

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 EUN SANG LEE and MIN JA LEE,  
5 *Petitioners,*

6  
7 vs.

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9 CITY OF PORTLAND,  
10 *Respondent.*

11 LUBA Nos. 2001-110 & 2001-111

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13  
14 FINAL OPINION  
15 AND ORDER

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17 Appeal from City of Portland.

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19 Steve C. Morasch, Portland, filed the petition for review and argued on behalf of  
20 petitioners. With him on the brief was Schwabe, Williamson and Wyatt.

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22 Frank Hudson, Deputy City Attorney, Portland, filed the response brief and argued on  
23 behalf of respondent.

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25 BRIGGS, Board Chair, and BASSHAM, Board Member, participated in the decision.

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27 HOLSTUN, Board Member, did not participate in the decision.

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29 AFFIRMED

10/19/2001

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31 You are entitled to judicial review of this Order. Judicial review is governed by the  
32 provisions of ORS 197.850.  
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**NATURE OF THE DECISION**

In LUBA Nos. 2001-110 and 2001-111, petitioners appeal a city decision approving an adjustment from a transit street setback requirement.

**CONSOLIDATION**

Under OAR 661-010-0055, LUBA  
“\* \* \* may consolidate two or more proceedings, provided the proceedings seek review of the same or closely related land use decision(s) or limited land use decision(s).”

LUBA Nos. 2001-110 and 2001-111 seek review of the same decision. Accordingly, LUBA Nos. 2001-110 and 2001-111 are consolidated for LUBA review.

**REPLY BRIEF**

Petitioners move to file a reply brief to respond to allegations made in the city’s response brief that petitioners waived certain issues by not raising them below. The reply brief is attached to petitioners’ motion. The city does not object to the reply brief, and it is allowed.

**FACTS**

The subject property is an irregularly-shaped 91,794 square foot lot located on SW Barbur Boulevard, west of SW 30th Avenue. The property is currently developed with an office/retail building and a parking lot. There is an existing gas station to the east of the site, a motel to the north, and strip commercial development to the west. The surrounding area includes a residential development further north along SW 30th Avenue. The site has frontage on SW Barbur Boulevard, SW Primrose Street and SW 30th Avenue.

SW Barbur Boulevard is a 100-foot right-of-way with a 60-foot paved road surface and is a designated Regional Transitway and Major City Transit Street. The subject property is zoned General Commercial (CG). The CG zone allows auto-accommodating commercial development with a full range of retail and service businesses. Because the subject property

1 is located on a transit street, Portland City Code (PCC) 33.130.215(B) requires that at least  
2 50 percent of the street-facing facade be located no more than 25 feet from the curb line of  
3 the transit street.<sup>1</sup>

4 The applicant proposes to construct an additional two-story building on the subject  
5 property consisting of approximately 11,440 square feet of floor area to house a mix of office  
6 and retail uses. The proposed building is rectangular in shape, with the long axis parallel to  
7 the existing building and parking area, and the short axis facing the street frontage. As  
8 designed, the transit street entrance provides access to only one retail tenant. Access to the  
9 remaining tenants is via entrances that face the parking lot. The applicant requested an  
10 adjustment to allow 59 percent of the street-facing facade to be further than 25 feet from the  
11 curb line of SW Barbur Boulevard.

12 The adjustment was approved by planning staff, and petitioners appealed the decision  
13 to the Portland Adjustment Committee (the adjustment committee), which affirmed the  
14 staff's decision. This appeal followed.

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<sup>1</sup>PCC 33.130.215(B) provides, in relevant part:

“[T]he minimum and maximum setbacks along transit streets \* \* \* are stated in Table 130-5. The setback standards apply to all buildings and structures on the site, except as specified in this section. \* \* \*

“\* \* \* \* \*

“2. Building setbacks on a transit street \* \* \*. The maximum setback standard of [PCC 33.130.215(B)(2)(b)] applies to buildings. The minimum setback standard of Table 130-5 applies to buildings and structures. These setback standards apply to all zones outside the Central City plan district. \* \* \*

“\* \* \* \* \*

“b. Standard. At least 50 percent of the length of the ground-level street-facing facade of the building must be within the maximum setback. \* \* \*”

1 **FIRST ASSIGNMENT OF ERROR (PART), SECOND AND THIRD ASSIGNMENTS**  
2 **OF ERROR**

3 Under the PCC, applications that deviate from development standards may  
4 nevertheless be approved if “the proposed development continues to meet the intended  
5 purpose of those regulations.” PCC 33.805.010. Adjustments to development standards are  
6 reviewed pursuant to PCC 33.805.040.<sup>2</sup> Petitioners argue that the building design, as  
7 proposed, does not satisfy PCC 33.805.040(A), (B), (C), and (E).

8 The theme that runs throughout petitioners’ assignments of error is that the proposed  
9 building design does not advance the purpose of the transit street design standards because  
10 the building is not designed to optimize pedestrian access. Petitioners contend that the  
11 proposed building is oriented toward the parking lot and vehicular traffic because a majority  
12 of the entrances to the building face the parking lot. Petitioners argue that having only one  
13 entrance to the building within the 25-foot transit setback area is not inviting to pedestrians,  
14 because pedestrians will have to walk around the building to reach other tenants. As a result,  
15 petitioners argue, fewer pedestrians will be drawn to the building and, therefore, the purpose

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<sup>2</sup>PCC 33.805.040 provides, in relevant part:

“[A]djustment requests will be approved if the review body finds that the applicant has shown that \* \* \* approval criteria [PCC 33.805.040(A) through (F)] have been met. \* \* \*

“A. Granting the adjustment will equally or better meet the purpose of the regulation to be modified; and

“B. If in a \* \* \* [CG] \* \* \* zone, the proposal will be consistent with the desired character of the area; and

“C. If more than one adjustment is being requested, the cumulative effect of the adjustments results in a project which is still consistent with the overall purpose of the zone; and

“D. City-designated scenic resources and historic resources are preserved; and

“E. Any impacts resulting from the adjustment are mitigated to the extent practicable; and

“F. If in an environmental zone, the proposal has as few significant detrimental environmental impacts on the resource and resource values as is practicable[.]”

1 of the transit street design standard—to create an environment that is inviting and convenient  
2 for pedestrians and transit riders—is undermined. *See* PCC 33.130.215(A) (“[t]he setback  
3 requirements along transit streets \* \* \* create an environment that is inviting to pedestrians  
4 and transit users”). In particular, part of the first assignment of error, and the entirety of the  
5 second and third assignments of error are premised on the idea that the proposed adjustment  
6 to the facade facing SW Barbur Boulevard necessarily requires a review of the plans for the  
7 building as a whole, and the proposed entrances to the building in particular.

8 While there may be some merit in such global review in the context of an application  
9 for an adjustment under PCC 33.805.040, we disagree with petitioners that PCC 33.805.040  
10 requires such review. Under the second assignment of error, petitioners argue that PCC  
11 33.805.040(B) requires that the “proposal” in its entirety will be consistent with the desired  
12 character of the area, not just that the adjustment will be consistent. Therefore, petitioners  
13 argue, PCC 33.805.040 requires that the city evaluate the entire design, not just those aspects  
14 of the design that are affected by the requested adjustment. We disagree. There is no  
15 suggestion in the text or context of PCC 33.805.040 that the scope of the “proposal” is the  
16 entire project, including areas or aspects unrelated to the requested adjustment. The city’s  
17 findings consider the “proposal” for the purposes of PCC 33.805.040(B) to be the adjustment  
18 and the mitigation proposed by the applicant.<sup>3</sup> That is a reasonable view of the scope of the

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<sup>3</sup>The adjustment committee’s finding with regard to PCC 33.805.040(B) states, in relevant part:

“The site is located in the CG zone. The desired character of the CG zone (Section 33.130.030 Characteristics of the Zones) states that development is expected to be generally auto-accommodating, except where the site is adjacent to a transit street. The zone’s development standards promote attractive development, an open and pleasant street appearance, and compatibility with adjacent residential areas. Development is intended to be aesthetically pleasing for motorists, transit users, pedestrians, and the businesses themselves.

“As stated above, the proposal includes a building facade with large window areas and a clearly visible entrance, as well as a large area of landscaping and a plaza between the building and the sidewalk. The design of the building facade and the location of the landscaping combine to create a pleasant built environment as viewed by passing motorists and pedestrians. The landscaping and the seating areas enhance the plaza, making it inviting to pedestrians. Therefore, this criterion is met.” Record 14.

1 “proposal” evaluated under PCC 33.805.040(B). Petitioners make similar arguments under  
2 the third assignment of error, that the scope of the mitigation considered under PCC  
3 33.805.040(E) must include design aspects of the entire building. However, the mitigation  
4 that must be considered under PCC 33.805.040(E) is related to the “impacts resulting from  
5 the adjustment.” Accordingly, to the extent petitioners’ assignments of error attack the  
6 subject city decision because it does not consider the impacts resulting from the part of the  
7 building design not related to the adjustment to PCC 33.130.215(B), we reject them.

8 The first assignment of error is denied, in part. The second and third assignments of  
9 error are denied.<sup>4</sup>

10 **FIRST ASSIGNMENT OF ERROR**

11 PCC 33.805.040(A) requires that the city find that “[g]ranting the adjustment will  
12 equally or better meet the purpose of the regulation to be modified.” *See* n 2. Petitioners  
13 argue that, to the extent the adjustment committee found that PCC 33.805.040(A) could be  
14 satisfied by architectural amenities such as a plaza, with stairs leading to a defined entrance  
15 to the building, the conditions of approval are insufficient to ensure that those assumed  
16 amenities will actually be constructed.

17 As a condition of approval, the adjustment committee required that

18 “each of the 4 required site plans and any additional drawings must reflect the  
19 information and design approved by this land use review as indicated in  
20 Exhibits C-1 through C-4. \* \* \*” Record 15.

21 The exhibits depict the area fronting SW Barbur Boulevard as a pedestrian entryway,  
22 with large glass windows on the first floor, a small overhang between the first and second  
23 floors, a three-step stairway leading to the entrance to the building, benches, trees and small  
24 plantings. The condition of approval requires that the approved building permit conform to

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<sup>4</sup>Because we reject petitioners’ arguments that there is a connection between the proposed design of the building entrances and PCC 33.805.040 as it pertains to an adjustment to PCC 33.130.215(B), we do not consider the city’s arguments that petitioners waived those issues by not raising them below.

1 the design shown in the exhibits, and is sufficient to ensure that the building, as constructed,  
2 satisfies PCC 33.805.040(A).

3 The first assignment of error is denied.

4 **FOURTH ASSIGNMENT OF ERROR**

5 PCC 33.805.040(C) requires that multiple requests for adjustments cumulatively  
6 comply with the overall purpose of the zone. *See* n 2. Petitioners argue that the city erred in  
7 concluding that PCC 33.805.040(C) is inapplicable, because at least one other adjustment  
8 must be approved before the building may be constructed as proposed. According to  
9 petitioners, PCC 33.130.242 requires that the main entrance be oriented toward the transit  
10 street.<sup>5</sup> Petitioners contend that the “main entrance” to the proposed building, as that term is  
11 defined in PCC 33.910.030, is oriented toward the rear parking area.<sup>6</sup> Petitioners contend

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<sup>5</sup>PCC 33.130.242, “Transit Street Main Entrance,” provides, in relevant part:

**“B. Applicability.**

“1. Generally. All sites with at least one frontage on a transit street, and where any of the floor area on the site is in nonresidential uses, must meet the standards of [PCC 33.130.242(C).] \* \* \*

“\* \* \* \* \*

**“C. Location.** At least one main entrance must:

“1. Be within 25 feet of the transit street;

“2. Allow pedestrians to both enter and exit the building; and

“3. Either:

“a. Face the transit street; or

“b. Be at an angle of up to 45 degrees from the transit street, measured from the street property line \* \* \*.”

<sup>6</sup>PCC 33.910.030 defines “Main Entrance,” in relevant part, as follows:

“A main entrance is the entrance to a building that most pedestrians are expected to use. Generally, each building has one main entrance. Main entrances are the widest entrance of those provided for use by pedestrians. In multi-tenant buildings, main entrances open directly into the building’s lobby or principal interior ground level circulation space. \* \* \*”

1 that it does not matter that the adjustment to the main entrance standard was not applied for  
2 during the proceedings before the city. Petitioners argue that it is enough that the second  
3 adjustment is implicated by the proposed building design. Given that the proposed design  
4 cannot be constructed without the second adjustment, petitioners contend that there is an  
5 implied *request* to consider that adjustment, for the purposes of PCC 33.805.040(C).  
6 Petitioners argue that if an applicant could avoid addressing cumulative impacts merely by  
7 filing separate applications, such a reading of the code would frustrate the purpose of the  
8 adjustment criteria.

9 The city responds that the only application before the committee was for a single  
10 adjustment and that the city properly considered only the requested adjustment. We agree.  
11 The city’s decision indicates that approval of the requested adjustment does not mean that the  
12 contemplated development complies with other development standards, or that no further  
13 adjustments may be necessary.<sup>7</sup> Apparently, in the city’s view, PCC 33.805.040(C) permits  
14 an applicant to consolidate multiple adjustment requests into one proceeding, but does not  
15 require such consolidation. That view is consistent with the text of PCC 33.805.040(C),  
16 which refers to circumstances when “more than one adjustment is being requested[.]”<sup>8</sup>

17 We disagree with petitioners that, pursuant to the city’s understanding of PCC  
18 33.805.040(C), an applicant can avoid addressing cumulative impacts caused by multiple  
19 adjustments merely by filing separate applications. Presumably the city will have a record of  
20 the adjustments applied for and approved during the course of development. If that is the

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<sup>7</sup>The city’s decision states, in relevant part:

“Unless specifically required in the approval criteria listed above, this proposal does not have to meet the development standards in order to be approved during this review process. The plans submitted for a building or zoning permit must demonstrate that all development standards of Title 33 can be met, or have received an Adjustment review prior to the approval of a building or zoning permit.” Record 15.

<sup>8</sup>We do not intend the foregoing to express a view regarding petitioners’ contention that a second adjustment is necessary.

1 case, the city has the opportunity to review the cumulative impacts of the subsequent  
2 adjustments in light of the first. The city's determination that PCC 33.805.040(C) does not  
3 apply because only one adjustment request was before it is reasonable and correct.

4           The fourth assignment of error is denied.

5           The city's decision is affirmed.