

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3
4 ERIC WENTLAND, STEVEN D. ROGERS)
5 and TESSIE HEALY,)
6)
7 Petitioners,)
8)
9 vs.)
10) LUBA No. 91-054
11 CITY OF PORTLAND,)
12) FINAL OPINION
13 Respondent,) AND ORDER
14)
15 and)
16)
17 VOLUNTEERS OF AMERICA OREGON,)
18 INC.,)
19)
20 Intervenor-Respondent.)

23 Appeal from City of Portland.

25 Eric Wentland, Portland, filed the petition for review
26 and argued on his own behalf.

28 Kathryn B. Imperati, Portland, filed a response brief
29 and argued on behalf of respondent.

31 Steven L. Pfeiffer, Portland, filed a response brief
32 and argued on behalf of intervenor-respondent. With him on
33 the brief was Stoel, Rives, Boley, Jones & Grey.

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

REVERSED IN PART/REMANDED IN PART 09/04/91

40 You are entitled to judicial review of this Order.
41 Judicial review is governed by the provisions of ORS
42 197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner¹ appeals a city decision granting a variance
4 and conditional use approval for a residential care facility
5 (RCF).

6 **MOTION TO INTERVENE**

7 Volunteers of America Oregon, Inc. (applicant) moves to
8 intervene on the side of respondent in this proceeding.
9 There is no opposition to the motion, and it is allowed.

10 **FACTS**

11 The proposed RCF will offer a three month residential
12 and drug treatment program with a six month aftercare
13 program for graduates. The facility ultimately will house
14 60 male adults convicted of nonviolent crimes, although only
15 40 clients would initially be in residence at the facility.
16 The clients would receive treatment, supervision and
17 counseling as an alternative to incarceration.

18 The subject site is zoned Light Manufacturing (M3) and
19 is located on the east side of N.E. Martin Luther King, Jr.
20 (MLK) Boulevard. The site includes approximately 11,250
21 square feet and is improved with a two-story building which
22 was originally constructed in 1910 as a hotel. The building
23 occupies approximately 7,500 square feet of the site and
24 includes a total of approximately 15,000 square feet of

¹Only petitioner Wentland filed a brief in this appeal.

1 space. A portion of the first floor is occupied by a marble
2 business and a beauty salon. The applicant plans to occupy
3 3,000 square feet on the first floor and all of the second
4 floor. The undeveloped portion of the property is in the
5 rear. That area is to be used for eight off-street parking
6 spaces and open space.

7 The properties in the vicinity facing MLK Boulevard are
8 also zoned M3. There are a number of unoccupied and
9 dilapidated buildings in the area, and the vicinity has been
10 targeted by the city for economic redevelopment. A tire
11 retreading business adjoins the subject property to the
12 north and other businesses in the area include a welding
13 supply business and an appliance store. To the east is a
14 large area, zoned Medium-Density Multifamily (R1), which is
15 developed with a mix of single-family and multi-family
16 residences.

17 **FIRST ASSIGNMENT OF ERROR**

18 **A. Residential Care Facility**

19 RCFs are allowed as a conditional use in the M3 zone.
20 Portland City Code (PCC) 33.50.200(10). PCC 33.12.616
21 defines "Residential Care Facility" as follows:

22 "'Residential care facility' means an
23 establishment operated with 24-hour supervision
24 for the purpose of and responsibility for
25 providing care and planned treatment or planned
26 training to persons by reason of their
27 circumstances or condition require such care and
28 planned treatment or planned training while living
29 as a single housekeeping unit in a dwelling unit.

1 " * * * * ."²

2 Petitioner first argues the challenged facility is a
3 correctional facility or an alternative to a jail, not an
4 RCF. In support of his argument, petitioner points out the
5 facility is run by the county corrections department and is
6 clearly an alternative to incarceration, because the
7 intended clients would be placed in jail if not housed in
8 the proposed facility.

9 The applicant points out the terms "correctional
10 facility" and "jail" are neither defined in the PCC nor used
11 in the PCC to identify permissible land uses. Moreover,
12 applicant argues petitioner's entire argument under this
13 subassignment of error is premised on an erroneous
14 assumption that a particular facility could not be both a
15 correctional facility (or an alternative to such a facility)
16 and an RCF.

17 We agree with the applicant that there is nothing about
18 the above quoted definition of RCF which necessarily would
19 preclude a correctional facility (or an alternative to such
20 a facility) from qualifying as an RCF. Additionally, we
21 agree with the applicant that the critical inquiry under
22 this subassignment of error is whether the proposed facility
23 falls within the PCC 33.12.616 definition of RCF. Other
24 than to suggest that a correctional facility could not be an

²The portion of PCC 33.12.616 omitted in the text provides definitions for the terms "care," "planned treatment" and "planned training."

1 RCF, petitioner does not argue the challenged facility fails
2 to qualify as an RCF under the above quoted definition. The
3 applicant argues that the proposed facility falls within the
4 PCC 33.12.616 definition of RCF and cites both findings and
5 evidence in the record supporting that contention.
6 Intervenor-Respondent's Brief 7-12.

7 In view of the findings and evidence cited by the
8 applicant, and petitioner's failure to explain why those
9 findings are inadequate or not supported by substantial
10 evidence, this subassignment of error is denied.

11 **B. Impacts**

12 In order to grant conditional use approval for an RCF,
13 the city must, among other things, find

14 " * * * that the use at the particular location is
15 desirable to the public convenience and welfare
16 and not detrimental or injurious to the public
17 health, peace, or safety, or to the character and
18 value of the surrounding properties. * * *" PCC
19 33.106.010.

20 Petitioner contends the record does not contain substantial
21 evidence in support of the city's findings that the standard
22 imposed by PCC 33.106.010 is met by the proposed facility.
23 However, petitioner's entire argument in support of his
24 substantial evidence challenge is that the city improperly
25 relied upon evidence of the applicant's experience with
26 similar facilities in other locations. Petitioner contends
27 the experience at these other facilities is not indicative
28 of what the experience will be at the proposed facility,

1 solely because those other facilities were further removed
2 from residential uses than is the subject facility.

3 There is a great deal of evidence in the record
4 concerning both the proposed facility and other facilities
5 operated by the applicant. Even if petitioner were correct
6 that the experience at other facilities is insufficient to
7 constitute substantial evidence of what the experience at
8 the proposed facility will be, the experience at other
9 facilities was only part of the evidence relied upon by the
10 city. The city also adopted detailed findings concerning
11 various benefits to the neighborhood that are expected as a
12 result of the proposed facility and steps that would be
13 taken to minimize the possibility of adverse impacts.³
14 Neither these findings nor their evidentiary support are
15 challenged by petitioner. The city also imposed a number of
16 conditions to address possible detrimental impacts on the
17 public and the neighborhood from the proposed facility.

18 We have no doubt that facilities such as the one
19 approved by the city in this case could result in instances
20 of detrimental impact or be operated in a manner such that
21 the net impact on the public and neighborhood could be
22 detrimental. The city recognized this possibility and

³For example, the city found the residents of the facility would perform a variety of community service activities; and the staff, probation officers and police presence at the facility would deter neighborhood crime. Both clients and visitors would be screened, and clients would be limited to those who had committed nonviolent crimes.

1 adopted detailed findings addressing particular aspects of
2 the facility and imposing conditions it felt necessary to
3 respond to particular potential problems. We conclude the
4 city's findings concerning compliance with PCC 33.106.010
5 are adequate, and we further conclude those findings are
6 supported by substantial evidence. Younger v. City of
7 Portland, 305 Or 346, 360, 752 P2d 262 (1988).

8 This subassignment of error is denied.

9 The first assignment of error is denied.

10 **SECOND AND FOURTH ASSIGNMENTS OF ERROR**

11 Minimum off-street parking requirements for RCFs are
12 established by PCC 33.106.100(A)(1)(b), which provides as
13 follows:

14 "One space shall be required for each vehicle
15 permanently located at the facility or operated on
16 a daily basis in connection with the facility."

17 Additionally, under PCC 33.82.010(h), "required parking
18 spaces shall be provided on the site or in a separate area,
19 the nearest portion of which is not more than 300 feet
20 removed from the use it serves." Under the second and
21 fourth assignments of error, petitioner contends the city's
22 findings that the applicant's proposal complies with the
23 requirements of PCC 33.106.100(A)(1)(b) and 33.82.010(h) are
24 not supported by substantial evidence in the record.

25 The city found that the eight onsite parking spaces
26 proposed by the applicant would be adequate to serve
27 existing staff and the proposed initial 40 clients. The

1 applicant submitted evidence in support of its contention
2 that the proposed eight onsite spaces would be adequate to
3 comply with PCC 33.106.100(A)(1)(b), and petitioner
4 submitted evidence that more spaces would be required.⁴

5 The evidence in the record concerning the adequacy of
6 the proposed eight onsite parking spaces to serve existing
7 requirements is conflicting. Where the record supporting a
8 land use decision contains conflicting believable evidence,
9 the choice of which evidence to believe belongs with the
10 local government decision maker. City of Portland v. Bureau
11 of Labor and Ind., 298 Or 104, 119, 690 P2d 475 (1984);
12 Braidwood v. City of Portland, 24 Or App 477, 480, 546 P2d
13 777 (1976); Douglas v. Multnomah County, ___ Or LUBA ___
14 (LUBA No. 89-086, January 12, 1990). We conclude the
15 evidence is such that a reasonable person could conclude
16 that the proposed eight onsite parking spaces would be
17 adequate to serve the facility initially. Younger v. City
18 of Portland, supra.

19 However, the city also found that in view of the plans
20 eventually to accommodate up to 60 clients, it was likely

⁴The applicant relied in large part on assumptions concerning the use of public transportation by staff, as well as scheduling staff arrivals and departures to maximize use of the available parking, and low levels of vehicle ownership by clients in the after care phase of the program. In addition, clients agree not to use personal vehicles in the initial phase of the program as a condition of enrollment.

Petitioner challenged a number of the assumptions used by the applicant and accepted by the city. Applying different assumptions, petitioner contended that as many as 17 spaces would be needed.

1 that additional parking spaces would be required in the
2 future. To address the potential need to provide more than
3 eight off-street parking spaces, the city's decision imposes
4 a number of transportation related conditions. Included in
5 those conditions are requirements that the applicant submit
6 an annual report showing the numbers of vehicles parking at
7 or near the site and that the applicant provide additional
8 off-street parking if needed in the future.

9 Petitioner contends the applicant's representations
10 during local proceedings that it had agreements which would
11 allow additional off-street parking spaces if necessary are
12 unsubstantiated.⁵ We understand petitioner to contend the
13 city's decision to impose the above described conditions to
14 assure continued compliance with PCC 33.106.100(A)(1)(b) and
15 33.82.010(h) in the future is, therefore, not supported by
16 substantial evidence in the record. However, petitioner
17 offers no reason to question the accuracy of the
18 representation, and apparently no questions were raised
19 concerning the applicant's representations during the local
20 proceedings. Because the applicant's unsubstantiated
21 representations concerning agreements for off-site parking
22 were not challenged below, and there is no evidence in the
23 record below that such agreements do not exist, we believe

⁵The applicant testified that it had agreements which would allow use of up to 15 offsite parking spaces within 300 feet of the facility, should additional parking spaces be needed. Record 42, 103.

1 the applicant's representations are evidence upon which a
2 reasonable person would rely in making a decision. We
3 therefore conclude the city's decision on this point is
4 supported by substantial evidence. City of Portland v.
5 Bureau of Labor and Ind., supra; Braidwood v. City of
6 Portland, supra; Douglas v. Multnomah County, supra.

7 The second and fourth assignments of error are denied.

8 **THIRD ASSIGNMENT OF ERROR**

9 PCC 33.106.100(3)(c) requires that an RCF provide a
10 minimum of 150 square feet of open space for each resident
11 18 years of age or older. In order to satisfy the
12 requirement of PCC 33.106.100(3)(c) for 60 RCF clients,
13 9,000 square feet of open space is required.

14 The applicant took the position during local
15 proceedings that the only practical way to provide the
16 entire amount of required open space for 60 clients would be
17 to demolish a major part of the existing building. Record
18 282. The applicant proposes to provide 7,000 square feet of
19 open space and was granted a variance to the requirement for
20 an additional 2,000 square feet. The applicant proposes to
21 provide most of the proposed 7,000 square feet of open space
22 on the roof of the existing building and to provide the
23 remainder in the small undeveloped area at the rear of the
24 building.

25 The PCC provisions governing variances are set forth at
26 PCC 33.98.010, which provides, in pertinent part:

1 "A variance * * * may be granted if literal
2 interpretation and enforcement of the regulations
3 of this Title applicable to a property would
4 result in practical difficulties or unnecessary
5 hardships.

6 "(a) Generally, any variance granted shall satisfy
7 all of the following general conditions:

8 "(1) It will not be contrary to the public
9 interest or to the intent and purpose of
10 this Title and particularly to the zone
11 involved.

12 "(2) It shall not permit the establishment
13 within a zone of any use which is not a
14 permitted use within that zone * * *.

15 "(3) It will not cause substantial adverse
16 effect upon property values or
17 environmental conditions in the
18 immediate vicinity * * *

19 "(4) It will relate only to the property that
20 is owned by the applicant.

21 "(b) Special Conditions. When all of the
22 foregoing [general] conditions can be
23 satisfied a variance may be granted as
24 follows:

25 "(1) Minor Variances. A minor variance * * *
26 may be granted when it will not
27 adversely affect the character,
28 livability, or appropriate development
29 of adjoining properties.

30 "(2) Major Variances. A major variance * * *
31 may be granted when any of the following
32 applicable conditions can be satisfied:

33 "A. The variance is required in order to
34 modify the impact of exceptional or
35 extraordinary circumstances or
36 conditions that apply to the subject
37 property or its development that do
38 not apply generally to other

1 properties in the vicinity; or

2 "B. The variance is required in order to
3 allow enjoyment by the applicant of
4 a property right possessed by a
5 substantial portion of the owners of
6 properties in the same vicinity,
7 while resulting in [a] comparatively
8 trivial detriment to the
9 neighborhood." (Emphases added.)

10 The major variance granted by the city in this case relies
11 upon findings that the major variance criterion in PCC
12 33.98.010(b)(2)(A) is met. Petitioner contends the city
13 failed to demonstrate compliance with that criterion.

14 Respondent argues the "exceptional or extraordinary
15 circumstances or conditions" in this case are caused by the
16 prior "development" of the subject property. In view of the
17 way the property is developed, respondent contends it would
18 be impractical to require the applicant to provide the
19 amount of open space called for under PCC 33.106.100(3)(c).
20 The city found that the applicant's proposal was "an
21 innovative approach to meeting both the open space and
22 security needs" of the facility. Record 21. The city also
23 found "[t]he applicant's approach to the provision of open
24 space, takes maximum advantage of the site as it has been
25 developed while preserving the existing residential
26 potential."⁶ (Emphasis added.) Id.

⁶The record supports respondent's contention that the subject property and its development present somewhat unique circumstances as compared to other properties in the area.

1 Clearly there is little space on the site which is
2 suitable for open space use, and the applicant's proposal to
3 use the roof is an innovative approach to providing as much
4 open space as possible. As far as we can tell, absent
5 elimination of the eight onsite parking spaces and provision
6 of the required off-street parking at another location, the
7 applicant has provided about as much open space as is
8 possible without removing a portion of the existing
9 structure. If compliance with the PCC open space
10 requirements required the elimination of required parking or
11 removal of a portion of the structure in order to put the
12 property to any of the uses in the M3 zone for which the
13 property is reasonably adaptable, we would have little doubt
14 the variance standard imposed by PCC 33.98.010(b)(2)(A)
15 would be met. However, it is equally clear that no variance
16 is "required" to allow an RCF on the subject property. If
17 the number of clients to be accommodated at the proposed
18 facility were reduced from 60 to 46, the proposed 7,000
19 square feet of open space would be more than adequate to
20 comply with PCC 33.106.100(3)(c) and no variance would be
21 required.⁷ The question then is whether, under PCC
22 33.98.010(b)(2)(A), a major variance is appropriate to allow
23 the full number of clients the applicant desires to
24 accommodate at the proposed facility.

⁷Forty six times 150 square feet = 6,900 square feet.

1 Although petitioner only explicitly mentions the
2 variance criterion of PCC 33.98.010(b)(2)(A), quoted supra,
3 that criterion must be read in context with the remaining
4 PCC variance provisions to determine whether a variance is
5 "required" under that section. See Oswego Properties Inc.
6 v. Lake Oswego, 108 Or App 113, ____ P2d ____ (1991); Kenton
7 Neighborhood Assoc. v. City of Portland, 17 Or LUBA 784, 797
8 (1989); Foster v. City of Astoria, 16 Or LUBA 879, 885
9 (1988). PCC 33.98.010 explains that a variance is to be
10 granted only "if literal interpretation and enforcement of
11 the regulations of [the PCC] applicable to a property would
12 result in practical difficulties or unnecessary hardships."
13 In construing this PCC language, we have previously
14 explained it imposes a traditional and demanding standard.

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

27 Notwithstanding the above quoted language, we believe
28 it is clear in reading PCC 33.98.010 as a whole, that the
29 city did not intend this stringent standard to apply to all
30 types of variances, at least where subsequent provisions of
31 PCC 33.98.010 make it clear that a more permissive approach

1 was intended. See Sokol v. City of Lake Oswego, 16 Or LUBA
2 429, 435-40 (1989). It is clear that the standards that
3 must be met for minor variances under PCC 33.98.010(b)(1)
4 are far more permissive than the traditional "practical
5 difficulties or unnecessary hardships" variance standard.
6 In addition, in construing the alternative special standard
7 for major variances provided in PCC 33.98.010(b)(2)(B), this
8 Board agreed with the city's interpretation of that
9 subsection to impose a somewhat permissive variance
10 standard. Morrison v. City of Portland, 11 Or LUBA 246
11 (1984), rev'd on other grounds 70 Or App 437 (1984).

12 However, the "exceptional or extraordinary
13 circumstances or conditions" standard of PCC
14 33.98.010(b)(2)(A) is also a traditional variance standard.⁸
15 See Bowman Park v. City of Albany, 11 Or LUBA 197, 222
16 (1984); Patzkowski v. Klamath County, 8 Or LUBA 64, 70
17 (1983). In Corbett/Terwilliger Neigh. Assoc. v. City of
18 Portland, ___ Or LUBA ___ (LUBA No. 89-018, March 2, 1990)
19 (Corbett II), slip op at 15, we explained "[t]he
20 'exceptional or extraordinary circumstances or conditions'
21 standard of PCC 33.98.010(b)(2)(A), like the 'practical
22 difficulties or unnecessary hardships' standard, is a

⁸PCC 33.98.010(b)(2)(A) provides that the exceptional or extraordinary circumstances may arise from the "development" of the property as well as from the other physical characteristics of the property. In this case, it is the "development" of the subject property which the city contends creates the property's exceptional or extraordinary circumstances or conditions.

1 demanding one." We do not believe a variance is "required"
2 under PCC 33.98.010(b)(2)(A) simply because the particular
3 intensity of use the applicant proposes would otherwise be
4 frustrated.

5 Stated simply, the variance granted by the city was
6 granted so that the applicant could accommodate 60 rather
7 than 46 clients. There is no suggestion in the record that
8 an RCF at the subject property must be able to accommodate
9 60 clients, and, in fact, the facility only anticipates
10 housing 40 clients initially. Thus, the variance has not
11 been shown to be "required" under PCC 33.98.010(b)(2)(A).
12 The traditional variance standard adopted by the city is not
13 properly construed to allow approval of variances so that
14 applicants for land use approval can "maximize" allowable
15 uses, as the city findings suggest, or simply to accommodate
16 a landowner's particular developmental desires. Lovell v.
17 Independence Planning Comm., 37 Or App 3, 7, 586 P2d 99
18 (1978); see Patzkowski v. Klamath County, 8 Or LUBA 64, 70
19 (1983); Corbett II, supra, slip op at 18.

20 It no doubt will often be the case that one or more of
21 the uses potentially allowable in a given zoning district
22 will not be practical due to unusual site conditions or past
23 development of the property. However, under prior
24 interpretations of the traditional variance standard imposed
25 by PCC 33.98.010(b)(2)(A), a property owner in such
26 circumstances may not refuse to develop his or her property

1 for one of the uses for which it is suited and insist on a
2 variance so that site may be developed for a use or
3 intensity of use which the characteristics of the site or
4 its development make impossible without the variance. If
5 the city wishes to adopt standards which allow it to grant
6 such variances, it must amend PCC 33.98.010(b)(2)(A) or
7 provide an alternative standard.⁹ See Sokol v. City of Lake
8 Oswego, supra.

9 The third assignment of error is sustained.

10 Our disposition of the third assignment of error
11 requires that we reverse the portion of the challenged
12 decision granting a major variance from the PCC open space
13 requirements. However, the conditional use approval portion
14 of the challenged decision could be modified or conditioned
15 to limit occupancy of the proposed RCF to a level complying
16 with the city's open space standards. We therefore remand
17 rather than reverse that portion of the decision.

18 The city's decision is reversed in part and remanded in
19 part.

⁹Of course another option for the city, if it simply wants to allow RCFs to make maximum utilization of existing buildings, notwithstanding open space limitations, is to amend the open space requirements of PCC 33.106.100(3)(c). Lovell v. Independence Planning Comm., supra.