

DEC 20 5 01 PM '83

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

3	BRUCE and DORA MORRISON,	)	
		)	
4	Petitioners,	)	LUBA No. 83-080
		)	
5	v.	)	
		)	
6	CITY OF PORTLAND,	)	FINAL OPINION
		)	AND ORDER
		)	
7	Respondent.	)	

8  
9 Appeal from City of Portland.

10 Timothy V. Ramis, Portland, filed a petition for review and  
11 Steven L. Pfeiffer, Portland, argued the cause for  
petitioners. With Mr. Ramis on the brief were O'Donnell,  
Sullivan & Ramis.

12 Ruth Spetter, Portland, filed a brief and argued the cause  
13 for Respondent.

14 Kressel, Referee; Bagg, Chief Referee; DuBay, Referee  
participated in the decision.

15 REMANDED 12/20/83

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17 You are entitled to judicial review of this Order.  
18 Judicial review is governed by the provisions of Oregon Laws  
19 1983, ch 827.  
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1 Opinion by Kressel

2 NATURE OF THE DECISION

3 Petitioners appeal the allowance of two setback variances  
4 by the Portland City Council. The variances would permit  
5 construction of certain additions to an existing single family  
6 residence.

7 FACTS

8 Participant-respondents (the Galtons) own two contiguous  
9 lots (Lots K and J) in a hilly section of Southwest Portland.  
10 The area is zoned R-7, medium density residential. The  
11 southwest portion of Lot K is developed with a two story  
12 residence, which was built before the area was zoned. A deck  
13 and spa have been added on the east side of the residence,  
14 taking advantage of the generally even topography in that  
15 area. Lot J, which is immediately east of Lot K, is  
16 undeveloped. The land on the rear portion (north) of both lots  
17 consists of an extremely steep slope.

18 In January, 1983, the Galtons approached the city with  
19 plans for a two-story addition on the southwest portion of Lot  
20 K. The addition would expand the kitchen on the main floor of  
21 the house. Directly above the expanded kitchen a new bedroom  
22 unit would be constructed.

23 The city's R-7 district requires a front yard setback of 20  
24 feet and side yards of six feet. However, the additions  
25 proposed by the Galtons came within 1.5 feet of the front  
26 property line and 2.4 feet of the southwest side yard lot

1 line. Accordingly, the zoning code prohibited construction  
2 unless variances were approved. Because the additions  
3 projected so far into the required setback areas, the city code  
4 classified the necessary relief as "major variances."

5 The Galtons' request was denied by the Portland Variance  
6 Committee. On appeal to the city council, however, the  
7 variances were allowed, over the objection by petitioners that  
8 the proposed addition interfered with their views. Petitioners  
9 also argued that because a different design which required no  
10 variances was possible, (placement of the addition on the east  
11 side of the house rather than on the southwest side), no  
12 hardship was present and the variances should be denied.

13 The council's findings in justification of the variances  
14 can be summarized as follows:

- 15 1. Although it would be possible to construct the  
16 proposed additions on the east side of the house,  
17 the Galtons' design would result in a more  
18 logical room arrangement and would better  
19 preserve the style and appearance of the  
20 residence. Also, the east side alternative would  
21 require removal of a substantial improvement (the  
22 deck and spa).
- 23 2. A number of property owners in the surrounding  
24 neighborhood have expanded existing residences to  
25 provide for better living arrangements. At least  
26 five setback variances in the vicinity had been  
granted by the city. Thus, allowance of this  
request would permit the applicants to enjoy  
rights already enjoyed by others in the vicinity.
3. The proposed addition would not be aesthetically  
or environmentally harmful. Scenic views enjoyed  
by neighbors would not be significantly  
disturbed. Neighborhood parking and traffic  
patterns would not be affected.

1 FIRST ASSIGNMENT OF ERROR

2 Petitioners first claim that the council misconstrued its  
3 variance approval criteria, particularly the provision for a  
4 major variance found in §33.98.010(b)(2)B of the city code.<sup>1</sup>

5 That provision requires a finding that:

6 "The variance is required in order to allow enjoyment  
7 by the appellant [sic] of a property right possessed  
8 by a substantial portion of the owners of properties  
9 in the same vicinity, while resulting in the  
10 comparatively trivial detriment to the neighborhood."

11 According to petitioners, this provision authorizes a major  
12 variance only where two conditions are met:

13 "(1) The applicant has been denied a property right  
14 possessed by a substantial portion of the owners of  
15 properties in the vicinity and (2) the enjoyment of  
16 this property right thus far denied requires a  
17 variance." Petition for Review at 5 (Emphasis in  
18 original).

19 In their petition and at oral argument, petitioners contend  
20 that neither condition is met in the present case. First, they  
21 argue that the city failed to identify the "property right"  
22 protected by the variance decision. Indeed, in petitioners'  
23 view there has been no property right deprivation because there  
24 is no right under zoning or other law to the expansion of an  
25 existing residence. The right recognized by the city in this  
26 case, according to petitioners, is not a recognized right in  
the legal (i.e. enforceable) sense but a mere preference, viz.  
the Galton's preference for a larger home. Second, even if  
there exists a right to expand a residence, petitioners argue  
the right could be accommodated in this instance without

1 variance relief. That is, there is substantial evidence in the  
2 record that construction of the addition on the east side of  
3 the house, rather than as proposed, would avoid the necessity  
4 for variance relief. Thus, petitioners assert that one of the  
5 code's pre-conditions for a major variance, i.e. that a  
6 variance is required in order to protect a property right, is  
7 not satisfied.

8 In response to these contentions, the city argues for a  
9 broad interpretation of its major variance standard. Indeed,  
10 the council's findings (discussed below) imply that the  
11 property rights referred to in §33.98.010(b)(2)B are not  
12 strictly limited to those which are recognized by law as  
13 enforceable rights. In addition, the city disputes  
14 petitioners' claim that the availability of a construction  
15 alternative requiring no variances rules out the relief granted  
16 in this case. The city finds no "alternative design"  
17 requirement in §33.98.010(b)(2)B. Beyond that, the city  
18 contends it was entitled to reject the east-side design  
19 alternative because it would result in an illogical room  
20 arrangement and unreasonable cost to the applicants.

21 The threshold inquiry under §33.98.010(b)(2)B is whether  
22 the variance is required in order to allow enjoyment of a  
23 property right possessed by a substantial portion of the owners  
24 of properties in the same vicinity. This provision is  
25 ambiguous at best. The words suggest divergent concepts of  
26 variance relief, one restrictive and the other permissive. On

1 one hand, as petitioners point out, the language seems to  
2 reflect elements of the traditional and restrictive idea that  
3 variance relief is available only where the landowner cannot  
4 make beneficial use of the lot in question without such  
5 relief. 3 Anderson, American Law of Zoning 2d §18.16 - §18.19  
6 (1977).<sup>2</sup> Section 33.98.010(b)(2)B reflects this concept by  
7 providing that a variance is allowable only when required to  
8 permit the landowners' enjoyment of "property rights." The  
9 courts have recognized a landowners' property right to make  
10 beneficial use of a lot, so that a municipal regulation which  
11 prohibits beneficial use is unenforceable. Suess Builders v  
12 City of Beaverton, 294 Or 254, 656 P2d 306 (1982); Fifth Avenue  
13 Corporation v Washington County, 282 Or 591, 581 P2d 50  
14 (1978). However, we are unaware of authority establishing a  
15 property right to expand or modify an existing beneficial use.  
16 Thus, it is plausible that §33.98.010(b)(2)B embraces a highly  
17 restrictive approach to variance relief. We note that one  
18 portion of the city's findings in this case seems to endorse  
19 this approach.<sup>3</sup>

20 Manifestly, a restrictive interpretation of  
21 §33.98.010(b)(2)B would call for reversal of the city's action  
22 in this case. The Galtons already enjoy the beneficial use of  
23 Lot K in the form of a single family residence. No variance  
24 relief is required in order to permit the continued enjoyment  
25 of this property right. The proposed enlargement of the  
26 residence implicates no property right and therefore presents

1 no basis for relief under a restrictive interpretation of the  
2 code.

3 The city urges a far broader and more permissive  
4 construction of §33.98.010(b)(2)B. At the outset, the city  
5 correctly observes that its power to allow a variance is not  
6 limited strictly to instances where relief is necessary to  
7 permit the beneficial use of land. Atwood v. Portland, 55 Or  
8 App 215, 219, 637 P2d 1302 (1981). See also, 1000 Friends of  
9 Oregon v Clackamas County, 40 Or App 529, 532, 595 P2d 1268  
10 (1979) (where the ordinance allowed a variance to relieve  
11 extraordinary hardship or to secure "the public interest,"  
12 relief based on the latter criterion could be granted). We  
13 note also that the language used in §33.98.010(b)(2)B  
14 (enjoyment "\* \* \* of a property right possessed by a  
15 substantial portion of the owners of properties in the same  
16 vicinity \* \* \*") implies that the restrictive construction of  
17 "property rights" advocated by petitioners may not have been  
18 intended. Property rights in the beneficial-use sense of the  
19 phrase are of constitutional magnitude and are enjoyed by all  
20 citizens. However, the code refers to property rights  
21 possessed by a substantial portion of landowners in a given  
22 area. This connotes a different and more open-ended concept,  
23 akin to the permissive approach embodied in decisions from  
24 other jurisdictions allowing variances to relieve "practical  
25 difficulties." 3 Anderson, supra, §18.46-18.51.

26 We proceed on the assumption that the city is not required

1 to allow variances only where property rights, in the  
2 beneficial use sense of that phrase, are implicated. Having  
3 gone that far, however, we are still unable to reject  
4 petitioners' first challenge to the city's decision.

5 Without question, the determination of the meaning of a  
6 city zoning ordinance such as the one at issue here is one of  
7 law, to be resolved in a judicial forum. Theland v. Multnomah  
8 County, 4 Or LUBA 284 (1981); Springfield Education Assn. v.  
9 Eugene School District, 270 Or 217, 224, 621 P2d 547 (1980).  
10 However, the city, as the agency which adopts and applies the  
11 zoning code to permit requests, has the initial duty to define  
12 ambiguous code terms in its final order. Id. In the absence  
13 of such definitions (in this case, definition of "property  
14 rights" and related terms as they are used in  
15 §33.98.010(b)(2)B) we cannot properly perform our review  
16 function under 1983 Or Laws, ch 827, §32(a).

17 A reading of the city's findings relating to this issue  
18 illustrates our difficulty in ascertaining the limits of the  
19 city's discretion under §33.98.010(b)(2)B. The findings state  
20 as follows:

21 "The council finds at least five properties in the  
22 vicinity of the applicant's site have been granted  
23 variances to reduce front yard setbacks to less than  
24 the required 20 feet in order to develop single family  
25 residences. Reducing the applicant's front yard  
26 setback to 1.5 feet as requested will permit the  
applicants to continue and expand the use of their  
single-family residence in the same fashion as have a  
substantial number of property owners in the vicinity  
of the applicant's property.

1       "\* \* \* The council also finds that the applicants  
2       should have the same rights as other neighbors in the  
3       area to provide new living space in an established  
4       home without disrupting its architectural  
5       characteristics nor disrupting the current room  
6       arrangements of rooms in the home on this site."  
7       Record at 17.

8       The first sentence is, at best, equivocal as to whether the  
9       "property rights" enjoyed by neighbors of the Galtons, and  
10      relied on by the city in granting these variances, consist of  
11      (1) the right to develop (i.e., build), single family  
12      residences on sloping lots or (2) the right to later expand  
13      such residences. The underlined word suggests the former  
14      meaning to this Board, a meaning which is consistent with the  
15      restrictive approach urged by petitioners. If that is the  
16      city's approach, however, the Galtons' variance application for  
17      an expansion should have been denied.

18      The remaining sentences in the quoted findings suggest, in  
19      line with a permissive construction of the code, that the  
20      "property right" recognized by the city under §33.98.010(b)(2)B  
21      is not only the right to beneficial use of a lot, but is also  
22      loosely measured by the extent to which others in a  
23      neighborhood have, with or without variances, previously  
24      expanded or modified their homes to accommodate changing needs  
25      and preferences. This is certainly the import of the finding  
26      that "[r]educing the applicants' front yard setback to 1.5 feet  
27      as requested will permit the applicants to continue and expand  
28      the use of their single family residence in the same fashion as  
29      have a substantial number of property owners in the vicinity of

1 the applicants' property." Record at 17 (emphasis added).

2 We believe it to be the city's duty to more clearly  
3 identify and explain the interpretation it gives to this  
4 portion of its code. If the permissive approach alluded to  
5 above is intended by the city, its findings should define that  
6 approach in terms of the language (e.g., "property right")  
7 actually used in §33.98.010(b)(2)B of the code. The findings  
8 should also demonstrate how the language in §33.98.010(b)(2)B,  
9 as interpreted by the city in this case, interrelates with the  
10 other applicable portions of the variance code. For example,  
11 how does the permissive interpretation relate to the word  
12 "required"<sup>4</sup> in the same section, and to "unnecessary  
13 hardships"<sup>5</sup> or "practical difficulties" in the preceding  
14 section? We remand this case for such explanatory findings.

15 SECOND ASSIGNMENT OF ERROR

16 Petitioners next challenge the sufficiency of certain  
17 findings made by the city on grounds they violate ORS  
18 227.173(2).<sup>6</sup> That statute requires the city to support a  
19 permit decision with a brief statement explaining the criteria  
20 considered relevant and justifying the decision based on the  
21 facts as they relate to those criteria. Petitioners claim  
22 that, with respect to three of the applicable variance criteria  
23 in the city code, respondent's findings are not sufficiently  
24 explanatory because they do not precisely define the meaning of  
25 terms such as "substantial," "environmental conditions" and  
26 "public interest." Petitioners also attack the city's

1 justification of the variance because it allegedly did not  
2 fully address the concerns petitioners raised before the  
3 council.

4 The pertinent variance criteria read as follows:

5 Section 33.98.010(a)

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

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

11 "\* \* \*

12 "(3) It will not cause substantial adverse effect upon  
13 property values or environmental conditions in  
14 the immediate vicinity or in the zone in which  
15 the property of the applicant is located.

16 Section 33.98.010(b)(2)B

17 "The variance is required in order to allow enjoyment  
18 by the appellant [sic] of a property right possessed  
19 by a substantial portion of the owners of properties  
20 in the same vicinity, while resulting in the  
21 comparatively trivial detriment to the neighborhood."  
22 (Emphasis added).

23 The city made extensive findings with respect to these  
24 variance criteria. We quote the following parts of the  
25 findings to illustrate the city's effort to satisfy ORS  
26 227.173(2):

"The request for a front yard setback is governed by  
the topographic character of the site and the  
placement of the existing residential structure,  
auxiliary uses (deck and spa) and garage on the site.

"The site slopes sharply in a northern direction,  
leaving very little room for the applicant to build  
the proposed addition on this portion of the site.  
The eastern portion of the site contains an existing  
deck and spa. Locating the proposed bedroom adjacent

1 to the living room and den would require the removal  
2 of these facilities, would disrupt the internal  
3 circulation system of the house and would create an  
4 illogical arrangement of rooms within the house.  
5 Permitting the additions to be constructed as proposed  
6 will locate the new bedroom near existing bedrooms and  
7 will better preserve the style and appearance of the  
8 residence. \* \* \* The proposed additions are designed  
9 to preserve the dwelling's Tudor architectural style  
10 and to preserve the dwelling's appearance in  
11 relationship to the rest of the neighborhood. These  
12 additions will not generate any additional traffic in  
13 the neighborhood and will not create any additional  
14 parking needs in this neighborhood. For these  
15 reasons, granting the front yard setback variance  
16 proposed by the applicant will not be contrary to the  
17 public interest.

18 "Granting the applicant's request for a variance to  
19 reduce the side yard setback to a minimum of 2.4 feet  
20 also will not be contrary to the public interest. A  
21 10-foot pedestrian public right-of-way exists between  
22 the applicant's southwest side yard lot line and the  
23 adjoining neighbors to the southwest; thus, ample  
24 space separates the two neighbors. Trees and  
25 vegetation located on the right-of-way and on the  
26 respective properties provide a visual buffer between  
the two homes. The proposed addition will not  
significantly alter the existing view from the  
property of the neighbors directly to the west (the  
Morrison's).

"The purpose of the R7 zone is to permit medium  
density single family housing options in areas  
difficult to service or having minor natural hazards,  
or already fully developed at that density. Granting  
both the front yard and side yard setback variance  
will not be contrary to the purpose and intent of the  
R7 zone because the variances will permit the  
applicant to expand a home constructed on a difficult  
R7 site in a manner that is not detrimental to the  
surrounding neighborhood."

In Lee v. Portland, 57 Or App 798, 646 P2d 662 (1982), the  
Court of Appeals broke down the requirements of ORS 227.173(2)  
into three parts:

"(1) An explanation of the standards considered  
relevant to the decision;

1       "(2) A statement of the facts supporting the decision;  
2       and

3       "(3) An explanation of how the standards and the facts  
4       dictate the decision reached. The words "brief  
5       statement" indicate a legislative intent that the  
6       statement need not be exhaustive, but rather that  
7       it contain a summary of the relevant factors."  
8       57 Or App at 803.

9       The city's findings with respect to the variance criteria  
10      brought to our attention in this assignment of error satisfy  
11      each of the statutory elements identified in Lee, supra. Most  
12      importantly for purposes of this appeal, the findings explain  
13      the considerations given weight by the city under each  
14      criterion.<sup>7</sup> Beyond that, the findings also take into account  
15      the objections registered before the council by petitioners.

16      We conclude that the second assignment of error must be  
17      denied.

18      THIRD ASSIGNMENT OF ERROR

19      The final assignment of error contends that there is  
20      evidence in the record to indicate that the addition proposed  
21      by the Galtons actually required a greater variance than the  
22      city council approved in the present case. Our attention is  
23      drawn to a site plan in the record which, according to  
24      petitioners, reveals that a portion of the addition will  
25      cantilever outward toward the front yard to within .34 feet of  
26      the front yard property line. Petitioners contend that the  
27      council implicitly approved this site plan and therefore  
28      actually granted a greater variance than is reflected in the  
29      final order. The allowance of the greater variance is invalid,

1 argue petitioners, because it is unsupported by adequate  
2 findings, substantial evidence, the justification required by  
3 ORS 227.173(2) and the notice of decision required by ORS  
4 227.173(3).<sup>8</sup>

5 The petition in this case calls upon this Board to review  
6 the final decision granted by the city in Case No. VZ7-83. In  
7 the final order in that case, the Portland City Council  
8 approved a front yard reduction from 20 feet to 1.5 feet and a  
9 side yard reduction from 6 feet to 2.4 feet. We agree with  
10 respondent that the site plan referred to by petitioners is not  
11 controlling on the question of what the city actually  
12 approved. Should these variances eventually be upheld, the  
13 applicants will be permitted to vary the required setbacks only  
14 by the number of feet expressly approved by the city. We  
15 therefore reject this assignment of error.<sup>9</sup>

16 This case is remanded to the city for further proceedings  
17 consistent with this opinion.

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FOOTNOTES

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4 Under §33.98.010(b)(2), a major variance can be granted  
when one of the following standards is satisfied:

5 "A. The variance is required in order to modify the  
6 impact of exceptional or extraordinary  
7 circumstances or conditions that apply to the  
8 subject property or its development that do not  
9 apply generally to other properties in the  
10 vicinity; or

11 "B. The variance is required in order to allow  
12 enjoyment by the appellant of a property right  
13 possessed by a substantial portion of the owners  
14 of properties in the same vicinity, while  
15 resulting in the comparatively trivial detriment  
16 to the neighborhood.

17 "C. In the case of property located in a Z Zone a  
18 variance may also be granted to one or more  
19 varianceable [sic] requirements of the Z Zone if  
20 it is found that such modification is supportive  
21 of the Planning Goals and Guidelines for Downtown  
22 Portland as adopted by the Council."

23 We note that the city relied only on paragraph B in this  
24 case.

25 2

26 We note that the restrictive interpretation of variance  
relief ordinarily flows from the use of the general phrase  
"unnecessary hardships" in a zoning code. 3 Anderson American  
Law of Zoning, 2d §18.16 (1977). Although the city's major  
variance provision does not employ this phrase, another portion  
of the code relating to variances (and applicable in this case)  
does. See, §33.98.010 (introductory paragraph) (variances  
available in cases of unnecessary hardships or practical  
difficulties).

27 3

28 The finding indicates that prior variances were allowed in  
29 the vicinity "in order to develop single family residences."  
30 This language suggests to us that the prior variances were  
31 considered necessary in order to allow landowners the  
32 beneficial use of their lots, i.e., the construction of single

1 family dwellings.

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What significance exists in the use of "required" in §33.98.101(b)(2)A and B and the use of "may also be granted" in §33.98.010(b)(2)C?

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In Faye Wright Neighborhood Planning Council v Salem, 3 Or LUBA 17 (1981) we stated:

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8 "The word 'hardship' has taken on special meaning in  
9 land use law. The term has been held to exclude a  
10 financial burden, unless the burden robs the developer  
11 of a return on his investment. See 3 Anderson,  
12 American Law of Zoning, section 185.1 (2nd Edition,  
13 1977). No facts showing such a financial burden are  
14 in the record here. We are mindful that the city uses  
15 the term 'unreasonable hardship,' but we do not find  
16 'unreasonable hardship' as used by the city to impose  
17 any less a standard than the term 'unnecessary  
18 hardship.' This latter term has been construed  
19 strictly in Oregon to exclude conditions that would  
20 simply favor a more profitable use. See Lovell v.  
21 Independence Planning Commission, 37 Or App 3, 586 P2d  
22 99 (1978).

23  
24 "Here the project can be finished without the  
25 variance. The lots would be designed differently and  
26 there could be fewer lots. We do not find these  
changes rob the owner of a return on his investment,  
however, based upon the record before us. We are not  
here saying that the development proposed by the  
applicant and approved by the city is not a proper  
development or even not perhaps the best development  
scheme for this property from an engineering and land  
use planning perspective. But the city's variance  
code does not permit deviations from other provisions  
of the city code solely on the basis of what appears  
to be the best development scheme. It could be  
drafted in such a manner, but it simply is not. We  
must give meaning to all provisions of Salem's  
variance code." 3 Or LUBA at 21-22 (emphasis in  
original) (footnotes omitted).

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2 ORS 227.173(2) provides:

3 "Approval or denial of a permit application shall be  
4 based upon and accompanied by a brief statement that  
5 explains the criteria and standards considered  
6 relevant to the decision, states the facts relied upon  
in rendering the decision and explains the  
justification for the decision based on the criteria,  
standards and facts set forth."

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9 For example, in determining that the variances would not be  
10 contrary to the public interest, the council considered the  
11 effect of the proposed addition on (1) appearances in the  
neighborhood, (2) traffic, (3) parking, (4) views and (5) the  
intent of the zoning ordinance. Certainly these were  
appropriate considerations under a "public interest" criterion.

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13 ORS 227.173(3) provides:

14 "Written notice of the approval or denial shall be given to  
15 all parties to the proceeding."

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17 No doubt legal remedies will be available if actual  
18 construction exceeds the approved variances.  
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