

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

ROGER PRIEST and PAMELA PRIEST,)	
)	
Petitioners,)	LUBA No. 90-023
)	
vs.)	FINAL OPINION
)	AND ORDER
MARION COUNTY,)	
)	
Respondent.)	

Appeal from Marion County.

Ted A. Troutman, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Muir & Troutman.

Jane Ellen Stonecipher, Salem, filed the response brief. Jeff Condit, Corvallis, argued on behalf of respondent.

HOLSTUN, Referee; SHERTON, Chief Referee; KELLINGTON, Referee, participated in the decision.

AFFIRMED

05/31/90

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal the county's denial of their application for a variance from requirements of the county's Greenway Management Overlay Zone and conditions of approval imposed on the Butte Landing Planned Unit Development (PUD).

FACTS

Marion County Zoning Ordinance (MCZO) 179.050(R) provides, in part, that

"[p]rivate docks, wharfs, and covered storage shall be limited to one per property ownership, shall not extend more than ten (10) feet above water level, and shall be limited to 300 square feet of gross area. Walkways to the dock, wharf or covered storage shall not [be] more than five (5) feet wide. * * *"

The Butte Landing PUD was approved by the county in 1986. Conditions of approval of the Butte Landing PUD impose similar limitations on private docks and, in addition, require that lots share access to private docks with adjoining lots and require that private docks not extend more than 25 feet into the river.

The subject property is lot 7 of the Butte Landing PUD. The structure at issue in this appeal was built by petitioners and has been licensed as a boat by the Oregon State Marine Board. The structure is 14 feet high, has an area of over 900 square feet, and extends over 26 feet into the river. Additionally,

"[t]he structure is designed with a boat well to

provide storage area for other boats owned by petitioners. It has a 2'x40' walkway on each side and a 6'x20' front deck. A wooden ramp provides access to the structure from petitioners' property." (Record citations omitted.) Respondent's Brief 2.

Petitioners contend their structure is a boat and, therefore, not subject to the above quoted requirements of the MCZO or the Butte Landing PUD conditions of approval regarding construction and use of private docks. In response to a county land use enforcement warning, petitioners submitted an application for a variance to allow their structure to remain in the river next to lot 7. The application indicated the variance was requested

"to park my boat Hull # ORZ00203F989, Certificate # OR 53RX in River adjacent to my property. Boat is a pleasure craft. I'm not sure that a variance is needed to park a boat but county said it is." Record 71.

At the hearing before the hearings officer, petitioners maintained that their structure is a boat, not a dock or boathouse, and petitioners made no attempt to demonstrate that the variance criteria of MCZO 122.020 are satisfied. Citing the petitioners' failure to present evidence of compliance with the county's variance criteria, the hearings officer denied the application. The board of commissioners affirmed the hearings officer's decision, and this appeal followed.

FIRST ASSIGNMENT OF ERROR

"The decision of the referee and as adopted by the County Board of Commissioners should be dismissed because applicant withdrew its application prior to a decision by the Hearings Officer."

In their first assignment of error, petitioners contend the county improperly rendered a decision on the application

because the application was withdrawn prior to the hearings officer's decision. See Torgeson v. City of Canby, ___ Or LUBA ___ (LUBA No. 89-087, May 24, 1990), slip op 6-7; Randall v. Wilsonville, 8 Or LUBA 185, 189-190 (1983).

The evidence in the record indicates petitioners continued to assert that the county lacked jurisdiction over their boat and argued the county was improperly attempting to subject their boat to regulations governing private docks and boathouses. However, nothing cited by petitioners supports their argument that the application was withdrawn.¹

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

"The decision by the County should be dismissed because it does not involve a land use matter."

The disposition of this assignment of error depends on the answer to a single question -- is petitioners' structure correctly viewed as a dock/boathouse under MCZO 179.050(R)?

¹Respondent attaches to its brief a partial transcript of the hearing before the hearings officer which makes it clear that petitioners did not withdraw their application. Petitioners object to our consideration of that partial transcript because it was not included as part of the record filed by the county in this proceeding. Petitioners do not, however, contend that the partial transcript is inaccurate or taken out of context. This Board's practice has been to consider transcripts or partial transcripts of local proceedings, even where those transcripts are not submitted as part of the record filed pursuant to OAR 661-10-025, unless a party demonstrates the transcripts or partial transcripts are inaccurate or taken out of context. Sunburst II Homeowners Assoc. v. City of West Linn, ___ Or LUBA ___ (LUBA No. 89-130, January 26, 1990), aff'd ___ Or App ___ (1990); Hammack & Associates, Inc. v. Washington County, 16 Or LUBA 75, 99, n 2 (1987). However, as noted in the text, even if we did not consider the partial transcript, petitioners do not identify evidence in the record that supports their contention that the application was withdrawn.

If it is, the county's decision must be affirmed.²

Petitioners contend their structure is a boat and is registered as such by the Oregon State Marine Board. Petitioners contend that because boats are not regulated by the MCZO, the county's decision should be remanded so that the variance application request can be dismissed.

Respondent contends petitioners' licensing of the structure with the State Marine Board does not mean the structure cannot be a dock or boathouse. Respondent argues there is substantial evidence in the record demonstrating "the structure is capable of being used, and is intended to be used, as a landing dock, a boathouse and covered storage." Respondent's Brief 4. Respondent contends these uses are subject to the MCZO 179.050(R) limitations imposed on "[p]rivate docks, wharfs and covered storage * * *."

The findings adopted by the county include the following:

"The structure under consideration is a dock for purposes of mooring boats and a landing pier. It is a boathouse for purposes of being a building to store a boat or boats, and equipped with recreational facilities. It may also be a houseboat and used for river or lake travel for which it must be licensed by the State Marine

²The county's decision also includes findings that the Butte Landing PUD conditions of approval make houseboats and houseboat moorages impermissible uses within the PUD. As respondent correctly notes in its brief, petitioners' application was not for a houseboat or houseboat moorage and petitioners do not contend their structure is a houseboat or houseboat moorage. The county's houseboat/houseboat moorage findings therefore are surplusage, and we do not consider them further in this opinion.

Board. This is similar to a motor home which is licensed for travel purposes and which may be used for a dwelling or for recreational purposes in other contexts.

"* * * * *

"The applicant * * * agreed the structure, while licensed for motoring on Oregon rivers, would be used to receive pedestrian and boat traffic arriving and departing this location, i.e., as a dock, and to store additional boats, including a 32 foot dinghy when those boats were at this location * * *. For use as a boathouse or dock at this location the structure does come under the Marion County Zoning Ordinance * * *." Record 7.

Petitioners do not dispute the above findings, except to disagree that their boat is a houseboat. See n 2, supra.

The MCZO provides no definition of "private dock" or "boathouse." The county's findings demonstrate that the county interprets these terms consistently with their common meaning as structures where boats may be landed and secured or stored under cover.³ From the evidence in the record it is clear that the structure could be used as a dock or boathouse. See Record 28a. We understand the county to have determined that the structure is properly viewed as a

³Dictionary definitions of the terms are as follows:

"dock * * * a place for the loading or unloading of materials (as from ships or carts) or for their storage * * *." Websters Third New International Dictionary 665.

"boathouse * * * a building * * * built partially over water for the housing or storing of boats and often provided with accommodations for gear or general storage * * *." Websters Third New International Dictionary 244.

dock or boathouse, notwithstanding petitioners' addition of a helm on top of the structure, attachment of two outboard motors and registration of the structure as a boat with the Oregon State Marine Board. The county's decision apparently is based on the ready adaptability of the structure for use as a dock or boathouse.

We see no reason why the county may not interpret the terms "private docks * * * and covered storage" in MCZO 179.050(R) to include structures that may also be boats, in the sense they have been rendered capable of transportation on the water, but are readily usable as docks or boathouses.⁴ We do not understand the county to have decided that simply because most large boats could also function as a dock or be used to store smaller boats, all such boats must comply with MCZO 179.050(R). The county's decision apparently is based on the ready adaptability and

⁴ORS 830.700(2) broadly defines "boat" for purposes of State Marine Board licensing purposes as follows:

"'Boat' means every description of watercraft used or capable of being used as a means of transportation on the water, but does not include aircraft equipped to land on water, boathouses, floating homes, air mattresses, beach and water toys or single inner tubes."

Although the above-quoted definition expressly excludes boathouses, we do not interpret the definition to preclude the possibility that a particular structure may be both a boathouse and a boat, if it is both built to function as a boathouse and capable of traveling across the water under its own power. Even if ORS 830.700(2) could be interpreted to make boathouses and boats mutually exclusive, that would not mean Marion County could not interpret the terms "boat," "dock" and "boathouse," for purposes of MCZO 179.050(R), as not necessarily being mutually exclusive.

intended use of the petitioners' structure for dock and boathouse purposes as well as for water travel under its own power. We agree with the county that petitioners' structure may properly be viewed as a "private dock * * * and covered storage" within the meaning of MCZO 179.050(R).

The county's decision is affirmed.