

LAND USE  
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON SEP 8 4 15 PM '80

3	STANDARD SUPPLY COMPANY,	)	
	INC.,	)	
4		)	
	Petitioner,	)	LUBA NO. 80-018
5		)	
	vs.	)	FINAL OPINION
6		)	AND ORDER
	CITY OF PORTLAND,	)	
7		)	
	Respondent.	)	

8 Appeal from City of Portland.

9  
10 Michael J. Morris, Portland, filed the petition for review  
and argued the cause for Petitioner Standard Supply Company,  
11 Inc. With him on the brief were Evans, Grebe, Gross, Jensen &  
Peek, P.C.

12 Ruth Spetter, Portland, filed the brief and argued the  
13 cause for Respondent City of Portland. With her on the brief  
was Christopher P. Thomas, City Attorney.

14 BAGG, Referee; REYNOLDS, Chief Referee; COX, Referee;  
15 participated in the decision.

16 Reversed. 9/8/80

17 You are entitled to judicial review of this Order.  
18 Judicial review is governed by the provisions of Oregon Laws  
1979, ch 772, sec 6(a).

1 BAGG, Referee

2 STATEMENT OF THE CASE

3 This case is about a variance granted the Portland  
4 Development Commission for the reestablishment of a  
5 nonconforming use. The use sought to be reestablished was an  
6 apartment building for occupancy generally by senior citizens  
7 in an M2 manufacturing zone. The M2 manufacturing zone does  
8 not allow apartment dwellings.

9 FACTS

10 On March 18, 1978, an occupied three-story apartment  
11 building, having 66 apartment units, was damaged by fire.  
12 Record 84. The building has remained vacant since the fire.  
13 The Portland Development Commission purchased the building in  
14 June of 1979 for the purpose of rehabilitating the building for  
15 use as apartments.

16 As the building had not been used as an apartment dwelling  
17 for more than one year, its use as an apartment building was  
18 prohibited under the City Code. Therefore, the Portland  
19 Development Commission had to approach the City of Portland's  
20 Variance Committee for a "special variance" in order to  
21 reestablish the nonconforming use. The variance was denied.  
22 Record 83-88. On appeal to the Portland City Council, the  
23 Portland City Council reversed the Variance Committee's  
24 decision and allowed the variance.

25 Thereafter, an appeal was made to this Board. By  
26 stipulation of the parties, the decision in this matter was

1 continued to allow the City of Portland to prepare new findings  
2 of fact, readopt its grant of a variance, and allow both  
3 petitioner and respondent the opportunity to revise their  
4 briefs based upon the new findings. The City of Portland  
5 adopted findings on June 5, 1980 by Ordinance No. 149739.

6 RELEVANT ORDINANCE PROVISIONS

7 As noted above, the M2 manufacturing zone does not permit  
8 apartment dwellings as outright permitted uses. That  
9 particular zone does not permit residential facilities, other  
10 than "care" facilities even as conditional uses. Apartment  
11 dwellings are listed as "prohibited uses" under section  
12 33.52.180 of the Portland City Code. See generally Chapter  
13 33.52, M2 General Manufacturing Zone. However, a nonconforming  
14 use may continue to exist as such so long as it is not  
15 abandoned.

16 under Section 33.94.020(b) of the City Code a nonconforming  
17 use idle for longer than a year "shall thereafter be occupied  
18 and used only for a conforming use." Therefore, by strict  
19 application of the city ordinance, the structure in question  
20 would have to be used only in conformance with the M2 zone  
21 designations.

22 However, variances are permissible "for the relaxation of  
23 certain provisions of the zoning regulations . . . ."  
24 33.98.005. There are several kinds of variances possible, but  
25 certain findings are necessary before any variance may be  
26 granted. Most importantly in this case, the city code provides

1 a variance may only be granted "if liberal interpretation and  
2 enforcement of the regulations of this title [section 33.98]  
3 applicable to a property would result in practical difficulties  
4 or unnecessary hardships." Section 33.98.010.

5 A "special variance" may be used to "relax" the city's  
6 prohibition against reestablishment of a nonconforming use  
7 under certain circumstances:

8 "(c) Special Variances. Special variances shall  
9 be for the reestablishment of nonconforming uses, which  
10 are compatible with a current comprehensive or policy  
11 plan adopted after April 1, 1977 and which would  
otherwise be prohibited due to discontinued use as  
described in 33.94.020(b) or destruction as described  
in 33.94.020(c)."

12 The reference to sec 33.94.020(b) would include apartment  
13 buildings whose use was discontinued for more than a year.  
14 There are particular criteria that apply to the granting of  
15 special variances and they are as follows:

16 "(3) Special variances. A special variance as  
17 specified in Section 33.98.015(c) may be granted to  
18 allow re-establishment of a non-conforming use and/or  
structure, if:

19 "A. The City of Portland has no comprehensive  
20 plan or this subsection has been expressly continued  
after adoption of such plan; and

21 "B. The nonconforming use and/or structure will  
22 be beneficial to the surrounding neighborhood; the use  
23 and/or structure will be reestablished and redesigned  
24 so as to be compatible with the neighborhood character  
as determined by the design review committee; the use  
and/or structure will be compatible with the area's  
current policy or comprehensive plan; and prior to its  
discontinued use or destruction, it . . . ."

25 The city claims that it has met all criteria for a special  
26 variance along with the showing of hardship common to all

1 variances.

2 ASSIGNMENTS OF ERROR 1 AND 2.

3 Assignment of Error No. 1 alleges that the applicant, the  
4 Portland Development Commission, did not meet its burden of  
5 proof for a variance. Petitioner stresses failure to show  
6 hardship as required by the City Code and also asserts that the  
7 applicant did not show that his request for a variance "will be  
8 compatible with the area's current policy or comprehensive  
9 plan." 33.98.010(3)(B).

10 Assignment of Error No. 2 in petitioner's initial petition  
11 originally alleged a failure of the city to make findings.  
12 Because of the stipulation allowing the city to make findings  
13 and readopt its grant of a variance, this assignment of error  
14 was withdrawn. In its place, petitioner has substituted the  
15 following:

16 "Assignment of Error No. 2A - The Portland City  
17 Council improperly construed the applicable law.

18 "Assignment of Error No. 2B - The findings of the  
19 Portland City Council are not supported by substantial  
evidence in the whole record."

20 Because the first assignment of error as recited above and  
21 assignments of error 2A and 2B are tied closely together and  
22 depend upon the same arguments, we will discuss them together.

23 Assignment of Error 1 and 2A are based upon the city's  
24 apparent definition of hardship as that term appears in the city  
25 ordinance. The city recognizes that a hardship must be shown  
26 under Section 33.98.010 before a variance may be granted, and its

1 interpretation of hardship is contained in findings no. 2.

2 "Literal interpretation and enforcement of the  
3 regulations of this Title applicable to the structure  
4 located at 630 SE Yamhill Street, Portland, Oregon,  
5 would result in unnecessary hardship.

6 "The reason for this is that the structure is a  
7 nonconforming apartment building residential use,  
8 which has been discontinued in use for over a year.  
9 According to this Title, Chapter 94, nonconforming  
10 uses which have been discontinued for over a year may  
11 not be reestablished. Portland City Code subsection  
12 33.94.020(b). It is a hardship to be prohibited from  
13 being reestablished.

14 "To impose this hardship, upon this structure, would  
15 be unnecessary because the City Council has an  
16 announced policy to permit the reestablishment of  
17 nonconforming uses when, prior to their discontinued  
18 use, they provided housing. Portland City Code  
19 subsection 33.98.010(b)(3)B.1. This structure was in  
20 use as an apartment building prior to its discontinued  
21 use." (Emphasis added)

22 In short, the city's finding says that enforcement of its own  
23 ordinance will result in unnecessary hardship. The city does  
24 not link this unnecessary hardship to any quality of the  
25 building or of the property on which it sits; and, in fact,  
26 claims no showing of hardship outside the terms of the  
27 ordinance is necessary.

28 Petitioner asserts that to obtain a variance, it is  
29 necessary that an applicant show a hardship "beyond the terms  
30 of the ordinance itself." Petitioner's Supplemental Brief at  
31 3. Under petitioner's argument, making application to the city  
32 for a variance is not a hardship. Indeed, under the city's  
33 interpretation of its own code, "no applicant for a variance  
34 would ever have to prove hardship." Petitioner's Supplement

1 Brief at 3.

2 We find no authority in the city code to support the city's  
3 definition of hardship or practical difficulty. The city has  
4 not chosen to redefine those terms or substitute others more to  
5 its liking. Therefore, we believe the city's interpretation of  
6 those key words must conform to the accepted legal  
7 interpretation.

8 The Oregon courts have apparently followed the rule  
9 subscribed to by most jurisdictions and decided that the  
10 hardship which must be shown to obtain a variance must itself  
11 arise out of conditions in the land. That is, in order to  
12 obtain a variance, an individual property owner must  
13 demonstrate some hardship or practical problem not shared by  
14 others. Lovell v. Independence Planning Comm., 37 Or App 3,  
15 586 P2d 99 (1978). Further, the courts in Oregon have  
16 generally held that the variance must be the minimal variance  
17 necessary to make use of the property. Practical difficulties  
18 and hardships are those conditions which, without a variance,  
19 would result in the virtual uselessness of the property.  
20 Erickson v. City of Portland, 9 Or App 256, 496 P2d 726 (1972);  
21 Fasano v. Washington Co. Comm., 264 Or 574, 507 P2d 23 (1973).  
22 See also Anderson, American Law of Zoning, sec. 1843 (1977).

23 The city's interpretation of its code simply does not meet  
24 the legal standard for practical difficulty and unnecessary  
25 hardship. Practical difficulties and unnecessary hardships do  
26 not arise out of only making application to the governing body

1 for a variance. We are mindful that a city may interpret its  
2 own ordinance, but it must do so within reasonable limits.

3 Bienz vs. City of Dayton, 29 Or App 761, 556 P2d 904 (1977).

4 SUBSTANTIAL EVIDENCE QUESTION

5 As mentioned above, petitioner alleges the grant of the  
6 variance is not compatible with a provision in 33.98.010(B)(3)  
7 requiring the variance to "be compatible with the area's  
8 current policy or comprehensive plan." The Central East Side  
9 Industrial Revitalization Study recognized by both petitioner  
10 and respondent as the only "policy or comprehensive plan"  
11 applicable to this project provides:

12 "[E]xisting multi-family uses in the area should  
13 be rehabilitated, where necessary, by their owners to  
14 meet health and safety standards. Such rehabilitation  
15 would help resist the evolution to skid row housing,  
16 which the Industrial Council views as  
17 counter-productive to the commercial and industrial  
18 revitalization of the area." Record 405, page 10.

16 Petitioner says the city has not shown the rehabilitation of  
17 this structure to be necessary. Further, the burned out  
18 structure cannot be considered an existing multi-family use.  
19 Therefore, the proposed use simply does not fit the policy.

20 The city's response, as we understand it, is that the  
21 findings establish the city's belief that the building was an  
22 existing multi-family use. See Findings, page 4. The city  
23 says that it is entitled to interpret its ordinance, and it has  
24 chosen to interpret "existing multi-family use" to include the  
25 circumstances of this case. However, the city has pointed us  
26 to nothing in its ordinance, plan or policy that would make



1 such a reading plausible.

2 In interpreting an ordinance, words that are clear in their  
3 terms should be given effect. 2A Sands, Sutherland Statutory  
4 Construction, sec 46.01, 46.04, 3rd Rev Ed (1974); State v.  
5 Hiller, 22 Or App 57, 537 P2d 571 (1975); Gouge v. David, 185  
6 Or 437, 202 P2d 489 (1948). The ordinary meaning of the word  
7 "exist" is "to have being or actuality; to be," and not to  
8 "have been" at some time in the past. See "Exist" Blacks Law  
9 Dictionary, 4th Ed (1968); A Merriam-Webster, Webster's New  
10 College Dictionary. It is beyond reason to say that a building  
11 gutted by fire and not used for residential purposes for over a  
12 year is an "existing" use.

13 Petitioner additionally complains that there is no  
14 substantial evidence to support the city's finding no. 5 that  
15 this particular use will not have an adverse impact upon the  
16 immediate vicinity. Petitioner bases his complaint on a  
17 Portland Bureau of Traffic Engineering study contained in the  
18 record suggesting that the redevelopment will result in  
19 additional demand for parking places. That demand will  
20 presumably damage petitioner's business.

21 The city responds by citing the same report and noting in  
22 the report the Bureau of Traffic Engineering finding that the  
23 project would not have a "significant impact" on parking or  
24 transportation systems. We believe the city may interpret the  
25 traffic report in such a way as to give support to finding no.  
26 5.<sup>2</sup> We do not view this contention by petitioner to be

1 correct.

2 Assignment of Error No. 1, 2A and 2B are sustained as  
3 discussed above.

4 ASSIGNMENT OF ERROR NO. 3

5 Assignment of Error No. 3 alleges that the city is engaged  
6 in "spot zoning." Because we have found the city's grant of  
7 the variance defective on other grounds, we need not reach this  
8 issue.

9 The grant of a special variance by the city is reversed and  
10 the matter remanded for action consistent with this opinion.

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FOOTNOTE

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3 1  
4 All ordinance citations use numbering current at the time  
5 of this opinion.

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6 2  
7 The city's finding in this matter is set out below.

8 "No adverse effect upon property values or environmental  
9 conditions in the immediate vicinity or in the zone in  
10 which the property is located would be caused by this  
11 variance, permitting the rehabilitation of housing,  
12 because:

13 "(1) It would not prevent current commercial uses from  
14 continuing as before;

15 "(2) Testimony before the Council, about studies conducted  
16 by the Bureau of Traffic Engineering, indicated no  
17 increased parking density would occur due to the  
18 continuation of residential uses in this structure.

19 "(3) Although the number of units in the use prior to the  
20 fire, which damaged this structure internally and is  
21 the reason rehabilitation is necessary, was 50, the  
22 rehabilitation structure will only have 44 units, and  
23 will be even more compatible with the commercial uses  
24 in the area; and

25 "(4) Three-quarters of this same block is in nonconforming  
26 apartment use.