



1 BAGG, Referee.

2 NATURE OF THE DECISION

3 Petitioner appeals the grant of a variance to allow  
4 construction of a fence abutting Campbell Street in the City of  
5 Baker.

6 STANDING

7 The City of Baker has not challenged standing of  
8 petitioner.<sup>1</sup>

9 FACTS

10 The property subject to this appeal is located in a portion  
11 of a commercial (C-G) zone in the City of Baker. The property  
12 is subject to the special requirements of the "Freeway and  
13 Campbell Area Developmental Standards." These special  
14 standards include a requirement that "[a]ll structures shall  
15 have a minimum setback of 20 feet from any street  
16 right-of-way." City of Baker Zoning Ordinance Section  
17 14.040(2)(j).

18 Sometime before the city planning commission hearing of  
19 November 18, 1981, the owner of the property, Mr. Bootsma,  
20 began construction of a fence. The fence was placed 7 feet 1  
21 inch behind the curb on Campbell Street. The right-of-way line  
22 for Campbell Street is 7 feet from the curb.

23 Mr. Bootsma was instructed to cease construction, and on  
24 November 10, 1981, he applied for a variance from the setback  
25 requirement. The City of Baker planning commission heard the  
26 request on November 18, 1981. The planning commission granted

1 the request, and petitioner herein appealed to the city  
2 council. The city council considered the matter, granted the  
3 variance, and this appeal followed.

4 FIRST ASSIGNMENTS OF ERROR

5 The first assignment of error states:

6 "The City of Baker erred in granting the variance  
7 requested because it left the applicant in violation  
8 of the 'Clear Vision' Ordinance."

9 Petitioner's argument is that although the city granted a  
10 variance from the minimum setback requirement contained in  
11 Section 14.040(2)(j), the city failed to grant a variance from  
12 the "clear vision" requirements of Section 14.030. In order to  
13 construct the fence, petitioner argues a second variance was  
14 required.

15 "Except in the Central Commercial (CC) Zone, a  
16 clear-vision area shall be maintained on the corners  
17 of all property adjacent to the intersection of two  
18 streets \* \* \* A clear-vision area shall contain no  
19 planting, fence, or other temporary or permanent  
20 obstruction exceeding 18 inches in height, measured  
21 from the top of the curb, or where no curb exists,  
22 from the established center line grade of the street \*  
23 \* \* \*

24 "A clear-vision area shall consist of a triangular  
25 area two sides of which are street lines and the third  
26 side of which is a line across the corner of the lot  
connecting the ends of the other two sides. The size  
of the clear-vision area is determined by the distance  
from the intersection of the two street lines to the  
third side, measured along the street \* \* \* \* In a  
commercial or industrial zone the distance determining  
the size of a clear-vision area shall be 15 feet, \* \*  
\* \*" Section 14.030.

27 Petitioner states the record shows the fence was  
28 constructed on applicant's property one inch from the boundary

1 line separating the Campbell Street right-of-way and the  
2 applicant's property. Petitioner advises that the city  
3 maintains the "Clear Vision Ordinance" calls for measurement  
4 along the curb line instead of the property or right-of-way  
5 line. Petitioner believes this position is mistaken.

6 Petitioner maintains the measurements should have been taken  
7 from the right-of-way lines and that they were in fact taken  
8 from the curbs of Campbell and Birch Streets.

9 We believe petitioner is correct. The ordinance defines  
10 street in terms of "width between the right-of-way lines" and  
11 street line as "a dividing line between a lot, tract, or parcel  
12 of land, and a contiguous street." Section 1.030(39)-(40).<sup>2</sup>  
13 This language clearly requires measurement from right-of-way  
14 lines and not from structures such as curbs.<sup>3</sup> Our review of  
15 the record does show that the measurement was taken along the  
16 curb line in violation of the provisions of the ordinance.<sup>4</sup>

17 Because the city failed to take a variance to its clear  
18 vision requirements and because the city based the act it did  
19 take on faulty measurements, the first assignment of error is  
20 sustained.<sup>5</sup>

21 SECOND AND THIRD ASSIGNMENT OF ERROR

22 We will discuss the last two assignments of error  
23 together. The second and third assignments of error state:

24 "The City erred in granting a variance because there  
25 is no hardship to the applicant within the meaning of  
the ordinances."

26 "The City did not support its decision on the variance

1 with adequate findings and conclusions supported by  
evidence."

2 Petitioner's argument here is that the applicant did not  
3 meet the burden of proof required by the city ordinance for a  
4 variance. Petitioner quotes Section 17.010 of the ordinance  
5 which provides:

6 "The purpose of a variance shall be to prevent or  
7 lessen such practical difficulties and unnecessary  
8 physical hardships which are inconsistent with the  
9 objectives of this ordinance. A practical difficulty  
10 or unnecessary physical hardship may result from the  
11 size, shape or dimensions of a site or the location of  
12 existing structures thereon, from geographic,  
13 topographic or other physical conditions on the site  
14 or in the immediate vicinity."

15 Petitioner argues that the record shows that the applicant was  
16 simply building an office complex and desired to provide  
17 parking places for it. Petitioner claims it was a matter of  
18 preference as to the size and configuration of the building,  
19 not a matter of a quality inherent in the land itself.  
20 According to petitioner, there is no showing the property would  
21 be worthless or useless for any other purpose if the variance  
22 were not granted.

23 In his third assignment of error, petitioner claims the  
24 findings do not show compliance with applicable standards as  
25 required by ORS 227.173. In this case, the city ordinance  
26 provides six issues that must be addressed before a variance  
may be granted.

"Except as provided in section 17.555 (solar energy  
structures), the Planning Commission may grant a  
variance to a regulation prescribed by this ordinance  
if on the basis of the petition, investigation and

1 evidence submitted, all of the following conditions  
2 are found to exist:

3 "(1) Strict or literal interpretation and enforcement  
4 of the specified regulation would result in practical  
5 difficulty or necessary physical hardship inconsistent  
6 with the objectives of the zoning ordinance.

7 "(2) Strict or literal interpretation and enforcement  
8 of the specified regulation would deprive the  
9 applicant of privileges enjoyed by the owners of other  
10 properties classified in the same zone.

11 "(3) There are exceptional or extraordinary  
12 circumstances or conditions applicable to the property  
13 involved which do not apply generally to other  
14 properties classified in the same zone.

15 "(4) The granting of the variance will not constitute  
16 a grant of special privileges inconsistent with the  
17 limitations on other properties classified in the same  
18 zone.

19 "(5) The granting of the variance will not be  
20 detrimental to the public health, safety, or welfare  
21 or materially injurious to properties or improvements  
22 in the vicinity.

23 "(6) The variance requested is in [sic] the minimum  
24 variance which would alleviate the difficulty."  
25 Section 17.050.

26 The petitioner discusses the city's findings and concludes that  
each of the six criteria were not met.

We agree with the petitioner. The city misconstrues the  
ordinance to the extent that it does not correctly apply the  
peculiar hardship or practical difficulty standard in its  
ordinance. The city finds that strict enforcement of the  
ordinance is inconsistent with the objectives of the  
ordinance. The city cites the purpose of the zoning ordinance  
as:

1 "To establish for the City of Baker a comprehensive  
2 zoning plan designed to protect the stability of  
3 residential, business, commercial, and manufacturing  
4 areas within the City, and to promote the orderly and  
5 beneficial development of these areas as designated in  
6 the 'City of Baker Comprehensive Plan'."

7  
8 The city concludes that the setback requirements are  
9 inconsistent with the purpose of the zoning ordinance. In  
10 other words, the city council believes that its set back  
11 requirements are too strict. The remedy is not the grant of a  
12 variance in a particular case, the remedy is an amendment to  
13 the zoning ordinance.

14 "If the city believes that its current zoning  
15 ordinances impede the accomplishment of goals deemed  
16 important to its citizens' welfare, the proper remedy  
17 lies in amending the zoning ordinance, not in granting  
18 a variance." Lovell v. Independence Planning  
19 Commission, 37 Or App 3, 7, 586 P2d 99 (1978).

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21 The city's findings state that the applicant's development has  
22 been designed in a professional manner and will be of benefit  
23 to the city through increased taxes, construction costs and the  
24 removal of a vacant lot and associated problems with a vacant  
25 lot. These are laudible aims, but they do not furnish reason  
26 for a variance.

27 The petitioner is also correct in his assertion that there  
28 is no evidence in the record to support the city's finding that  
29 strict enforcement of the ordinance would deprive the applicant  
30 of privileges enjoyed by other persons in the same zone. The  
31 city seems to be arguing that the special standards applicable  
32 to Campbell Street furnish the "exceptional circumstances"

1 necessary to satisfy the third of the six criteria in the city  
2 ordinance. The city is mistaken; the provisions of the  
3 ordinance are not grounds for a variance. Standard Supply  
4 Company v. Portland, 1 Or LUBA 259 (1980).

5 Similarly, the fourth, fifth and sixth criteria of the  
6 zoning ordinance have not been met. The city simply recites a  
7 conclusion that the variance will not constitute a special  
8 privilege, that it will not injure the public health, safety or  
9 welfare and that it is the minimum variance required to  
10 alleviate the difficulty. The city seems to believe that the  
11 aim of keeping the site in balance and harmony with design  
12 plans is sufficient reason to grant a variance and to allow the  
13 fence. While the Board understands these qualities are  
14 desirable, they do not amount to reasons for granting a  
15 variance. The city's remedy, in our view, is to amend its  
16 zoning ordinance. See Faye Wright v. Salem, 3 Or LUBA 17  
17 (1981).

18 The second and third assignments of error are sustained.

19 The decision of the City of Baker is reversed.

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FOOTNOTES

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1 The City of Baker made no appearance in this matter.

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2 The ordinance does not provide for different points of measurement depending on the purpose of the measurement. The city's point of measurement was, therefore, incorrect for purposes of a setback variance and a clear vision variance.

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3 We can understand the reason for this requirement. A right-of-way line is set independent of existing structures. To measure from a curb line would incorporate whatever error may have existed in placing the curb.

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4 The city and the petitioner stipulated that the record in this case is to show the following:

The city position at both the Planning Commission hearing and the City Council meeting was that the zoning ordinance required, for clear-vision purposes, a sight triangle that was measured 15 feet from the curb line. Petitioner's position was the measurement should be from the street right-of-way line.

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5 We note in the minutes of the City Council meeting of December 8, that the clear vision requirements of the ordinance were discussed. There is no mention of the clear vision requirements in the city's order, however.