

1 Opinion by Sherton.

2 **NATURE OF THE DECISIONS**

3 Petitioners appeal three city decisions denying
4 variances from the height limitation, front yard setback
5 requirement and street side yard setback requirement
6 applicable to single family dwellings in the Residential
7 (R-2) zone.

8 **FACTS**

9 Petitioners own two R-2 zoned homesites, each of which
10 is comprised of two tax lots. The two homesites are
11 referred to as Lots 26/27 and Lots 24/25. Access to the
12 subject property is from S. Juniper Street, which adjoins
13 the subject property to the west. S. Fourth Avenue adjoins
14 Lots 24/25 to the south. The subject property slopes
15 downward to the north and east. The slope is particularly
16 steep on Lots 26/27.

17 In April 1992, petitioners obtained building permits
18 for two single family dwellings on the subject property and
19 began construction. In June 1992, petitioners applied for a
20 variance from the 24 ft. height limitation in the R-2 zone
21 to allow a building 30 ft. in height on Lots 26/27.
22 Petitioners also applied for variances from the 15 ft. front
23 yard and street side yard setbacks required in the R-2 zone,
24 to allow 5 ft. front yard and street side yard setbacks on
25 Lots 24/25.

26 After a public hearing, the city planning commission

1 denied the requested variances. Petitioners appealed the
2 planning commission decisions to the city council. After a
3 de novo public hearing, the city council adopted the
4 challenged orders denying the requested variances.
5 Petitioners thereafter filed notices of intent to appeal
6 with this Board challenging the city decisions denying the
7 height variance (LUBA No. 92-199), front yard setback
8 variance (LUBA No. 92-200) and street side yard setback
9 variance (LUBA No. 92-201).

10 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

11 In these assignments of error, petitioners challenge
12 the city decision denying a height variance for the dwelling
13 on Lots 26/27.

14 Section 8.020(1) of the city's zoning ordinance (ZO)
15 provides that height and setback variances may be granted if
16 the following criteria are satisfied:

17 "(a) That a strict or literal interpretation and
18 enforcement of the specified requirement
19 would result in practical difficulty or
20 unnecessary hardship and would be
21 inconsistent with the objectives of the
22 Comprehensive Plan; and

23 "(b) That there are exceptional or extraordinary
24 circumstances or conditions applicable to the
25 property involved or to the intended use of
26 the property which do not apply generally to
27 other properties in the same zone; and

28 "(c) That the granting of the variance will not be
29 detrimental to the public health, safety, or
30 welfare or materially injurious to properties
31 or improvements in the near vicinity; and

1 "(d) That the granting of the variance would
2 support policies contained within the
3 Comprehensive Plan.

4 "Variances in accordance with this subsection
5 should not ordinarily be granted if the special
6 circumstances upon which the applicant relies are
7 a result of the actions of the applicant or
8 owner."

9 The challenged decision concludes the proposed height
10 variance fails to satisfy any of the four criteria quoted
11 above. Petitioners challenge the evidentiary support for
12 the city's determinations of noncompliance with
13 ZO 8.020(1)(a)-(d).

14 Because the challenged decision denies development
15 approval, the city need only adopt findings, supported by
16 substantial evidence, demonstrating that one or more
17 approval standards are not met. Garre v. Clackamas County,
18 18 Or LUBA 877, aff'd 102 Or App 123 (1990); Baughman v.
19 Marion County, 17 Or LUBA 632, 638 (1989). Further, in
20 order to overturn on evidentiary grounds the city's
21 determination that an applicable approval criterion is not
22 met, it is not sufficient for petitioners to show there is
23 substantial evidence in the record to support their
24 position. Rather, the "evidence must be such that a
25 reasonable trier of fact could only say petitioners'
26 evidence should be believed." Morley v. Marion County,
27 16 Or LUBA 385, 393 (1987); McCoy v. Marion County, 16
28 Or LUBA 284, 286 (1987); Weyerhauser v. Lane County, 7
29 Or LUBA 42, 46 (1982). Petitioners must demonstrate they

1 sustained their burden of proof of compliance with
2 applicable criteria, as a matter of law. Jurgenson v. Union
3 County Court, 42 Or App 505, 600 P2d 1241 (1979);
4 Consolidated Rock Products v. Clackamas County, 17 Or LUBA
5 609, 619 (1989).

6 We consider first the city's determination of
7 noncompliance with the "practical difficulty or unnecessary
8 hardship" requirement of ZO 8.020(1)(a).¹ The city findings
9 state:

10 "There is no practical difficulty or unnecessary
11 hardship which the applicant has presented to
12 justify the additional height. The applicant was
13 aware of the 24 foot height limitation prior to
14 excavation of the site, and was capable of
15 building a structure which meets the height
16 requirements through the use of driven or drilled

¹"Practical difficulty or unnecessary hardship" is a traditional
variance standard, concerning which we have previously stated:

"Practical difficult[y] or unnecessary hardship is a demanding
standard, requiring proof that the benefits of property
ownership would be prevented by strict enforcement of zoning
regulations. Erickson v. City of Portland, [9 Or App 256, 496
P2d 726 (1972)]. While no precise definition of the terms is
available to guide decision makers, judicial precedent makes it
clear that the difficulties must be more than an obstruction of
the personal desires of the landowner. * * *" Corbett/
Terwilliger Neigh. Assoc. v. City of Portland, 16 Or LUBA 49,
60-61 (1987).

This Board is required to defer to the city's interpretation of its own
enactment, so long as that interpretation is not "clearly wrong." Clark v.
Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992); Goose Hollow
Foothills League v. City of Portland, 117 Or App 211, 217, ___ P2d ___
(1992); West v. Clackamas County, 116 Or App 89, 92-93, ___ P2d ___ (1992).
However, in this case it is clear from the city's findings, quoted in the
text, infra, that its interpretation of the "practical difficulty or
unnecessary hardship" standard is consistent with the traditional,
demanding interpretation ascribed to this variance standard.

1 pilings. This procedure would have maintained the
2 topography of the site without the need to remove
3 massive amounts of soil to establish footings.
4 Other alternatives available to the applicant
5 include the construction of a single story
6 dwelling through the use of cantilevered
7 foundations. * * * Record 2.

8 Petitioners' evidentiary challenge to the city's
9 determination of noncompliance with ZO 8.020(1)(a) is based
10 primarily on the September 1992 written and oral testimony
11 of petitioners' consulting structural engineer.² Record
12 12-14, 32-34. We understand petitioners to contend that a
13 "practical difficulty or unnecessary hardship" is created by
14 construction of a dwelling in compliance with the 24 ft.
15 building height limitation on the subject property
16 considering both (1) the original topography of the subject
17 property, and (2) the topography of the property after
18 petitioners' initial excavation.

19 With regard to the original condition of the property,
20 the record includes a geologic and geotechnical
21 reconnaissance of the subject project, prepared by a
22 certified engineering geologist and registered geotechnical
23 engineer.³ Record 47-53. The report recommends that the
24 proposed dwelling "be supported on driven piles or drilled

²We note that although this individual describes himself as a structural engineer in his testimony, his written submittals do not bear the seal of a registered engineer.

³This report is dated April 6, 1992, approximately three weeks before petitioners obtained a building permit for the proposed dwelling and 2 1/2 months before petitioners applied for the subject height variance.

1 piers." Record 49. The report states that "[d]rilled piers
2 should be established at least 12 to 15 feet below existing
3 grade in order to get below any unstable soils." Id.
4 However, rather than using driven piles or drilled piers,
5 the contractor excavated the site, removing between 12 and
6 16 feet of soil, and began construction of the planned
7 dwelling at the original surface elevation, on top of walls
8 that are approximately two stories high on the downslope
9 side.⁴ Record 32. This resulted in increasing the height
10 of the building beyond the 24 ft. limit because, under the
11 ZO, "height of building" means the vertical distance from
12 the average elevation of the finished grade to the highest
13 point on the roof surface.

14 In testimony submitted in September 1992, petitioners'
15 structural engineer stated that driving piles through the
16 unstable soil "was determined to be an impractical solution
17 to the site conditions present on the hillside." Record 12.
18 However, this testimony does not explicitly state who made
19 this determination, explain why a method recommended earlier
20 by an engineering geologist and geotechnical engineer was
21 found to be "impractical," or explain the amount of hardship
22 or difficulty implied by the term "impractical." Also, this
23 testimony says nothing about the use of drilled piers, the

⁴Although some of these walls include windows (Record 23, 25), there is testimony from petitioners' structural engineer that the two stories below the main floor of the dwelling are not intended for occupancy. Record 14.

1 preferred recommendation of the engineering geologist and
2 geotechnical engineer. In addition, petitioners' structural
3 engineer stated that due to scheduling conflicts, he "was
4 not able to inspect much of the project." Record 33.

5 With regard to the condition of the property after
6 petitioners excavated 12 to 16 feet of soil, petitioners
7 argue the only alternative available to comply with the
8 24 ft. height limitation is to build a single story dwelling
9 15 feet below street level, which petitioners contend would
10 constitute a "practical difficulty or unnecessary hardship."
11 However, even if we agreed with petitioners that in
12 determining compliance with the variance criteria, the city
13 is required to consider the condition of the property after
14 12 to 16 feet of soil was removed, we note petitioners'
15 structural engineer testified that after the excavation,
16 there were two reasonable choices, one of which was a
17 "redesign of the house with the garage/entry level placed at
18 the top of the house." Record 32. In addition, petitioners
19 cite no evidence in the record establishing that placing
20 backfill around the existing construction to attain
21 compliance with the 24 ft. height limitation would
22 constitute a "practical difficulty or unnecessary hardship."

23 We conclude the evidence in the record does not
24 demonstrate, as a matter of law, that enforcing the 24 ft.
25 building height limitation will result in "practical
26 difficulty or unnecessary hardship." Because the city's

1 determination of noncompliance with ZO 8.020(1)(a) is, in
2 itself, a sufficient basis for denial of the requested
3 height variance, we do not consider petitioners' challenges
4 to the city's determinations of compliance with
5 ZO 8.020(1)(b)-(d).

6 One further point requires consideration. Petitioners
7 contend the city's decision is improperly based on the fact
8 that construction of the subject dwelling was begun before
9 the variance application was filed, rather than on the
10 criteria of ZO 8.020(1)(a)-(d).

11 The challenged decision notes that the proposed
12 dwelling is partly constructed and states in two places that
13 the "special circumstances" relied upon to obtain variance
14 approval "are a result of the actions of the applicant."
15 Record 2-3. These statements appear to be responsive to the
16 final paragraph of ZO 8.020(1), which states that variances
17 "should not ordinarily be granted" if the special
18 circumstances relied on are a result of the actions of the
19 owner or applicant. Regardless of whether these findings
20 would provide an independent basis for denial of the subject
21 application, which we do not decide, they do not affect or
22 invalidate the city's determinations of noncompliance with
23 the approval criteria of ZO 8.020(1)(a)-(d), one of which we
24 sustain, supra.

25 The first and second assignments of error are denied.

1 **THIRD AND FOURTH ASSIGNMENTS OF ERROR**

2 In these assignments of error, petitioners challenge
3 the city decisions denying front yard and street side yard
4 setback variances for the dwelling on Lots 24/25. The
5 challenged decisions conclude the proposed setback variances
6 fail to satisfy any of the four criteria established by
7 ZO 8.020(1)(a)-(d). Petitioners challenge the evidentiary
8 support for the city's determinations of noncompliance with
9 ZO 8.020(1)(a)-(d).

10 We consider first the city's determinations of
11 noncompliance with the "practical difficulty or unnecessary
12 hardship" requirement of ZO 8.020(1)(a). The challenged
13 decisions state the setback reduction requests are for the
14 purpose of constructing a second floor deck on the west
15 (front) and south sides of the dwelling within five feet of
16 the property line. With regard to the front yard setback
17 variance, the findings state:

18 "There is no practical difficulty or unnecessary
19 hardship which the applicant has presented to
20 justify the setback reduction, because the
21 property is not extremely steep, and the applicant
22 is capable of constructing a conventional
23 foundation, according to the geologic hazards
24 report. In addition, the deck on the west side of
25 the house is an amenity, but is not integral to
26 the livability of the structure. The applicant
27 can construct decks on other portions of the house
28 which do not extend into the setbacks. * * *
29 (Emphasis added.) Record 131.

30 The findings with regard to the street side yard setback
31 variance are identical, save that they refer to the deck on

1 the south side of the dwelling. Record 134.

2 Petitioners argue:

3 "* * * There is no evidence in the record from
4 which the [city] can conclude as it has that
5 [petitioners] can construct decks on other
6 portions of the house. The finding is in reality
7 a conclusion without evidence to support it."
8 Petition for Review 13.

9 As explained above, in challenging these determinations
10 of noncompliance with ZO 8.020(1)(a) on evidentiary grounds,
11 what petitioners must show is that the evidence in the
12 record establishes, as a matter of law, that enforcement of
13 the 15 ft. front yard and street side yard setback
14 requirements will cause "practical difficulty or unnecessary
15 hardship." Petitioners do not dispute the city findings
16 that the requested setback variances are necessary only to
17 allow a deck (or decks) to be built on the south and west
18 sides of the subject dwelling, within five feet of the
19 property line. Petitioners cite no evidence establishing
20 that having such a deck (or decks) on the south and west
21 sides of the dwelling on Lots 24/25 is more than a personal
22 preference or amenity. Because we sustain the city's
23 determinations of noncompliance with ZO 8.020(1)(a), we do
24 not address petitioners' challenges to the city's
25 determinations of noncompliance with ZO 8.020(1)(b)-(d).

26 The third and fourth assignments of error are denied.

27 The city's decisions are affirmed.