is measured from the surface of the parking area for purposes of applying the setback, the retaining wall supporting the northwest corner of the parking area essentially has zero height*. * * *
>
> "When the correct base measuring point is used for the entire structure, *the structure does not violate the setback because the parking area retaining wall is not 30 inches above grade*. * * * Instead, the structure does not exceed 30 inches above the base point until the western wall of the office building, which is well beyond 25 feet from the western property line * * *." Intervenors-Respondents' Brief 8-9 (Emphases added) (citations omitted).

Based on this explanation, we understand intervenors to argue that the city found that because the parking area and retaining wall are not more than 30 inches above grade when measured from a base point grade in front of the building, no violation of the setback requirement has occurred.

It is not clear from the adopted findings whether the city interprets CDC 2.030's definition of "structure" in the way intervenors explain. However, to the extent the city interprets the phrase "more than 30 inches above grade" found in the definition of "structure" to apply to structures generally, rather than to apply only to the part of the definition that references "platforms, walks, and driveways," we do not think that interpretation is

consistent with the text of the definition. If the city intended to find that the parking area and/or the retaining wall are "platform[s], walks and driveways" that are not more than 30 inches above grade, it may explain its rationale for such a finding on remand.

Finally, intervenors argue in the alternative that the retaining wall is an "accessory structure" as defined in CDC 2.030, and is therefore permitted to be located three feet from the property line as set forth in CDC 34.060.[5] However, there is nothing in the adopted findings that supports intervenors' theory, and in fact the findings state that "the applicant does not propose any accessory structures." Record 202. For those reasons, we decline to adopt intervenors' theory. The city may consider that theory on remand if it wishes.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

In their third assignment of error, petitioners argue that the city erred in concluding that CDC 48.040(b) was satisfied. CDC 48.040(b) provides:

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[5] CDC 2.030 defines accessory structure as:

> "A subordinate structure with a maximum area of 1,500 square feet, except for agricultural buildings, located on the lot, the use of which is clearly incidental to and associated with the principal use."

CDC 34.060 provides:

> "Accessory structures such as garages, carports, garden/tool sheds, etc. shall comply with all requirements for the principal use except as provided in Section 34.040 and where specifically modified by this Code as follows:
>
> "A side yard or rear yard requirement may be reduced to three feet for an accessory structure except for a side or rear yard abutting a street, with the exception of alleys platted and dedicated prior to September 30, 1984, as defined in this Code, provided that:
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> "A. The structure is erected more than 60 feet from the front lot line;
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> "B. The structure does not exceed one story or 15 feet in height;
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> "C. The structure does not exceed an area of 500 square feet; and,
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> "D. The structure does not violate any existing utility easements."

> "All non-residential uses shall be served by one or more service drives as determined necessary to provide convenient and safe access to the property and designed according to Section 48.030(A). In no case shall the design of the service drive or drives require or facilitate the backward movement or other maneuvering of a vehicle with a street, other than an alley."

The city determined that the proposal satisfied the access requirement. Record 203. Petitioners argue that large vehicles, and possibly any vehicles if the parking area is full, will be unable to turn around in the driveway in the underbuilding parking lot without backing onto Hood Street in violation of this provision.

Intervenors respond that the city was correct in concluding that the criterion was satisfied. Intervenors note that planning staff presented evidence that the twelve parking spaces provide ample parking for office uses, and that those office uses do not generate heavy delivery truck traffic. Intervenors also point out that the record indicates that most vehicles would be able to turn around under the building either by using a vacant parking space or using the access aisle adjacent to the handicapped parking space. We agree with intervenors that the evidence in the record is sufficient to support the city's determination that CDC 48.040(b) is satisfied.

In this assignment of error, petitioners also assert that intervenors' application materials omitted a vehicle access, egress and circulation plan as required by CDC 48.020(c), and that the applicant provided unclear information as to where and how refuse collection and recycling would be accommodated on the site. Intervenors respond that a circulation plan and a refuse and recycling plan were provided. Record 112-113, 212. We agree with intervenors.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

In the fourth assignment of error, petitioners argue that the city erred in determining that CDC 54.020(E)(3)(d) was satisfied. CDC 54.020(E)(3)(d) provides:

> "A parking, loading, or service area which abuts a street shall be set back from the right-of-way line by perimeter landscaping in the form of a landscaped strip at least 10 feet in width. * * *"

We understand petitioners to argue that the provision is not satisfied because the covered parking area on the east side of the building is not set back from the street right-of-way line by a 10-foot landscaping strip.

The planning commission interpreted CDC 54.020(E)(3)(d) as not applying to a covered parking area such as the one proposed:

> "The Planning Commission determined that the CDC 54.020(E)(3)(d), requiring a 10-foot wide landscaped strip between a public street and an adjacent off-street parking area, did not apply to situations where the adjacent off-street parking area was covered and underneath the building structure. * * *" Record 9.

Petitioners argue that the text of CDC 54.020(E)(3)(d) does not support the planning commission's interpretation because the provision does not distinguish between covered and surface parking areas, and that in any event intervenors' proposed parking lot is in fact a surface level parking lot, notwithstanding that it is covered.

Intervenors respond that the planning commission's interpretation is entitled to deference under ORS 197.829(1), which requires LUBA to affirm that interpretation unless it is inconsistent with the text of CDC 54.020(E)(3)(d). We agree with intervenors that the planning commission's interpretation of the CDC is not inconsistent with its text.

The fourth assignment of error is denied.

The city's decision is remanded.