

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 WILLIAM HAWKINS, PHILLIP SMITH,)
5 and WILLIAM FAILING,)
6)
7 Petitioners,)

8)
9 vs.)

10)
11 CITY OF PORTLAND,)
12)
13 Respondent,)

14)
15 and)

16)
17 SELWYN BINGHAM, JR., STUART)
18 BINGHAM, CLARK BINGHAM,)
19 SOPHIA BINGHAM, and BINGHAM)
20 INVESTMENT CO.,)
21)
22 Intervenors-Respondent.)

LUBA No. 91-055

FINAL OPINION
AND ORDER

23
24
25 Appeal from City of Portland.

26
27 Vincent Salvi, Portland, filed the petition for review
28 and argued on behalf of petitioners. With him on the brief
29 was Weiss, Jensen, Ellis & Botteri.

30
31 Adrienne Brockman, Portland, filed a response brief and
32 argued on behalf of respondent.

33
34 James Stuart Smith, Portland, filed a response brief
35 and argued on behalf of intervenors-respondent. With him on
36 the brief was Davis, Wright & Tremaine.

37
38 KELLINGTON, Chief Referee; HOLSTUN, Referee; SHERTON,
39 Referee, participated in the decision.

40
41 REMANDED 09/13/91

42
43 You are entitled to judicial review of this Order.
44 Judicial review is governed by the provisions of ORS
45 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal an order of the city council
4 approving height variances for two apartment towers.

5 **MOTION TO INTERVENE**

6 Selwyn Bingham, Jr., Stuart Bingham, Clark Bingham,
7 Sophia Bingham and Bingham Investment Co. move to intervene
8 on the side of respondent. Petitioners do not object to the
9 motion, and it is allowed.

10 **FACTS**

11 The subject parcel is 1.19 acres in size and is zoned
12 Residential (R-1). The parcel is immediately south of the
13 Vista Bridge, and is located between S.W. Vista Avenue and
14 S.W. Market Drive. There is a drop of 100 feet between
15 Vista and Market at the subject parcel. The parcel is
16 visible from the city's downtown area and from its eastside.
17 Most of the subject parcel is very steep and is covered with
18 trees, including a 100 year old black oak tree. The
19 steepest portion of the parcel consists, in part, of fill
20 which was brought to the site to facilitate the construction
21 of Vista. There is a relatively small level area on the
22 property along Market. Intervenors-respondent (intervenors)
23 propose to construct two apartment towers on the level area
24 of the property along Market.

25 In the absence of height variance approval, the maximum
26 height allowed for a building in the R-1 zone is 45 feet.

1 The approved variances allow construction of one apartment
2 tower 73 feet tall and another apartment tower 84 feet tall.
3 The total number of residential units proposed for both
4 towers is 26. Most of the proposed living units will be
5 2,060 square feet in size. In addition, two top floor
6 units, consisting of 3,600 square feet each, are proposed.

7 Intervenor requested major variance approval for the
8 proposed apartment towers so that the 26 units might be
9 constructed to the desired size, which is larger than the
10 size of an average city apartment. Intervenor also sought
11 the challenged height variances to enable them to build the
12 proposed 26 large apartment units without having to excavate
13 the property.

14 The city variance committee denied intervenors'
15 application, and intervenors appealed to the city council.
16 The city council reversed the variance committee and
17 approved the height variances. This appeal followed.

18 **ASSIGNMENT OF ERROR**

19 "The City erred under its Code Section
20 33.98.015(b) in granting the variances as the
21 record does not support a finding that literal
22 interpretation and enforcement of the regulation
23 to the subject property would result in practical
24 difficulties or unnecessary hardships."

25 The Portland City Code (PCC) provisions governing major
26 variances are set forth at PCC 33.98.010, which provides, in
27 relevant part:

28 "A variance * * * may be granted if literal
29 interpretation and enforcement of the regulations

1 of this Title applicable to a property would
2 result in practical difficulties or unnecessary
3 hardships.

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

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

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

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

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

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

23 "* * * * *

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

27 "A. The variance is required in order to
28 modify the impact of exceptional or
29 extraordinary circumstances or
30 conditions that apply to the subject
31 property or its development that do
32 not apply generally to other
33 properties in the vicinity; or

34 "B. The variance is required in order to
35 allow enjoyment by the applicant of
36 a property right possessed by a
37 substantial portion of the owners of

1 properties in the same vicinity,
2 while resulting in [a] comparatively
3 trivial detriment to the
4 neighborhood." (Emphasis supplied.)

5 The city approved the challenged variances on the basis
6 of PCC 33.98.010(b)(2)(A), rather than (B).

7 The city's findings essentially state that in the
8 absence of the proposed height variances, construction of 26
9 apartment units of the size proposed would require a
10 tremendous amount of excavation on the subject parcel. The
11 findings also state that in the absence of the proposed
12 variances, construction of residential apartment units on
13 the parcel, to the extent allowed by the R-1 zoning
14 district, would result in removal of a substantial number of
15 trees. The city determined that development in the manner
16 allowed in the R-1 zoning district would cause environmental
17 damage to the parcel. The findings state such construction
18 would impair views of the parcel from downtown and the
19 eastside, which the city states are views worthy of
20 protection.¹ The city determined the parcel's visibility
21 from the city's downtown area and eastside, amounted to
22 exceptional or extraordinary circumstances justifying the
23 challenged height variances. The city also determined the

¹While the view of the parcel, and apparently the parcel itself, is ranked high in an inventory of natural resources in the city's draft Resource Plan and ESEE analysis, no adopted comprehensive plan or implementing ordinance provision identifies and protects the scenic views at issue in this appeal.

1 unobstructed view of the parcel from downtown and the
2 eastside is a unique feature not shared by other parcels, in
3 the sense that there were no other undeveloped parcels zoned
4 R-1 in the area.

5 Petitioners contend the city's findings are inadequate
6 to justify the challenged height variance. They argue the
7 basis for the variance is to avoid the impacts associated
8 with developing the parcel as allowed by applicable zoning
9 regulations. Petitioners argue that degradation of a view
10 of a parcel, in circumstances where the parcel is simply to
11 be developed in the manner allowed under applicable zoning,
12 is an inadequate justification for a major variance under
13 PCC 33.98.010(b)(2)(A). Petitioners contend intervenors
14 could reduce the size or number of the proposed apartment
15 units and build a residential apartment structure without
16 the necessity of a major height variance. Petitioners also
17 concede that apartment units built in a manner sensitive to
18 protecting the disputed view or environmental features of
19 the parcel may not be as large or as numerous as intervenors
20 would like. However, according to petitioners, that does
21 not mean the granting of a height variance is justified.

22 If compliance with the city's comprehensive plan or the
23 PCC required preserving a particular view of the property
24 from the city's downtown area and eastside, trees on the
25 parcel or other of the parcel's environmental aspects, and
26 if the applicable regulations prohibited excavation to such

1 an extent that a reasonable R-1 use of the subject parcel
2 was not possible, we would have little doubt the variance
3 standard imposed by PCC 33.98.010(b)(2)(A) would be met.
4 However, no variance is "required" to allow construction of
5 residential apartment structures on the subject parcel.² If
6 the size or number of the proposed apartment units were
7 reduced, there is no reason to believe that two apartment
8 structures could not be constructed at the proposed
9 location, consistent with the height limitations of the R-1
10 zone.

11 Under PCC 33.98.010, a variance is to be granted only
12 "if literal interpretation and enforcement of the
13 regulations of [the PCC] applicable to a property would
14 result in practical difficulties or unnecessary hardships."
15 This Board has previously construed this PCC language, and
16 has determined that it imposes a traditional and demanding
17 variance standard:

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

²There is no dispute that in the absence of the approved variances, under the applicable R-1 zoning, intervenors could build apartment structures on the parcel containing 31 units.

1 Corbett/Terwilliger Neigh. Assoc. v. City of
2 Portland, 16 Or LUBA 49, 60 (1987).

3 See also Wentland v. City of Portland, ___ Or LUBA ___ (LUBA
4 No. 91-050, September 4, 1991). In addition, the
5 'exceptional or extraordinary circumstances or conditions'
6 standard contained in PCC 33.98.010(b)(2)(A), regarding
7 approval of major variances, is also a strict variance
8 standard.³ Corbett/Terwilliger Neigh. Assoc. v. City of
9 Portland, ___ Or LUBA ___ (LUBA No. 89-018, March 2, 1990),
10 slip op 15; see Bowman Park v. City of Albany, 11 Or LUBA
11 197, 222 (1984); Patzkowski v. Klamath County, 8 Or LUBA 64,
12 70 (1983).

13 This Board recently determined that a variance is not
14 "required" to modify the impact of exceptional circumstances
15 under PCC 33.98.010(b)(2)(A) simply because an applicant
16 proposes a particular intensity of use, which would be
17 frustrated by literal interpretation and application of
18 PCC requirements. Wentland v. City of Portland, supra, slip
19 op at 15. Here, the justification for the challenged
20 variance is not based on any limitations on building
21 apartment units on the subject parcel imposed by the PCC.

³Clearly, the standards for a minor variance under PCC 33.98.010(b)(1) are more permissive than the traditional "practical difficulties or unnecessary hardships" variance standard. In addition, the alternate special standard for major variances provided in PCC 33.98.010(b)(2)(B) also has been determined to impose a more permissive variance standard. Morrison v. City of Portland, 11 Or LUBA 246, rev'd on other grounds 70 Or App 437 (1984). However, the challenged decision is one approving a major variance under the strict standard of PCC 33.98.010(b)(2)(A).

1 Neither, is it based on hardship to the property owner due
2 to the inability to make any reasonable use of the subject
3 parcel because of applicable zoning requirements and
4 particular characteristics unique to the parcel. Rather,
5 the city determined variances to allow building the proposed
6 apartment structures on the subject parcel are justified
7 solely due to the fact that the city would rather preserve a
8 particular view, and a treed area on the subject parcel,
9 than adhere to the height restrictions imposed by its R-1
10 zone.

11 Presumably the parcel was steep, had many trees and
12 both contained and constituted a beautiful view at the time
13 the city zoned it R-1. However, the city has not seen fit
14 to enact any regulations to protect these qualities of the
15 parcel. The alleged injury to these environmental qualities
16 on the subject parcel may potentially adversely affect the
17 city in the sense that it may lose a view and trees which it
18 wishes it had protected by the enactment of applicable
19 zoning restrictions. However, there are no city regulations
20 preventing the property owner from developing apartments in
21 a way that protects the view of, and trees located on, the
22 parcel.⁴ The question here is whether the city may waive
23 zoning restrictions that would otherwise apply (here the
24 height restriction in the R-1 zoning district), so that the

⁴Of course, developing the parcel in such a manner may mean it cannot be developed as intensively as would otherwise be possible.

1 intensity desired by the property owner can be attained and
2 so that unique features of the property are protected.

3 In Erickson v. City of Portland, supra 9 Or App at 261,
4 the Court of Appeals stated:

5 "Variances traditionally have been considered
6 escape valves to allow property owners relief from
7 zoning restrictions which, have the result of
8 making that land completely unusable, or usable
9 only with extraordinary effort." (Emphasis
10 supplied.)

11 We recognize that in this case, if the property owner elects
12 to develop the subject parcel as allowed in the R-1 zone,
13 the views the city wishes to protect may be damaged.
14 However, we do not believe PCC 33.98.010(b)(2)(A) allows the
15 city to approve a variance to the R-1 zone's height
16 restrictions on the basis of preserving views not protected
17 by any plan or PCC provision.

18 We conclude the PCC 33.98.010(b)(2)(A) major variance
19 provisions afford a property owner relief from applicable
20 zoning restrictions contained in the PCC under particular
21 circumstances. We do not believe the major variance
22 provisions allow the city to avoid the impact of uses
23 allowed by the PCC.⁵ We determine the city's findings are
24 inadequate to support the challenged decision approving a

⁵While there may be other provisions in the PCC which apply to ameliorate the impact of developing uses which are permitted in particular zones, the city's major variance provisions are not among them.

1 major height variance under PCC 332.98.010(b)(2)(A).⁶

2 The city argues that if its findings are inadequate,
3 its decision should nevertheless be affirmed because there
4 is evidence in the record to "clearly support" a decision
5 that the variances are required to modify the impact of
6 extraordinary circumstances or conditions which apply to the
7 subject parcel and its development that do not apply to
8 other properties in the area. ORS 197.835(9)(b).⁷

9 We have examined the evidence cited by the city and do
10 not believe it clearly supports the city's decision to
11 approve the challenged height variances. The evidence to
12 which we are cited establishes that the site has unique
13 features, but it does not "clearly support" a determination
14 that those unique features, together with applicable zoning
15 restrictions, so limit the permissible uses which may be
16 made of the parcel that the property owner is prevented from

⁶We note that petitioners also argue the city's findings are not supported by substantial evidence in the whole record. However, little purpose is served in addressing the evidentiary support for inadequate findings, and we decline to do so here.

⁷ORS 197.835(9)(b) provides:

"Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record which clearly supports the decision or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action."

1 making reasonable use of it.

2 One more aspect of this appeal warrants comment. The
3 city and intervenors cite this Board's decision in Atwood v.
4 City of Portland, 2 Or LUBA 397 (1981), and the decision of
5 the Court of Appeals affirming that decision, Atwood v. City
6 of Portland, 55 Or App 215, 644 P2d 1131 (1982), as
7 authority supporting the challenged decision in this appeal.
8 At issue in the Atwood cases was a city decision approving
9 major height variances for apartment towers similar to those
10 approved here on the parcel at issue in this appeal.⁸ Both
11 LUBA and the Court of Appeals affirmed the city's decision
12 to approve the height variances in the Atwood cases.
13 However, those height variance approvals lapsed before they
14 were ever acted upon.

15 The city's findings state the previous city approvals
16 of the variances discussed above, together with the economic
17 circumstances which caused that earlier project not to be
18 built, constitute a zoning history of the subject parcel
19 which is itself an "exceptional or extraordinary"
20 circumstance justifying the variances approved in the
21 instant appeal.

22 We disagree with the city.

23 The city further argues in its brief that the appellate
24 decisions in the Atwood cases, compel this Board to approve

⁸The applicants in this appeal were apparently some or all of the applicants in the Atwood cases.

1 the challenged variances in this case.

2 In its decision, the Board suggested the city decision
3 in Atwood was based on both PCC 33.98.010(b)(2)(A) and (B).
4 However, the Board's discussion of PCC 33.98.010(b)(2)(A)
5 (the standard at issue in this appeal), was limited to
6 determining that the city made findings of compliance with
7 that standard. The Board did not specifically determine the
8 adequacy of the city's findings of compliance with
9 PCC 33.98.010(b)(2)(A), as we are asked to do here. LUBA's
10 decision in Atwood was primarily based upon city compliance
11 with the PCC 33.98.010(b)(2)(B) standard, which as we point
12 out above, is a somewhat less demanding variance standard.
13 See Morrison v. City of Portland, supra.

14 The Court of Appeals decision in Atwood also determined
15 the city had indeed adopted findings of compliance with
16 PCC 33.98.010(b)(2)(A), among other things. However, in its
17 decision in Atwood, the Court of Appeals determined the
18 city's findings were adequate to withstand the particular
19 challenges made to the findings in that case. The Court of
20 Appeals did not, in Atwood, address the relevant inquiry
21 here, viz, whether the major variance standard of
22 PCC 33.98.010(b)(2)(A) may be correctly interpreted to allow
23 approval of a major variance even though there are no PCC
24 standards, and no particular characteristics of the parcel,
25 severely limiting the property owner's ability to put the
26 parcel to any of the uses allowed by the R-1 zoning

1 district. Consequently, the Court of Appeals decision in
2 Atwood does not provide much guidance on the particular
3 dispute here.

4 The assignment of error is sustained.

5 The city's decision is remanded.

6