

LAND USE
BOARD OF APPEALS

FEB 10 3 20 PM '81

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

3	ROY R. MICHAEL,)	
4)	
	Petitioner,)	LUBA NO. 80-145
5)	
	vs.)	
6)	FINAL OPINION
	CLACKAMAS COUNTY, a Political)	AND ORDER
7	Subdivision of the State of)	
	Oregon,)	
8)	
	Respondent.)	
9)	
	and)	
10)	
	THEODORE R. ARMSTRONG, LEW)	
11	LANGLOIS, JOHN ERICKSON)	
	and DUNCAN BRINKLEY,)	
12)	
	Intervenors.)	

13
14 Appeal from Clackamas County.

15 James R. Carskadon, Jr., Milwaukie, filed a brief and argued the cause for Petitioner.

16 Michael Judd, Oregon City, filed a brief for Respondent.

17 Edward J. Sullivan and Timothy V. Ramis, filed a brief and Mr. Sullivan argued the cause for Intervenors Armstrong, Langlois, Erickson and Brinkley.

19 Cox, Referee; Reynolds, Chief Referee; Bagg, Referee; participated in the decision.

21 Affirmed 2/18/81

22 You are entitled to judicial review of this Order.
23 Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a).

1 COX, Referee.

2 NATURE OF THE PROCEEDING

3 Petitioner appeals the Clackamas County Board of
4 Commissioners' September 3, 1980 Order No. 80-2039 denying
5 petitioner's applications to expand a non-conforming use and
6 for a variance. Petitioner seeks reversal of Order No. 80-2039
7 and reinstatement of a hearings officer's decision which was
8 favorable to petitioner.

9 STANDING

10 Standing is not an issue.

11 ALLEGATIONS OF ERROR

12 Petitioner sets forth five allegations of error as follows:

13 "1. The board erred in finding that the
14 washroom, lunchroom and office structure was built in
violation of uniform building code regulations.

15 "2. The board erred in finding no substantial
16 evidence to conclude that the proposed alteration of
17 the non-conforming use was 'reasonably necessary to
continue that use' because it applied the wrong
standard.

18 "3. The board erred in substituting its judgment
19 of the believability or weight of the testimony and
evidence for that of the hearings officer in finding
20 an adverse impact on the neighborhood.

21 "4. The board erred in adopting and applying its
definition of 'unnecessary hardship.'

22 "5. The board's decision violates the Clackamas
23 County Comprehensive Plan and Zoning Ordinance and
LCDC Goal No. 13."

24 FACTS

25 Petitioner bought the subject property in 1962. Between
26 1962 and 1975 petitioner maintained a single family residence,

1 a precast concrete products manufacturing plant and cedar shake
2 mill on the property. The property is located in an
3 agriculture district, and the existing plant and mill
4 constitute non-conforming uses.

5 In 1978 petitioner received a citation from the Workers
6 Compensation Accident Prevention Division (referred to by
7 respondent as OSHA) indicating hand washing facilities needed
8 to be provided for employes. Specifically, the citation and
9 notice of penalty states:

10 "there was no hand washing facilities with hot
11 and cold water provided near the toilet rooms so that
employees could practice good personal hygiene."

12 On the basis of that citation, petitioner constructed in 1979 a
13 building housing employe's washroom and lunchroom facilities on
14 the ground floor and an office on the upper floor. The office
15 replaced one previously located in petitioner's home on the
16 property. Petitioner claims he contacted the county on two
17 separate occasions to acquire a development or building permit
18 and was told each time that a permit was not required because
19 the property was located in an unzoned area. He proceeded to
20 build the washroom, lunchroom and office facility without
21 building permits.

22 In addition petitioner began to expand an existing
23 equipment storage building in order to house products and heavy
24 equipment that are currently stored outside on the property.
25 After petitioner had started to frame the expansion to the
26 equipment storage building he was notified that a building

1 permit was required. In addition, he was notified that the
2 washroom/office building was built without a permit and was,
3 therefore, in violation of existing codes. At that point
4 petitioner applied to Clackamas County for a permit to expand a
5 non-conforming use and for a variance permit. The
6 non-conforming use expansion approval was required for the 1979
7 washroom/office and a cement bin as well as the equipment
8 storage building. The variance, on the other hand, was
9 requested for the partially constructed equipment storage
10 building being built within 3 1/2 feet of the property line
11 rather than the 10 foot setback required by Clackamas County
12 code.

13 The Clackamas County planning staff recommended approval of
14 petitioner's application. After public hearing, the Clackamas
15 County hearings officer approved the application subject to
16 conditions. Intervenor appealed to the Board of Commissioners
17 which reversed the hearings officer and denied both of
18 petitioner's requested permits. The Board of Commissioners'
19 order found that aside from the OSHA citation, there was no
20 substantial evidence in the whole record upon which it could
21 find that the alteration to the non-conforming use was
22 reasonably necessary to continue that use.

23 In its findings number 2, 3, 4 and 5, the county states:

24 "2. The Board finds and determines that the
25 structure proposed for a lunchroom, washroom and
26 office was built in violation of the regulations of
the General Agricultural District and the Uniform
Building Code and that the subsurface sewage disposal

1 system was also constructed without a permit.

2 "3. Aside from the OSHA citation, Exhibit 12,
3 citing the applicants for lack of hand-washing
4 facilities, the Board finds no substantial evidence in
5 the whole record upon which it can predicate a
6 conclusion that the proposed alteration to the
7 non-conforming use is reasonably necessary to continue
8 that use. With respect to a lack of hand-washing
9 facilities, the Board finds no evidence relating to
10 the lack of alternatives of locating such facilities
11 in an existing building or at another location on the
12 site and therefore cannot predicate a conclusion of a
13 reasonable need to continue the non-conforming use.

14 "4. The Board, in examining the whole record in
15 this matter, believes the testimony that the proposal,
16 as submitted:

17 "(a) Would block views of local residents of
18 Mount Hood (See Exhibits 17 through 24 and
19 testimony of Mr. Langlois at Tr. pp 51-53);
20 and

21 "(b) Would exacerbate existing noise and traffic
22 externalities (See Armstrong testimony, tr.
23 pp. 57 and 48) and would have an adverse
24 effect on property values (Langlois
25 testimony, tr. p. 50).

26 "Lacking believable testimony or other evidence upon
27 which the applicant must carry his burden of
28 demonstrating that the use, as proposed, would have no
29 adverse effect on the neighborhood, this Board cannot
30 predicate a conclusion of that nature, at least with
31 respect to the neighborhood described in Exhibit 3.

32 "5. This Board uses the definition of
33 'unnecessary hardship' in Otto v. Steinhilber, 282 NY
34 71, 24 NE 2d 851 (1939), reh. den. 282 NY 681, 26 NE
35 2d 811, as quoted in 3 Anderson, American Law of
36 Zoning, Section 18.16, p. 172. Adopting such a
37 definition this Board finds no reliable probative and
38 substantive evidence in the whole record that the
39 applicant's plight amounts to an 'unnecessary
40 hardship.'"

41 Based on its findings, Clackamas County in part concluded:

42 "2. The policy direction required by each of the
43 points of applicable law listed in (1) above, requires

1 the phasing out or relocation of non-conforming uses
2 in agricultural districts, rather than lending more
permanency thereto.

3 "3. Lacking substantial evidence in the whole
4 record on each of the two matters applied for, i.e.,
5 the request for and alteration of a non-conforming use
6 and the variance to facilitate such alteration, both
7 requests must be denied as there is not showing that
8 the proposals, if granted, were reasonably necessary
to continue the aforesaid non-conforming use and would
have no adverse impact on the neighborhood. Further,
lacking any facts upon which to predicate a showing of
'unnecessary hardship' as that term is defined by this
Board, the variance application must also be denied."

9 FIRST ASSIGNMENT OF ERROR

10 In petitioner's first assignment of error, he alleges that
11 "the Board erred in finding that the washroom, lunchroom and
12 office structure was built in violation of the uniform business
13 code regulations." (See Finding No. 2 supra). Petitioner
14 argues that although the building was constructed without a
15 building permit, the testimony from a State of Oregon certified
16 building official indicates that the structure meets Uniform
17 Building Code requirements. In addition, petitioner argues
18 that although the subsurface sewage disposal system was also
19 built without a permit, the testimony by the chief soil
20 scientist for Clackamas County indicated no sewage problems.
21 Inasmuch as petitioner admits that the building permits did not
22 exist, we find no basis for error on the part of the
23 respondent. The fact that the building and sewage disposal
24 system may have been constructed to UBC standards does not
25 relieve petitioner's obligation to first secure the proper

26 / /

1 permits. Therefore, petitioner's first assignment of error is
2 denied.

3 SECOND ASSIGNMENT OF ERROR

4 Petitioner's second assignment of error alleges that "the
5 Board erred in finding no substantial evidence to conclude that
6 the proposed alteration of the non-conforming use was
7 "reasonably necessary to continue that use" because it applied
8 the wrong standard. Section 9.146 of respondent's zoning
9 ordinance states:

10 "Alterations or a change of the use or structure may
11 be permitted to reasonably continue the use subject to
12 Hearings Officer review and approval under provisions
of Section 11 and the following conditions:

13 "A. The change in the structure or physical
14 improvement will have no greater adverse
15 impact on the neighborhood than the existing
16 structure and improvements; and

17 "B. The change in use, if applicable, will have
18 no greater adverse impact on the
19 neighborhood than the existing use."¹

20 Petitioner interprets the applicable ordinance to require
21 only a showing that the alterations proposed will "reasonably
22 continue" the use. Under this interpretation, petitioner
23 contends that the respondent improperly examined the question
24 of whether petitioner had alternatives to construction of new
25 buildings in order to meet the OSHA requirement of handwashing
26 facilities. Petitioner argues the evidence shows that the
additional buildings meet the correct standard and will
"reasonably continue" the existing business.

In analyzing petitioner's argument, it is necessary that

1 section 9.144 of respondent's zoning ordinance be considered.

2 Section 9.144 permits:

3 "the alteration of any non-conforming use when
4 necessary to comply with any lawful requirement for
5 alteration of the use or structure, subject to all the
laws, ordinances and regulations." (Emphasis added).

6 Under 9.144, an applicant is entitled to alteration of a
7 non-conforming use when it can be shown that the alteration is
8 necessitated by a lawful regulatory measure. Petitioner
9 introduced evidence that OSHA required the installation of
10 handwashing facilities with hot and cold water. Respondent
11 found that petitioner had failed to show that the additional
12 buildings were necessitated by the requirement of having
13 handwashing facilities. The county further found that there
14 was no explanation of why the handwashing facilities could not
15 have been placed in an existing building or at another location
16 on the site. In short, the County Commissioners simply could
17 not find that the requirement of hot and cold running water
18 made necessary the construction of various buildings to house
19 offices, a lunchroom, washroom and equipment storage. Under
20 Section 9.144 it is the respondent's responsibility to
21 determine whether the additional buildings were necessary in
22 order to comply with the OSHA order.

23 This Board finds respondent properly applied its zoning
24 ordinance as regards sections 9.144. Reading ordinance
25 sections 9.144 and 9.146 together, we conclude the county was
26 correct in finding that petitioner failed to show reasonable

1 necessity to alter the non-conforming use in the manner
2 chosen. See Sunnyside Neighborhood v. Clackamas Co., 280 Or 3,
3 569 P2d 1063 (1977). Therefore, petitioner's second assignment
4 of error is denied.

5 THIRD ASSIGNMENT OF ERROR

6 In petitioner's third assignment of error he alleges that
7 "the Board erred in substituting its judgment of the
8 believability or weight of the testimony and evidence for that
9 of the hearings officer in finding an adverse impact on the
10 neighborhood."

11 Petitioner, in essence, is arguing that the hearings
12 officer is the trier of fact and as such weighs the
13 believability of witnesses and evidence introduced before him.
14 As such, petitioner argues that the hearings officer was in a
15 better position to make a decision based on the evidence than
16 was the Clackamas County Board of Commissioners whose decision
17 was based on the record rather than an opportunity to evaluate
18 the demeanor of the witnesses.

19 Clackamas County Zoning Ordinance Section 11.47 provides:

20 "The Board of Commissioners may affirm, rescind or
21 amend the action of the Hearings Officer and may
22 reasonably grant approval subject to conditions
23 necessary to carry out the Comprehensive Plan and as
24 provided for in Section 11.35. . . .

23 "A. For all cases the Board of Commissioners shall
24 make findings based on the record before it and
25 any testimony or other evidence received by it
26 and made a part of the record, as justification
for its actions."

By the terms of the ordinance, the county may rescind or

1 amend the findings of the hearings officer. It is also
2 empowered to make its own findings based upon the evidence. In
3 Grebb v. Klamath County Commissioners, 32 Or App 39, 573 P2d
4 733 (1978), the Court of Appeals rejected a contention very
5 similar to that being made by petitioner. In Grebb, the local
6 ordinance provided that the Board of Commissioners should
7 sustain the decision of the Planning Commission if it was
8 supported by the substantial evidence. Even in the face of
9 that provision, the court upheld the Board of Commissioners'
10 authority to substitute its judgment on matters of fact. The
11 court held that ORS ch 215 vests the county governing body with
12 ultimate authority for land use decisions, and therefore the
13 authority is retained even in the face of a contrary local
14 ordinance. The court in Grebb further found that the Board of
15 Commissioners was not in the position of an appellate court,
16 which cannot substitute judgment on the question of which side
17 in a controversy presented the greater weight of evidence.
18 Based on chapter 215, the court in Grebb determined that the
19 commissioners have greater latitude on review than an appellate
20 court. Clackamas County zoning ordinance sec 11.47 (supra)
21 provides its Board of Commissioners even greater latitude than
22 that provided the respondent in Grebb v. Klamath County
23 Commissioners, supra.

24 Petitioner cites this Board to no authority to support his
25 contention that Clackamas County was without power to decide
26 which evidence it would believe and which it would not. Based

1 on the foregoing, petitioner's third assignment of error is
2 denied.

3 FOURTH ASSIGNMENT OF ERROR

4 Petitioner alleges that the Clackamas County Board of
5 Commissioners not only improperly adopted a definition of
6 unnecessary hardship as relates to his variance request, it
7 also mistakenly applied the definition to his request for
8 alteration of a non-conforming use. Petitioner argues that
9 respondent erred in three respects: (1) the unnecessary
10 hardship standard is inapplicable to a request for an
11 alteration of a non-conforming use; (2) the definition of
12 unnecessary hardship chosen by respondent is inapplicable to
13 request for an area variance; and (3) no notice was given that
14 the definition and its standards would be imposed on petitioner.
15 Application to Non-Conforming Use.

16 Petitioner argues that the Clackamas County Comprehensive
17 Plan and zoning ordinance allow alteration of non-conforming
18 uses which "reasonably continue" the present use. The
19 ordinances, argues the petitioner, do not require a showing of
20 "unnecessary hardship" to allow the alteration. Petitioner
21 concludes that to require a showing of "unnecessary hardship" is
22 to adopt a standard not allowed by the ordinances.

23 Respondent's conclusion No. 3, supra, indicates that
24 Clackamas County did not apply the unnecessary hardship
25 standard to petitioner's non-conforming use alteration
26 request. Instead, the conclusion indicates that the

1 non-conforming use alteration request was denied because there
2 was neither a showing of reasonable necessity nor that the
3 alteration would have no adverse impact on the neighborhood.
4 (See discussion of second assignment of error supra.)

5 Definitions Applicability to Variance Requested.

6 Petitioner next argues that the definition of unnecessary
7 hardship adopted by the county is inapplicable to his request
8 for a variance because the definition was derived from a case
9 relating to a use rather than area variance. Petitioner
10 contends he is asking for an area variance. In light of our
11 decision that Respondent was correct in denying petitioner's
12 non-conforming use request this issue is moot. Petitioner's
13 request is for a variance relating to a non-conforming use
14 which was denied. Since the non-conforming use permit is
15 disallowed, there is no need for a variance.²

16 Notice of Definition to be Used.

17 As regards the petitioner's concern that he was not given
18 notice the Otto, supra, definition and its standards would be
19 imposed upon him, the Board again does not agree with
20 petitioner's position.

21 As we held earlier in this decision, the unnecessary
22 hardship standard was not applied to petitioner's request for a
23 non-conforming use permit. In addition, since we also found
24 that the variance request was moot since the non-conforming use
25 was correctly denied, petitioner's concern about lack of notice
26 is also moot. The definition of unnecessary hardship only

1 relates to the variance request. Since the variance is not
2 allowed if the non-conforming use is denied, petitioner is not
3 harmed in this fact situation by whatever definition of
4 unnecessary hardship respondent chooses. For the above cited
5 reasons, petitioner's fourth assignment of error is denied.

6 FIFTH ASSIGNMENT OF ERROR

7 Petitioner alleges that Clackamas County's decision
8 violates the Clackamas County Comprehensive Plan and Zoning
9 Ordinance and LCDC Goal No. 13.

10 Goal 13

11 Taking the allegation of error concerning Goal 13 first,
12 this Board finds that there has been no violation of that
13 goal. Statewide Goal 13 states in pertinent part:

14 "GOAL: To conserve energy.
15 "Land and uses developed on the land shall be managed
16 and controlled so as to maximize the conservation of
all forms of energy, based upon sound economic
principles."

17 Petitioner asserts that the county's decision violates LCDC
18 Goal 13 because "greater energy consumption will result if the
19 public in rural Clackamas County is required to travel greater
20 distances to acquire the type of product manufactured by
21 petitioner." In support of this argument, petitioner cites
22 this Board to a section of the record which is testimony by a
23 consulting registered and structural engineer. In addition,
24 the witness was qualified as a "certified building official for
25 the State of Oregon and certified plans examiner and certified
26 inspector." The testimony of the witness used by petitioner

1 for support of his allegation that Goal 13 will be violated is
2 as follows:

3 "If it were further -- I don't have a good idea
4 as to which direction most of his products go, but I
5 assume that by far they go towards Portland and the
6 metropolitan area. And so the further out, of course,
it's going to mean more energy consumed and it will
require more expense in hauling and picking up and so
on."

7 This Board finds that petitioner has failed to support his
8 allegation that Goal 13 will be violated.³ Even if we were
9 to assume it would be a violation of Goal 13 for the county to
10 deny the non-conforming use when facts clearly showed that as a
11 result petitioner would have to locate his business further
12 from established markets, the testimony cited by petitioner in
13 support of his allegation at best is mere speculation. There
14 is no evidence in the record to support the assumption that the
15 business would be relocated to an energy inefficient location.
16 This Board will not assume that an enlightened business entity
17 requiring expansion space will increase its energy consumption
18 costs by failing to seek a location close to its major markets.

19 As regards petitioner's assertion that respondent violated
20 its own comprehensive plan, we do not agree. Petitioner's
21 argument seems to be that respondent's conclusion No. 2, supra,
22 (phasing out of non-conforming uses in agricultural districts)
23 is inconsistent with its ordinances allowing restoration of
24 destroyed non-conforming uses. Petitioner's request does not
25 fall within respondent's ordinances controlling restoration of
26 non-conforming uses. Respondent's conclusion or phasing out

1 agriculture zone non-conforming uses is not a necessary element
2 of its decision to deny petitioner's requests. Therefore,
3 petitioner's fifth allegation of error is dismissed.

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1 FOOTNOTES

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4 As regards section 9.146, the county found that the
5 applicant failed to meet his burden of proof that the use would
6 not detrimentally impact the neighborhood. The county further
7 found that the use would block views at Mt. Hood and would
8 exacerbate existing noise and traffic problems.

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10 2

11 The zoning ordinance under which the County was proceeding
12 allows a variance pursuant to sec 14.1 of that ordinance which
13 states:

14 "Variances

15 A... The Hearings Officer may authorize a variance
16 from the provisions of this ordinance, after a
17 public hearing conducted pursuant to Section II,
18 provided that the application demonstrates all of
19 the following: (Adopted 8/1/79)

20 "1.. Compliance with the Zoning Ordinance would
21 create an unnecessary hardship;

22 "2.. The hardship is due to conditions, such as
23 physical characteristics of the land,
24 improvements, or uses which are not typical
25 of the area; and existing condition which
26 violates the Zoning Ordinance shall not be
considered as a condition not typical of the
area;

"3.. Approval of the application will allow the
property to be used only for the purposes
authorized by the Zoning Ordinance; and

"4.. Approval of the application is consistent
with the Comprehensive Plan."

27 The ordinance requires that a showing of unnecessary
28 hardship be made regardless of whether the requested variance
29 is one for use or area. The ordinance prescribes an
30 unnecessary hardship standard on all variances. It indicates,
31 however, that only area variances are allowed. Unless
32 respondent's choice of the unnecessary hardship standard, is
33 shown to be unreasonable or an abuse of discretion, this Board
34 will honor the standard chosen by the local government. The
35 same is true of the county's choice of definition for terms

1 used in those standards. Bienz v. Dayton, 29 Or App 761, 566
2 P2d 904, rev den (1977).

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4 On February 17, 1981, the Land Conservation and Development
5 Commission issued a determination adopting the proposed opinion
6 of the Land Use Board of Appeals concerning allegations of
7 Statewide Goal violations.
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