

LAND USE
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS 3 04 PM '87
OF THE STATE OF OREGON

3	GEORGE HUTMACHER,)	
)	
4	Petitioner,)	LUBA No. 87-052
)	
5	CITY OF SALEM,)	FINAL OPINION
)	AND ORDER
6	Respondent.)	

7
8 Appeal from the City of Salem.

9 George Hutmacher, Salem, filed a petition for review and argued on his own behalf.

10 Paul A. Lee, Salem, filed a response brief and argued on behalf of respondent City of Salem.

11 HOLSTUN, Referee; DuBAY, Chief Referee; BAGG, Referee,
12 participated in the decision.

13 AFFIRMED 10/16/87

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

1 Opinion by Holstun.

2 NATURE OF THE DECISION

3 The city denied petitioner's request for a variance from
4 setback and use limitations imposed under the city zoning code.

5 FACTS

6 Petitioner's property is located at the south tip of a
7 triangular block at the confluence of two one-way streets, 12th
8 and 13th Streets. The triangle is bounded on the southeast by
9 13th Street going north and on the west by 12th Street going
10 south. These streets form a two-way street south of
11 petitioner's property. Petitioner's property and the property
12 to the north are vacant.

13 The property is zoned Commercial General (CG) and includes
14 approximately 5,600 square feet. Petitioner proposes to
15 operate a used car lot on the property. Used car lots are a
16 permitted use in the CG zone.

17 Under Section 130.180(a) of the city zoning code, the
18 portion of petitioner's property adjoining 12th Street is
19 subject to a 50 foot special setback measured from the street
20 centerline. This special setback projects approximately 20
21 feet onto petitioner's property. Within the setback area, no
22 paving or parking and displaying of automobiles is allowed.

23 A small portion of petitioner's property at the
24 intersection of 12th and 13th Streets is subject to Section
25 130.280 which requires a vision clearance area at street
26 intersections. In addition, Section 153.080 requires

1 landscaping a five foot strip of petitioner's property
2 adjoining 12th and 13th Streets.

3 Petitioner requested a variance from each of these
4 requirements to permit him to pave up to the edge of adjoining
5 sidewalks. The variance would allow petitioner to display
6 several additional cars on the property. Record 11.

7 The city hearings officer denied the requested variance
8 from the five foot landscaped strip requirement, but granted
9 the other variance requests. Record 5-10. That approval was
10 appealed to the city council and the city council denied all
11 requested variances. Record 2-4. This appeal followed.

12 In this appeal petitioner accepts the five foot landscaping
13 setback requirement in Section 153.080, but seeks reversal of
14 the city's denial of variances from the special setback and
15 vision clearance requirements in Sections 130.180(a) and
16 130.280.

17 ASSIGNMENTS OF ERROR

18 Petitioner does not allege assignments of error as such.
19 The city observed in its brief that petitioner's summary of
20 oral arguments and statement of facts can be read liberally to
21 allege the city's findings regarding traffic hazards are not
22 supported by substantial evidence in the record. Respondent's
23 Brief 4 and 6. We will review the petition based on this
24 characterization.

25 The city relied on evidence of traffic hazards in
26 concluding three of the applicable criteria were not met. The

1 criteria in the city's zoning ordinance that must be satisfied
2 to grant a variance are as follows:

3 "The hearings officer may grant the degree of variance
4 from any of the development standards imposed on a
5 particular subject property under the provisions of
6 this zoning code which is reasonably necessary to
7 permit development for an otherwise lawful use upon
8 finding that each of the following criteria is met:

9 (a) There are special conditions applying to the
10 land, buildings, or use referred to in the
11 application, which circumstances or conditions do
12 not apply generally to land, buildings, or uses
13 in the same district, and which create
14 unreasonable hardships or practical difficulties
15 which can be most effectively relieved by a
16 variance. Nonconforming land, uses, or
17 structures in the vicinity shall not in
18 themselves constitute such special conditions,
19 nor shall the purely economic interests of the
20 applicant. The potential for economic
21 development of the subject property itself may,
22 however, be considered among the factors
23 specified in this subsection.

24 (b) Granting a variance will not be unreasonably
25 detrimental to the public welfare or to property
26 or improvements in the neighborhood of the
subject property;

(c) Granting a variance will not, under the
circumstances of the particular case,
unreasonably affect the health or safety of
persons working or residing in the neighborhood
of the subject property; and

(d) Granting a variance will be consistent with
the comprehensive plan and with the intent and
purpose of this zoning code." Section 115.020.

27 The city found petitioner's requested variances satisfied
28 none of the above criteria. Record 3-4. The city argues
29 petitioner does not challenge the city's finding that
30 petitioner does not suffer unusual hardship or difficulty
31 because of special conditions related to the land as required

1 by Section 115.020(a).¹

2 The record shows the usable area of petitioner's property
3 would be reduced by 1700 square feet or 30% of its total area
4 if the special setback is imposed. Record 7. The city argues
5 in its brief that petitioner has not shown his property is any
6 different from adjoining properties. Petitioner simply seeks
7 use of the special setback area so he can increase the number
8 of cars that can be displayed. According to the city, nothing
9 about the property prevents it from being put to its intended
10 use. The city argues petitioner seeks the variance in order to
11 allow a larger operation, an insufficient reason to demonstrate
12 compliance with Section 115.020(a).

13 We agree with the city. The record shows that while the
14 usable area of the property will be reduced by 1700 square
15 feet, the property can nevertheless be used for petitioner's
16 proposed use. Petitioner does not challenge the city's finding
17 that the Section 115.020(a) criterion is not met. Neither does
18 petitioner provide any basis for a contrary finding.

19 All of the criteria in Section 115.020 must be met to
20 approve a variance. Therefore, in order to affirm the city's
21 decision, we need only conclude that the city's findings support
22 the conclusion that one of the required criteria is not met.

23 Portland City Temple v. Clackamas County, 11 Or LUBA 70

24 (1982). We conclude the city's uncontradicted finding that
25 Section 115.020(a) is not met is supported by the record. We,
26 therefore, affirm the city's decision.

1 We also find against petitioner's challenge of the city's
2 findings regarding compliance with the other criteria in
3 Section 115.020. The city relied in large part on potential
4 traffic hazards that may result if petitioner is allowed to
5 park within the special setback area or vision clearance area.
6 Record 4. The city found:

7 "2. The proposed variances would be detrimental to
8 the public welfare. If granted, the variance
9 would allow displayed vehicles to encroach into
10 an area which was intended for open space. This
11 would create the impression of a more congested
12 arterial street and would cause traffic problems
13 by distracting the motorists on 12th Street.

14 "3. The proposed variances would unreasonably affect
15 the health or safety of persons working or
16 residing in the neighborhood of the subject
17 property. Vehicles parked within the Exclusive
18 Setback (SRC 130.180) and the required five foot
19 setback would distract passing motorists and
20 create an unsafe condition. Vehicles parked in
21 the vision clearance (SRC 130.280) area would
22 impair vision of vehicles traversing the
23 12th-13th Street intersection.

24 "4. The variance would not be consistent with the
25 Salem Area Comprehensive Plan (SACP) or with the
26 intent and purpose of the Zoning Code. The SACP
Commercial Policies require that standards be
adopted to minimize circulation conflicts between
automobiles and other vehicles servicing
commercial developments and that buffer strips be
provided for all commercial development. * * *"
Record 4.

27 The record shows the intersection of 13th and McGilchrist
28 Street, 111 feet north of petitioner's property, is a dangerous
29 intersection. There have been 48 accidents at that
30 intersection since 1981. Record 41. There is also evidence in
31 the record that the separation of 12th and 13th Streets at

1 petitioner's property is hazardous, and dangerous pedestrian
2 crossings at petitioner's property would be made more dangerous
3 by the requested variance.

4 Petitioner argues his business will have an impact on
5 traffic on 12th and 13th Streets that is no different from
6 other businesses. Petitioner relies on a memorandum in the
7 record from the Salem Department of Public Works which states
8 the variance would have no influence on traffic problems at
9 13th and McGilchrist and would not cause significant conflicts
10 with traffic on 12th Street.

11 The city concedes the record contains conflicting
12 evidence. The city says evidence in the record shows
13 petitioner's plan to park vehicles immediately adjacent to the
14 roadway would attract drivers' attention on two busy arterials
15 passing petitioner's property. The city says this is evidence
16 a reasonable person could rely on and is, therefore,
17 substantial evidence supporting the decision.

18 Even if the evidence cited by petitioner could support
19 findings that the criteria in Section 115.020(b), (c), and (d),
20 are met, we conclude the record also supports the city's
21 finding to the contrary. We do not reweigh the evidence and,
22 therefore, we defer to the city. Younger v. City of Portland,
23 86 Or App 211, ___ P2d ___ (1987). See, Home Builders v. Metro
24 Service Dist., 57 Or App 60, 633 P2d 1320 (1981).

25 The city's decision is affirmed.

FOOTNOTES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

1 The city only interpreted petitioner's brief to challenge the city's findings on the standards in 115.020(b) and (c). We will assume petitioner also challenges the city's finding that 115.020(d) is not met. The city's finding was based in part on traffic hazards and in part on plan policies favoring landscaping. Because the petitioner no longer challenges the landscaping requirement, we examine the adequacy of the city's findings regarding traffic hazards.