

JUN 15 4 21 PM '84

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

3	BRUCE and DORA MORRISON,	)	
		)	
4	Petitioners,	)	LUBA No. 84-022
		)	
5	vs.	)	
		)	FINAL OPINION
6	CITY OF PORTLAND,	)	AND ORDER
		)	
7	Respondent.	)	

8  
9 Appeal from the City of Portland.

10 Timothy V. Ramis, Portland, filed the Petition for Review,  
11 and Steven L. Pfeiffer argued the cause on behalf of  
12 Petitioners. With them on the brief were O'Donnell, Sullivan  
13 and Ramis.

14 Ruth Spetter, Portland, filed the response brief and argued  
15 the cause on behalf of Respondent City.

16 Jeffrey L. Kleinman, Portland, filed the response brief and  
17 argued the cause on behalf of Participant Galton. With him on  
18 the brief were Opton and Galton.

19 KRESSEL, Referee; DuBAY, Referee; participated in this  
20 decision.

21 BAGG, Chief Referee; Dissenting.

22 AFFIRMED 06/15/84

23 You are entitled to judicial review of this Order.  
24 Judicial review is governed by the provisions of ORS 197.850.  
25  
26

1 Opinion by Kressel.

2 NATURE OF THE DECISION

3 Petitioners appeal the city's approval of front and side  
4 yard variances to allow construction of an addition to a single  
5 family residence.

6 FACTS

7 This case is before the Board for the second time. The  
8 facts are stated in our opinion in the first appeal, Morrison  
9 v. City of Portland, \_\_\_ Or LUBA \_\_\_ (LUBA No. 83-080,  
10 December 20, 1983). In that case, we remanded the city's  
11 approval of the variances because the final order did not  
12 reflect a consistent application of the approval criteria to  
13 the facts. In particular, we expressed uncertainty as to the  
14 city's interpretation and application to the case of the terms  
15 "property right" and "practical difficulties or unnecessary  
16 hardships" in §33.98.010 of the code. That section reads as  
17 follows:

18 "A variance as specified in Section 33.98.015 may  
19 be granted if literal interpretation and enforcement  
20 of the regulations of this title applicant (sic) to a  
21 property would result in practical difficulties or  
unnecessary hardships... (a) Generally, any variance  
granted shall satisfy all of the following general  
conditions:

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

24 "(2) It shall not permit the establishment  
25 within a zone of any use which is not a permitted use  
26 within that zone or the establishment of any use for  
which a conditional use is required within that zone.

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

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

7           "(b) When all of the foregoing conditions can be  
8 satisfied a variance may be granted as follows: \* \* \*

9           "(2) Major Variances. A major variance as  
10 specified in Section 33.98.015(b) may be granted when  
11 any of the following applicable conditions can be  
12 satisfied:

13           "A. The variance is required in order to modify  
14 the impact of exceptional or extraordinary  
15 circumstances or conditions that apply to the subject  
16 property or its development that do not apply  
17 generally to other properties in the vicinity; or

18           "B. The variance is required in order to allow  
19 enjoyment by the applicant of a property right  
20 possessed by a substantial portion of the owners of  
21 properties in the same vicinity, while resulting in  
22 the comparatively trivial detriment to the  
23 neighborhood."<sup>1</sup> (emphasis added).

24           On remand, the city council met to consider supplemental  
25 findings drafted by the city attorney. As discussed later in  
26 this opinion, the supplemental findings explained the city  
council's application of §33.98.010 to the requested  
variances. No new evidence was presented. Petitioners, who  
were represented by legal counsel, requested an opportunity to  
present legal argument on the supplementary findings.<sup>2</sup>  
However, the request was denied and the supplemental findings  
were adopted as submitted. This appeal followed.

1 FIRST ASSIGNMENT OF ERROR

2 Petitioners assign error to the city's refusal to permit  
3 argument on remand. The remand action, in their view, involved  
4 the formulation of variance standards and the application of  
5 those standards to the facts. Petitioners rely on Fasano v.  
6 Board of County Commissioners of Washington County, 264 Or 574,  
7 507 P2d 23 (1973), Marbett v. Portland General Electric, 277 Or  
8 447, 561 P2d 154 (1977), and Sun Ray Dairy v. OLCC, 16 Or App  
9 73, 517 P2d 289 (1973) for the proposition that they were  
10 entitled to be heard, when the city council took up the  
11 proposed supplemental findings.<sup>3</sup> The petition states:

12 "In sum, the city failed to live up to its legal  
13 responsibility to articulate the applicable standards  
14 when originally accepting and reviewing the evidence  
15 and adopting the first set of findings in this  
16 quasi-judicial proceeding. It was only on remand and  
17 the adoption of the supplementary findings by the city  
18 that the relevant standards were articulated and  
19 applied and the variance granted - without allowing  
20 petitioners an opportunity to be heard. Such an  
21 action by the city is clearly in violation of  
22 petitioners' right to a hearing established under the  
23 quasi-judicial procedural requirements of Fasano, Sun  
24 Ray Drive-In Dairy, and their progeny, and under the  
25 due process clauses of the Fifth and Fourteenth  
26 Amendments of the United States Constitution."  
Petition at 12.

21 We do not accept petitioners' characterization of the  
22 city's proceeding on remand. Our opinion in Morrison v. City  
23 of Portland, supra, did not state that the city had failed to  
24 adopt and apply variance standards. Rather, as noted  
25 previously, we stated that the final order seemed to embrace  
26 inconsistent interpretations of the code. In light of the

1 inconsistent interpretation, we called on the city to "...more  
2 clearly identify and explain the interpretation it gives to  
3 this portion [the variance standards] of the code." Slip  
4 Opinion at 10. In remanding the decision, we sought  
5 explanatory findings concerning the city's understanding of the  
6 existing standards, not the formulation of standards.

7 The city's procedure on remand was consistent with our  
8 order. Although supplemental findings were entered in an  
9 attempt to remove the inconsistency we pointed out in the first  
10 appeal, the factual record was not reopened.

11 Without question, petitioners were entitled to contested  
12 case procedural safeguards before the variance applications at  
13 issue were approved by the city. Fasano v. Board of County  
14 Commissioners of Washington County, supra; West v. City of  
15 Astoria, 18 Or App 212, 221, 524 P2d 12165 (1974). However, we  
16 have not been cited to authority for the proposition that such  
17 safeguards must be provided when a city undertakes to construe  
18 existing standards similar to those considered here, either  
19 after closing the initial fact-finding hearing or on remand  
20 from a court or agency. Indeed, our opinion in Feitelson v.  
21 City of Salem, 2 Or LUBA 168, 172 (1981) suggests the contrary  
22 where, as here, the remand hearing does not involve  
23 consideration of new facts. See also, Citadel Corporation v.  
24 Tillamook County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 83-049, September  
25 13, 1983, Slip Opinion at 5-6).

26 We conclude the city was under no obligation to allow

1 argument by petitioners on remand. The supplemental findings  
2 are explanatory. The approval criteria they address are not  
3 worded in precise terms, but the terms are precise enough to  
4 inform interested persons of the basis on which application  
5 would be granted or denied." Lee v. City of Portland, 57 Or  
6 App 798, 803, 646 P2d 662 (1980). Petitioners had full  
7 opportunity to present factual and legal argument to the city  
8 in relation to the approval criteria when the case was first  
9 heard. Another opportunity was not required on remand.

10 SECOND AND THIRD ASSIGNMENTS OF ERROR

11 In these assignments of error petitioners contend the city  
12 improperly construed the term "property right" in  
13 §33.98.010(b)(2)(B) of the code on remand.<sup>4</sup> That portion of  
14 the city's approval criteria for a major variance states:

15 "(B) The variance is required in order to allow  
16 enjoyment by the appellant (sic) of a property  
17 right possessed by a substantial portion of the  
18 owners of property in the same vicinity, while  
19 resulting in the comparatively trivial detriment  
20 to the neighborhood." (emphasis added).

21 As noted above, we found the city's interpretation of the  
22 underlined language internally inconsistent in the first  
23 appeal. Our difficulty lay in determining the intended scope  
24 of the term "property right." Although parts of the final  
25 order suggested the protected right was the limited right to  
26 make some beneficial use of an irregularly shaped lot despite  
zoning restrictions, other aspects of the order, as well as the  
text of the code itself, indicated that the right is

1 "...loosely measured by the extent to which others in a  
2 neighborhood have, with or without variances, previously  
3 expanded or modified their homes to accommodate changing needs  
4 and preferences." Slip Op. at 9. We commented that to the  
5 extent the former, restrictive meaning was intended, the  
6 approval of setback variances to expand an already existing  
7 beneficial use (i.e., the residence) was not permissible. Id.

8 The city's supplemental order addresses these concerns.  
9 First, it is stated that "property right" is broadly  
10 interpreted to

11 "include such things as historical development of  
12 property in the vicinity and recognition of property  
13 development existing in the vicinity (neighborhood)  
14 through the granting of previous variances.  
15 Furthermore the right applies to any development on  
16 the subject site, whether original or additional."  
17 Record at 28.

18 Next, the city points out the applicants' home is in a  
19 neighborhood of steeply sloping lots. Many of the homes on  
20 these lots predate zoning and do not conform to contemporary  
21 setback requirements. Others have more recently been permitted  
22 to encroach into required setbacks because of the severe site  
23 development limitations.

24 The order characterizes the situation in the neighborhood  
25 as follows:

26 "Due to timing and physical circumstances reduced side  
27 and front yards are common in the neighborhood and are  
28 a right these home owners have which is not shared  
29 generally in R7 Zones throughout the city." Record at  
30 29.

31 What emerges from the supplemental order then, is the idea that

1 the "property right" recognized by §33.98.010(b)(2)(B) in this  
2 case is the right of a landowner to maintain existing lawful  
3 development within required setbacks in the area in question.

4 The city's brief presents the following explanation:

5 "The emphasis in §33.98.010(b)(2)(B) is on the issues  
6 of protecting the general integrity of the applicable  
7 zone, severely limiting any activity which might have  
8 an adverse impact on nearby properties, and on being  
9 realistic enough to say that if deviation from the  
10 code's standards for the zone has legally taken place,  
11 in a particular vicinity, in the past then, assuming  
12 the other variance standards (safeguards) can be met,  
13 there is no reason to deny a similar deviation to  
14 another property owner in the same vicinity.  
15 ...'Property rights' are, in this subsection,  
16 circumstances shared and reflected in the development  
17 of other properties in the vicinity whose preexisting  
18 nature, without harm to the integrity of the zone,  
19 provides a reason to believe that an additional  
20 request will be to the same effect." Brief of  
21 Respondent at 20.

22 Petitioners contend the city's interpretation of  
23 §33.98.010(b)(2)(B) cannot be sustained because it conflicts  
24 with the plain language of the code section. They maintain the  
25 section cannot be read to define "property right" in terms of a  
26 right to maintain existing lawful development within required  
27 setbacks because that reading disregards the word "required" in  
28 the same section and overlooks distinctions that may exist  
29 between the applicants' proposal and the improvements others in  
30 the area have made which exceed setback limitations. They  
31 explain their position this way:

32 "The section distinguishes between the variance  
33 requested and the property right, as the variance is  
34 to be granted because it is required so that the  
35 applicant may enjoy some property right possessed by  
36 other property owners in the vicinity. No property

1 owner, including the Galtons, needs a reduced front  
2 yard solely to have a reduced front yard; he or she  
3 needs a reduced front yard in which to place some sort  
4 of development or use otherwise not allowed in that  
5 area. As the code section is written and structured,  
6 the variance (here, reduced front and side yards) is  
7 simply the mechanism - not the property right."  
8 (emphasis in original). Petition at 20.

9  
10 Petitioners do not offer an alternative construction of  
11 "property right" as it appears in §33.98.010(b)(2)(B), but they  
12 imply the term should be defined in the limited, beneficial-use  
13 sense mentioned earlier, i.e., the city may allow relief only  
14 where an applicant cannot put his property to a beneficial-use  
15 without a variance. Since the applicants in this case already  
16 enjoy such a use (the residence), relief must be denied. Even  
17 if a more permissive reading of "property right" is possible,  
18 they argue, the text obligates the city to deny relief where,  
19 as here, (a) the applicant can make the desired room additions  
20 without a variance by adjusting his plans, (b) the proposed  
21 improvement is not similar in nature to those the city relies  
22 on as the "property right" enjoyed by others and (c) the  
23 proposed improvement conflicts with setback requirements to a  
24 materially greater degree than do those constituting the  
25 "property rights" enjoyed by others.

26  
27 As we observed in the first appeal, the city's  
28 interpretation of the variance standard reflects a considerably  
29 more permissive approach to this form of relief than is taken  
30 in many other jurisdictions. However, we note petitioners do  
31 not maintain the city's interpretation is barred by

1 constitutional, statutory or other superior law. Rather, they  
2 claim only that the interpretation is not supported by the text  
3 of the code itself.

4 If the code is unambiguous and does not support the city's  
5 interpretation, there is no question the interpretation must be  
6 set aside, as was the case in City of Hillsboro v. Housing  
7 Development Corporation of Washington County, 61 Or App 484,  
8 488, 625 P2d 726 (1983). However, if the text in question is  
9 ambiguous, we will defer to a reasonable interpretation by the  
10 city. Fifth Avenue Corporation v. Washington County, 282 Or  
11 591, 599, 581 P2d 50(1978); Bienz v. City of Dayton, 29 Or App  
12 761, 556 P2d 904 (1977); City of Hillsboro v. Development  
13 Corporation of Washington County, supra

14 The text in question is ambiguous. In our view, the text  
15 does not support an argument that relief must be denied when  
16 the applicant can put the land to some beneficial use without a  
17 variance. Cf Atwood v. City of Portland, 55 Or App 215, 637  
18 P2d 1302, cert den, 292 Or 722 (1982). If that result was  
19 intended, the code would not have used the phrase "property  
20 right possessed by a substantial portion of the owners of  
21 properties in the same vicinity." (emphasis added). As we  
22 observed in the first appeal, property rights in the  
23 beneficial-use sense of the phrase are enjoyed by all  
24 citizens. Morrison v. City of Portland, supra, Slip Op. at 7.  
25 (emphasis added). Suess Builders Co. v. City of Beaverton, 294  
26 Or 254, 656 P2d 306 (1982).

1 As we read the code, §33.98.010(b)(2)(B) encompasses one  
2 type of situation the city has determined warrants relaxation  
3 of zoning requirements. In that situation, a general pattern  
4 of development which does not conform to contemporary zoning  
5 requirements (here, setback requirements) has taken place in  
6 the vicinity of the applicant's property. The pattern consists  
7 of lawfully established improvements, either because they  
8 predate zoning or they have been authorized by the city  
9 pursuant to the zoning code. Once lawfully established, the  
10 improvements making up the pattern constitute, in the words of  
11 §33.98.010(b)(2)(B), a "property right"<sup>5</sup> possessed by a  
12 substantial portion of the owners of properties in the same  
13 vicinity." Variance relief is "required" as the code puts it,  
14 if others who seek to continue this pattern are to be allowed  
15 to do so.

16 Notably, the city code does not automatically allow  
17 variance relief where the applicant demonstrates a pattern of  
18 nonconforming setback development. In addition to the  
19 requirement in §33.98.010(b)(2)(B) that relief must be found to  
20 result "in the comparatively trivial detriment to the  
21 neighborhood," other variance criteria require the city to  
22 consider the public interest, the purpose of the zoning code in  
23 general and the zoning district in particular, and the effect  
24 on property values or environmental conditions. See  
25 §33.98.010(a). The final order and the record indicate these  
26 criteria were considered in this case. Petitioners do not

1 challenge the findings made by the city in relation to them.

2 Other portions of the city code pertaining to variances  
3 lend support to the city's decision to allow relief in this  
4 circumstance. For example, §33.98.008 provides, in pertinent  
5 part:

6 "...[t]he purpose of these provisions is to describe  
7 the procedure for the relaxation of certain provisions  
8 of the zoning regulations, under specified conditions,  
9 so that the public health, safety and welfare is  
secure and substantial justice done most nearly in  
accord with the general purpose, intent and spirit of  
this title and in the public interest." See also,  
§33.98.015(b)(1).<sup>6</sup>

10 Based on the foregoing, we believe the text reasonably  
11 supports the city's interpretation of §33.98.010(b)(2)(B).

12 Finally, we note petitioners claim that "nowhere does the  
13 city justify the Galtons's requested side yard reduction  
14 variance (requested along with a front yard variance justified  
15 by "steep slope reasons) in terms of topography, property  
16 rights or otherwise." Petition at 23 (emphasis in original).  
17 However, the city's findings in connection with the pattern of  
18 existing setback encroachment, quoted at page 7 of this  
19 opinion, refers to both reduced front and side yards. Record  
20 at 29.<sup>7</sup>

21 CONCLUSIONS

22 In conclusion, we hold the city was not obligated to  
23 provide petitioners an opportunity to present argument when the  
24 case was taken up by the council on remand. We also find the  
25 city's interpretation of §33.98.010(b)(2)(B) was reasonable.  
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1 Accordingly, the decision is affirmed.

2 Affirmed.

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1 BAGG, Dissenting.

2 I would reverse the city's decision. Portland City Code  
3 §33.98.010 provides a variance may be granted

4 "if literal interpretation and enforcement of the  
5 regulations of this title applicant [sic] to a  
6 property would result in practical difficulties or  
unnecessary hardships...."

7 I do not read the city's code to illustrate the drafters of the  
8 code meant anything other than a very strict standard when  
9 incorporating the terms "practical difficulties" and  
10 "unnecessary hardships." The majority of jurisdictions and, I  
11 believe Oregon cases to date, understand the terms to mean a  
12 strict standard of hardship or difficulty such that without a  
13 variance, the property would be rendered useless. See Erickson  
14 v. City of Portland, 9 Or App 256, 496 P2d 726 (1972); Lovell  
15 v. Independent Planning Commission, 37 Or App 3, 586 P2d 99  
16 (1978); More v. Board of Clackamas County Commissioners, 35 Or  
17 App 39, 580 P2d 583 (1978); 3 R Anderson, American Law of  
18 Zoning, Sec. 18 (2d ed. 1977). I see the requirements for  
19 grant of a particular major variance found at PCC  
20 33.98.010(b) (2) (A-B) to reinforce this interpretation.

21 Under PCC §33.98.010(b) (2) (A), a major variance may be  
22 granted if

23 "required in order to modify the impact of exceptional  
24 or extraordinary circumstances or conditions that  
25 apply to the subject property or its development that  
do not apply generally to other properties in the  
vicinity...."

1 As I understand the city's code, hardship or practical  
2 difficulty may be shown if the applicant can prove his property  
3 is subject to such exception or extraordinary circumstances. I  
4 believe this standard mirrors that in Lovell v. Independent  
5 Planning Commission, supra, in which the Court of Appeals found  
6 such language to mean that a variance cannot be granted unless  
7 the property was rendered essentially useless without the  
8 variance.

9 Under PCC §33.98.010(b)(2)(B), applicable in this case,  
10 practical difficulties and unnecessary hardships may be shown  
11 if the applicant can prove that a variance is "required" to  
12 enable the applicant to enjoy a property right possessed by a  
13 substantial portion of others in the same vicinity while  
14 causing trivial detriment to the neighborhood. I view the  
15 property right in this subsection to be a right to develop the  
16 property in accord with whatever uses are permitted or  
17 conditionally permitted within the zone. In other words, I see  
18 the term to mean a grant of some legal right to make a  
19 particular use of property. A variance might be given under  
20 this subsection where, for example, no exceptional or  
21 extraordinary physical characteristics or circumstances exist  
22 (such as slope, rockiness, etc.), but where the property might  
23 be undersized or otherwise not fit all code requirements. In  
24 such a case, if others in the same vicinity on like properties  
25 have been granted variances to build, then a variance might be  
26 granted to allow the newcomer the same residential use of the

1 land. This standard may be unconventional in that it seems to  
2 make a variance dependent on past variances. Nonetheless, that  
3 is what the code says.

4 In this case, the city has not shown such circumstances to  
5 exist. There has been no showing other property owners have  
6 been granted a right to so configure their houses as to make  
7 the floor plan desired by the applicant (and causing the house  
8 to overflow its setbacks) a "property right" for the area. I  
9 do not see variance relief available under this code to make a  
10 residence more comfortable unless it is shown that the same  
11 amenities have been granted by variance or other means to a  
12 substantial number of owners of properties in the same vicinity.

13 I note the city relies, in part, on a view that "practical  
14 difficulties" includes a balancing test by

15 "weighing of the harm which will be suffered by the  
16 applicant if the variance is not granted against the  
17 probable effect on property owners in the vicinity if  
the variance is granted." Record, pp. 23-24.

18 I see nothing in the code to suggest that practical difficulty  
19 is measured in such a fashion. Indeed, I see this balancing  
20 test as part of the separate analysis required under PCC  
21 §33.98.010(a)(1 - 4).

FOOTNOTES

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3 1  
4 Our concern in the first appeal was that the city's final  
5 order seemed to reflect two different concepts of variance  
6 relief: (1) the restrictive idea that relief is available only  
7 in the unusual case where necessary to permit some beneficial  
8 use of the land (i.e., where zoning enforcement would bring  
9 about deprivation of a property right in the constitutional  
10 sense of that term) and, (2) a more permissive concept,  
11 allowing relief where circumstances, such as the pattern of  
12 existing development, made strict adherence to code  
13 requirements inequitable. We remanded the city's decision  
14 because the final order was equivocal on this point, although  
15 it seemed to embrace the latter approach.

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16 2  
17 Prior to the hearing, petitioners sent a letter to the  
18 council requesting notice and an opportunity to be heard when  
19 the matter came up on the council agenda. The letter gave  
20 these reasons for the request (1) the proposed supplemental  
21 findings reflected a code interpretation different from prior  
22 interpretations by the city, (2) if the council adopted a legal  
23 standard different from the one announced at the original  
24 council hearing, an opportunity to present evidence had to be  
25 provided, (3) petitioners were not represented by legal counsel  
26 at the original hearings, and (4) clarification of the meaning  
of variance criteria required a full hearing. Record at 14.

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3  
4 Petitioners also rely on various federal cases recognizing  
5 the due process right to be heard before substantial rights are  
6 affected. See e.g., Matthews v. Eldridge, 424 US 319, 333  
7 (1975); Goldberg v. Kelly, 397 US 254, 267 (1970).

8 The Oregon cases cited in the petition do not clearly  
9 indicate that constitutional law is the basis for the right  
10 petitioners assert. Fasano's discussion of procedural rights  
11 in quasi-judicial rezoning cases seems to have constitutional  
12 underpinning but the opinion is vague on this question. See  
13 West v. City of Astoria, 18 Or App 212, 228, 524 P2d 1216  
14 (1974) (Schwab, specially concurring). Marbett and Sun Ray  
15 Dairy, on the other hand, are based on statutory law. The  
16 petition does not explain the linkage between the statutes  
17 applied in those two cases and the procedural rights asserted  
18 here.

1 In any event, we do not read any of the cited cases to  
2 require a contested case hearing or a hearing for legal  
3 argument only, where an agency interprets or explains a  
4 previously issued order based on existing standards.

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4 4  
5 None of the parties contend §33.98.010(b)(2)(A) applies in  
6 this case.

6 Petitioners also claim substantial evidence does not  
7 support the city's decision. The evidentiary claim, however,  
8 closely interrelates with the misapplication-of-law claim.  
9 This is because petitioners charge the city with not relying on  
10 evidence which would be required only if petitioners'  
11 interpretation of the approval standard had to be followed. As  
12 stated in this opinion, however, we do not accept petitioners'  
13 interpretation. Similarly, we do not accept their related  
14 evidentiary claim.

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11 5  
12 Without question, the city's use of "property right" in  
13 §33.98.010(b)(2)(B) invites petitioner's criticism because the  
14 phrase is often used in zoning cases, especially variance  
15 cases, in connection with the restrictive, "beneficial-use"  
16 notion. See generally, 3 R Anderson, American Law of Zoning,  
17 Chapter 18 (2d ed. 1977). However, as our Supreme Court has  
18 stated, "land use law is not a branch of common law, but is  
19 rather based on particular statutes, ordinances and rules  
20 enacted by legislative and administrative bodies. Anderson v.  
21 Peden, 284 Or 314, 315, 587 P2d 59 (1978). The inquiry in this  
22 zoning case, then, as in all others, must focus on the text of  
23 the code itself, not on case law construing different  
24 provisions.

19 As we state in this opinion, the text of  
20 §33.98.010(b)(2)(B), standing alone and in conjunction with  
21 other code provisions, does not support the argument that  
22 beneficial-use meaning of "property right" was intended. A  
23 broader meaning along the lines adopted by the city is not  
24 unreasonable.

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23 6  
24 Section 33.98.015(b)(1) provides for variances from  
25 dimensional and other requirements "...as may be necessary to  
26 secure appropriate improvement or occupancy of a lot or  
27 structure which is of such size, shape or terrain, or so  
28 located with relation to surrounding development or physical  
29 characteristics, that such modification is shown by the

1 applicant not to be contrary to the public interest." (emphasis  
2 added). Standing alone, the provision at least suggests the  
3 city intends to embrace a flexible policy on variance relief,  
4 consistent with §33.98.008 and the interpretation given in this  
5 case under §33.98.010(b) (2) (B).

6 Moreover, review of a previously enacted version of  
7 §33.98.015(b) (1) indicates the city has moved from a  
8 restrictive to a more flexible variance approach. That version  
9 provided for relief only where the lot could not be  
10 "appropriately improved without such modifications." See,  
11 Erickson v. City of Portland, 9 Or App 256, 496 P2d 726 (1972);  
12 Inn Home for Boys v. City of Portland, 16 Or App 497, 501, 519  
13 P2d 390 (1974). The prior version supports petitioners'  
14 approach, the present version supports the city.

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10 Although the order specifically refers to variances granted  
11 by the city to reduce front yard setback requirements in the  
12 vicinity, it appears a number of older, nonconforming  
13 residences meet neither front nor side yard requirements. The  
14 record is in the first appeal indicates this is the case.  
15 Original Record at 25, 29.