

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

3
4 JONATHAN BOWERS,
5 *Petitioner,*

6
7 and

8
9 DEBORAH FRISCH,
10 *Intervenor-Petitioner,*

11
12 vs.

13
14 CITY OF EUGENE,
15 *Respondent,*

16
17 and

18
19 OREGON STATE BOARD OF HIGHER EDUCATION,
20 *Intervenor-Respondent.*

21
22 LUBA Nos. 2008-156 and 2008-157

23
24 FINAL OPINION
25 AND ORDER

26
27 Appeal from City of Eugene.

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29 Jonathan Bowers, Eugene, filed a petition for review and argued on his own behalf.

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31 Deborah Frisch, Eugene, filed a petition for review and argued on her own behalf.

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33 Emily N. Jerome, Eugene, filed a response brief and argued on behalf of respondent.
34 With her on the brief were Harrang Long Gary Rudnick PC, Steven E. Shipsey, Assistant
35 Attorney General, and Erin L. Donald Assistant Attorney General.

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37 Steven E. Shipsey, Assistant Attorney General and Erin L. Donald Assistant Attorney
38 General, Salem, filed a response brief and Steven E. Shipsey argued on behalf of intervenor-
39 respondent. With them on the brief were Emily N. Jerome and Harrang Long Gary Rudnick
40 PC.

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42 HOLSTUN, Board Member; BASSHAM, Board Chair, participated in the decision.

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44 RYAN, Board Member, did not participate in the decision.
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AFFIRMED

12/19/2008

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

NATURE OF THE DECISION

Petitioner appeals two city decisions that vacate portions of an alley and city street right-of-way.

MOTION TO INTERVENE

Deborah Frisch moves to intervene on the side of petitioner in this appeal. There is no opposition to the motion, and it is granted.

The Oregon State Board of Higher Education, the applicant below, moves to intervene on the side of respondent in this appeal. There is no opposition to the motion, and it is granted.

FACTS

The Oregon State Board of Higher Education (OSBHE) owns property (the subject property) immediately south of Franklin Boulevard at its intersection with East 13th Avenue. The subject property lies at the northeast corner of the University of Oregon campus, immediately west of Villard Street, a north-south street that runs along the east side of the campus. The university wishes to construct a new basketball arena on the subject property. McArthur Court is the university's current basketball arena. McArthur Court is located some distance to the southwest of the subject property, near the center of the university campus. If the new basketball arena is constructed, the ultimate use of McArthur Court is uncertain at this point. However, if the new basketball arena is constructed, McArthur Court would no longer serve as the university's basketball facility and one possibility is that McArthur Court would be demolished in the future and replaced with a new campus building.

The subject property is divided by Villard Alley. Villard Alley is a north-south alley that divides the easternmost one-quarter of the subject property from the westernmost three-quarters of the property. OSBHE requested that the city vacate Villard Alley, between East 13th Avenue on the north and East 15th Avenue on the south. In addition, OSBHE

1 requested that the city vacate a small portion of East 13th Avenue, where it intersects with
2 Franklin Boulevard. A portion of the exterior sidewalk area around the proposed basketball
3 arena would occupy the vacated portion of East 13th Avenue. The easternmost portion of the
4 new arena would occupy a portion of the vacated Villard Alley. Record 11, 19, 679. The
5 city council found that the requested vacations would be in the public interest and granted the
6 requests. This appeal followed.

7 **PETITIONER’S ASSIGNMENT OF ERROR**

8 The sole approval criterion that controls vacations like the two vacations that are at
9 issue in this appeal is set out at EC 9.8725. EC 9.8725 requires that the city find that the
10 disputed vacations are “in the public interest.” In a single assignment of error, petitioner
11 argues that the disputed vacations are not in the public interest.

12 McArthur Court, built in 1926, was designed by Ellis Lawrence. Ellis Lawrence was
13 a prominent Oregon architect and longtime dean of the University of Oregon School of
14 Architecture until his death in 1946. In the first part of his petition for review, relying in part
15 on internet links that lead to information that is not included in the record of this appeal,
16 petitioner explains that McArthur Court is a historic structure and one of a handful of historic
17 University Division 1 basketball arenas in the United States that remain in use today.
18 Petitioner contends that McArthur Court could be renovated and continue to serve
19 satisfactorily in the future as the University of Oregon’s basketball arena. Petitioner faults
20 the city for relying on the personal opinions of various persons and representatives of the
21 university and studies that in turn rely in large part on those personal opinions to conclude
22 that McArthur Court has come to the end of its useful life, is unsafe, and because it lacks the
23 amenities of modern basketball arenas should be replaced by the proposed new arena on the
24 subject property. Petitioner contends that the disputed right-of-way vacations, which would
25 allow the university to go forward with the new basketball arena and discontinue use of

1 McArthur Court as the university’s basketball arena is therefore not “in the public interest,”
2 as required by EC 9.8725.

3 **A. The City’s Decision**

4 Eugene Code (EC) 9.8700 through 9.8725 set out procedures and standards for
5 vacating public ways. EC 9.8725 provides:

6 **“Approval Criteria for the Vacation of Improved Public Right-of-Way, Public**
7 **Ways Acquired with Public Funds, and Undeveloped Subdivision and Partition**
8 **Plats.** The city council shall approve, or approve with conditions and
9 reservations of easements, the vacation of improved public right-of-way,
10 public ways acquired with public funds, or undeveloped subdivision and
11 partition plats, or portions thereof, including public right-of-way and
12 improved public easements located therein, only *if the council finds that*
13 *approval of the vacation is in the public interest.*” (Emphasis added.)

14 The city findings that explain why the city found that the requested vacation of
15 Villard Alley is in the public interest include the following:

16 “The benefit of the alley to the transportation system is, and has been very
17 limited. The portion of Villard Alley * * * proposed for vacation has been
18 gated for years (on the south side of the former Williams Bakery site) because
19 of safety conflicts between trucks and pedestrians. The alley’s current
20 circumstances also provide minimal benefit to the public. The University now
21 owns all of the land adjacent to Villard Alley. Therefore, there are no other
22 properties which directly depend on this portion of Villard Alley for access.
23 The alley also provides little benefit to pedestrians and bicyclists traveling
24 between Franklin Boulevard and destinations to the south. For example,
25 access to the EmX line would be east or west of the alley to reach the stations.
26 There are no destinations other than University lands themselves that are
27 better served by this alley. As such, there is no additional out-of-direction
28 travel for pedestrians and bicyclists necessitated by the proposed vacation.

29 “ * * * [C]onsolidation of the parcels will improve traffic circulation in the
30 area by reducing the number of driveways on Villard Street. With a single
31 owner, future redevelopment of the site will be able to coordinate and
32 consolidate driveway locations and address overall circulation to a much
33 greater degree than under separate ownership.

34 “* * * * *

35 “The current alignment of the alley significantly limits how the eastern
36 portion of the site can be developed. Elimination of Villard Alley would
37 provide much more flexibility to develop the site in a coordinated and

1 integrated manner. By enabling consolidation of this site, future
2 redevelopment plans can address the variety of development concerns (both
3 potential impacts and benefits) in a holistic manner. Given the limited value
4 of Villard Alley, its benefit to the public would be minimal in comparison to
5 the benefits resulting from a comprehensive development plan for the entire
6 site.” Record 13-14.

7 The city also found that granting the requested vacation of a portion of the East 13th
8 Avenue right-of-way near Franklin Boulevard is in the public interest. The city will retain a
9 public utility and pedestrian access easement across the vacated portion of East 13th Avenue
10 and the city found that the requested vacation will not interfere with the operation of East
11 13th Avenue. As was the case with the findings regarding Villard Alley, the findings
12 concerning the East 13th Avenue vacation find that the vacation will make it much easier to
13 plan the subject property for redevelopment in a comprehensive manner. The findings
14 regarding the requested East 13th Avenue vacation include the following paragraph that
15 appears immediately before the city’s ultimate conclusion that vacating the requested portion
16 of the East 13th Avenue right-of-way will be in the public interest:

17 “The ability to re-use this property in a consolidated manner also enhances its
18 economic viability given the additional flexibility afforded [by] the vacation
19 of the street. As such the vacation can help facilitate increased economic
20 opportunities associated with its redevelopment. Any development of this
21 consolidated, commercially zoned parcel, *even in the absence of a basketball*
22 *arena* would result in substantial employment opportunities both for the
23 construction trade as well as increased employment opportunities with the
24 University. These additional employment and economic opportunities will
25 result in substantial benefit to the community.” Record 21 (emphasis added).

26 A paragraph nearly identical to the one quoted above appears immediately before the city’s
27 conclusion that granting the requested vacation of Villard Alley is in the public interest.
28 Record 14.

29 Petitioner does not really challenge the above findings. Before returning to
30 petitioner’s argument, it is worth emphasizing that the city’s findings conclude that the
31 disputed vacations are in the public interest, without regard to whether the disputed vacations
32 actually result in the construction of the anticipated new basketball arena. The city’s

1 reasoning, which is not really challenged by petitioners, is that neither Villard Alley nor the
2 vacated portion of the East 13th Avenue right-of-way serve important or necessary public
3 purposes in their current condition, and vacating those rights of way would make it easier to
4 redevelop the currently vacant subject property and make it more likely that such
5 development will occur and generate employment and other economic benefits.

6 **B. Petitioner’s Legal Theory**

7 Petitioner argues that the city’s findings, portions of which were quoted earlier, might
8 be adequate to establish that the proposed vacations will be in the public interest if the city
9 had first *conclusively* demonstrated that McArthur Court needs to be replaced.

10 “I should note that the Findings * * * would only be applicable had the
11 [university] conclusively demonstrated that a new arena is necessary. A
12 couple of conclusions should be noted. First, had the University of Oregon
13 lacked a basketball facility to begin with, I would not have any qualms about
14 the property vacations. Second, had the [university] demonstrated to the
15 public and various public bodies conclusive information that McArthur Court
16 is in need of replacement, I would not have any qualms with the [city]
17 vacating the properties the [university] seeks.” Petition for Review 8.

18 Later in the petition for review, petitioner includes the following argument:

19 “Before I begin, however, I want to point out to [LUBA] that an endeavor to
20 build a basketball arena, or any other major project for that matter, on the
21 campus of the University of Oregon, would require the utmost attention to
22 detail and a high level of suitable and substantial fact on the part of the
23 [university] that would convincingly show – to [LUBA], governmental
24 bodies, and especially the public – that such projects are necessary. As such,
25 it would be absolutely prudent that at *all* levels of the proposed arena’s
26 development – from getting permission to obtain funds, to spend funds, and to
27 build – unequivocal fact and support would be necessary. In the current
28 circumstances, such facts and support the [university] *must* show would be
29 that McArthur Court is in need of replacement. * * * Petition for Review 18
30 (emphases in original).

31 Petitioner concedes above that if the university did not already have a basketball
32 arena, a decision to approve the disputed vacations to allow the university to construct the
33 disputed basketball arena would be in the public interest. Even without the concession, the
34 city clearly could find that vacating a largely unused right-of-way that crosses vacant

1 property to allow construction of a new basketball facility is in the public interest. Once that
2 is established, the question becomes what obligation the city has under EC 9.8725, if any, to
3 consider the potential secondary effects of approving the requested vacations and allowing
4 the proposed new basketball arena to be built. Petitioner presents what is obviously a
5 heartfelt case on behalf of renovating McArthur Court instead of building a new basketball
6 arena. We are unprepared to say that the city could not interpret the EC 9.8725 “public
7 interest” criterion to allow it to consider such a secondary effect of vacating rights of way to
8 facilitate redevelopment of vacant land. But the decision that is before us in this appeal does
9 not mention McArthur Court, barely mentions the new basketball arena and clearly does not
10 interpret the EC 9.8725 public interest criterion to require that the city consider the
11 secondary effects of approving the disputed vacations to make it easier to plan for
12 redevelopment of the subject property.

13 The city decision that is before us finds that without regard to whether the anticipated
14 basketball arena is constructed, the disputed vacations result in practically no loss of useable
15 transportation facilities and result in greater development flexibility on the subject property.
16 The city concludes that those results are sufficient to support its conclusion that the vacations
17 are in the public interest. EC 9.8725 does not require that the city establish that all secondary
18 effects that may flow from the development made possible by the vacation request (here the
19 likelihood that McArthur Court will be demolished and presumably the certainty that it will
20 no longer be the university’s basketball arena) are also in the public interest. Neither does
21 EC 9.8725 require that the university “conclusively demonstrate” as part of its application to
22 the city that the new basketball arena is necessary because there is “unequivocal fact and
23 support” for the proposition that renovation of McArthur Court is not a viable and preferable
24 alternative. Nowhere in the language of EC 9.8725 is there any support for imposing such a
25 heightened evidentiary burden on the university in this case. Because petitioner’s first
26 assignment of error is founded on his assumptions that under EC 9.8725 the city must (1)

1 consider such secondary effects and (2) require that the university carry such a heightened
2 evidentiary burden before the city can approve the requested vacations, petitioner’s
3 assignment of error provides no basis for remand.

4 Petitioner’s assignment of error is denied.

5 **INTERVENOR-PETITIONER’S FIRST ASSIGNMENT OF ERROR**

6 In her first assignment of error, intervenor-petitioner challenges the adequacy of the
7 city’s findings that granting the two vacation requests is in the public interest. She also
8 challenges the evidentiary support for those findings.

9 **A. Findings Challenge**

10 In the first three paragraphs of argument under her first assignment of error,
11 intervenor-petitioner disagrees with the city’s findings that vacating Villard Alley to allow
12 the subject property to be redeveloped as a whole rather than requiring the eastern one-
13 quarter and western three-quarters to be redeveloped separately “enhances its economic
14 viability given the additional flexibility afforded wit[h] the vacation of the street.”
15 Intervenor-Petitioner’s Amended Petition for Review 2. Intervenor-petitioner contends that
16 “[t]his statement is blatantly false.” *Id.*

17 Intervenor-petitioner must do more than assert that the challenged finding is false.
18 That intervenor-petitioner disagrees with the city’s findings does not establish that those
19 findings are inadequate. *McGowan v. City of Eugene*, 24 Or LUBA 540, 546 (1993). We do
20 not see how vacating the portion of Villard Alley that separates the eastern one-quarter of the
21 subject property from the western three-quarters of the subject property could possibly
22 “DECREASE [development] flexibility,” as intervenor-petitioner argues.

23 **B. Evidentiary Challenge**

24 Under EC 9.8710(5)(a), the city manager is required to estimate the special benefit
25 that will accrue to the party requesting vacation of a public way, and the applicant must

1 submit a deposit with the application that is equal to that special benefit.¹ Intervenor-
2 petitioner argues that the April 14, 2008 Basis of Value Report that the city relied on to
3 determine the special benefit and deposit required by EC 9.8710(5)(a) is inadequate and thus
4 provides an inadequate basis for assuring the city will be adequately compensated for the loss
5 of right-of-way. We understand intervenor-petitioner to argue that the result of this
6 evidentiary inadequacy is that the city’s findings that it is in the public interest to grant the
7 right-of-way vacation requests are not supported by substantial evidence. We turn to
8 intervenor-petitioner’s arguments.

¹ As relevant, EC 9.8710 provides:

“9.8710 Vacations, Application Requirements.

“* * * * *

“(5) In addition to payment of the application and publication fees * * *, a vacation of improved or unimproved public right-of-way, * * * shall require the payment by the applicant of a deposit equal to the assessment of special benefit that results from the vacation and disposition of property to the benefitted property owners.

“(a) The assessed value of special benefit and the amount of money to be deposited shall be determined by the city manager. The assessed value of special benefit shall include:

1. The value of the real property; and
2. The costs incurred by the city in the construction of public improvements.

“(b) Notice of the proposed assessment for benefits shall be given by mail to the owners of the property to be assessed no less than 20 days prior to the public hearing * * *.

“(c) At least 5 working days prior to the public hearing * * *, the land owner shall deposit with the city the sum of money called for by this subsection (5).

“(d) If the vacation application is approved, the deposit shall be retained by the city. If the vacation application is denied, the deposit shall be returned to the land owner.”

1 **1. Miscalculation of Square Footage**

2 Intervenor-petitioner argues the applicant miscalculated the square footage of vacated
3 right-of-way and was later required to add \$19,153 to the original \$463,821 that the
4 university deposited with the city based on the original April 14, 2008 report.

5 As respondents explain, the \$463,821 figure in the April 14, 2008 Basis of Value
6 Report was based on the original site plan and the square footage of the proposed vacation
7 was later increased when that site plan was revised. Record 46. The city required and the
8 university later deposited an additional \$19,153 to compensate for the additional vacated
9 right-of-way. Record 198.

10 We fail to see how the correction in the required deposit demonstrates any
11 inadequacy in the Basis of Value Report.

12 **2. The Basis of Value Report is not an Appraisal and was not**
13 **Prepared by an Appraiser**

14 Intervenor-petitioner next argues the person who prepared the Basis of Value Report
15 is not licensed to perform commercial or public real estate appraisals and that the Basis of
16 Value report is clearly not an appraisal.

17 Respondents answer that EC 9.8710(5) does not require an appraisal or require that
18 the city manager’s estimate of special benefit be based on an appraisal.

19 The Basis of Value Report identifies seven nearby comparable sales during 2007 for
20 which a price per square foot is calculated. Those sales ranged from a high of \$39.82 per
21 square foot to a low of \$17.63 per square foot. Record 42. The Basis of Value Report then
22 explains how it arrived at its estimate that commercially zoned properties along Franklin
23 Avenue sell for approximately \$37 per square foot while properties up to two blocks away
24 from Franklin Avenue sell for approximately \$27 per square foot. Record 44. Finally, the
25 Basis of Value Report explains that 12,196 square feet of vacated right-of-way along
26 Franklin Avenue, where the city will retain a public pedestrian and sidewalk easement, was
27 devalued by 65 percent to reflect the retained public easement. In the southern Villard Alley

1 area the city will retain a utility easement and the value was reduced by 50 percent to reflect
2 that easement. No city easements will be retained in the northern Villard Alley area, and its
3 value was not reduced. Based on the above explanation, the April 14, 2008 Basis of Value
4 Report arrives at an estimate of \$463,821 for the fair market value of the vacated right-of-
5 way.

6 Other than arguing that the Basis of Value Report is not an appraisal and that the
7 person who prepared the report is not licensed to prepare commercial real estate appraisals,
8 intervenor-petitioner makes no attempt to challenge the reasoning and rationale for the Basis
9 of Value Report's estimate of fair market value. As respondents correctly point out, EC
10 9.8710(5) does not require that the city manager's finding of special value be based on an
11 appraisal. Intervenor-petitioner makes no attempt to explain why she believes the
12 methodology employed in the Basis of Value Report is arbitrary or does not provide an
13 adequate basis for making the required finding of special benefit.

14 **3. Arbitrary Division of the Vacated Rights of Way Into Discounted**
15 **Subsets**

16 Intervenor-petitioner's final argument under her first assignment of error is that the
17 Basis of Value Report "arbitrarily discounted at 35%, 50% and 100% of the appraised
18 value." Intervenor-Petitioner's Amended Petition for Review 3.

19 As we have already explained, the Basis of Value Report discounted vacated areas
20 where the city retained public easements. There is nothing arbitrary about discounting the
21 value of acquired property where the property owner retains an easement to allow that
22 property owner to continue using the property for the purposes specified in the easement
23 after the fee ownership is transferred. Intervenor-petitioner makes no attempt to explain why
24 she believes those discounts do not accurately reflect the value of the easement, other than to
25 claim they are arbitrary.

26 Intervenor-petitioner's first assignment of error is denied.

1 **INTERVENOR-PETITIONER’S SECOND ASSIGNMENT OF ERROR**

2 In her second assignment of error, intervenor-petitioner alleges that “at the August
3 13, 2008 Eugene City council meeting, several city employees including the city’s legal
4 counsel provided knowingly false information to the City Councilors to motivate them to
5 approve the requests by the time the meeting was adjourned.” Intervenor-Petitioner’s
6 Amended Petition for Review 4. Intervenor-petitioner contends that staff’s and the city
7 attorney’s actions resulted in a procedural error that prejudiced her substantial rights.

8 Questions arose among city councilors at the end of the August 13, 2008 city council
9 meeting about the adequacy of the Basis of Value Report. Intervenor-petitioner argues that
10 because the city manager was present at that meeting, the city could easily have required that
11 the fair market value of the vacated right-of-way be valued higher than the estimate set out in
12 the Basis of Value Report. Intervenor-petitioner contends that city staff and the city’s
13 attorney falsely advised the city council that it was not possible to deviate from the fair
14 market value in the Basis of Value report.

15 During its August 13, 2008 deliberations, one member of the city council made a
16 motion, which was seconded, to increase the estimate of special benefit by \$984,221. Record
17 51. The moving city councilor reasoned that the 65 percent reduction in value to reflect the
18 retained pedestrian and sidewalk easement on 12,196 square feet of the vacated right-of-way
19 was arbitrary and that the estimate of special benefit should be increased to reflect lost
20 parking spaces. *Id.* Discussion then ensued with staff and the city attorney about the
21 possible consequences of passing that motion, whether an appraisal would be needed to
22 justify such an increase in estimated special benefit, whether the university would likely
23 appeal such an action and whether it was likely the university would prevail in such an
24 appeal. Record 51-54. The motion was subsequently withdrawn and replaced with a motion
25 to direct the city manager to continue to negotiate with the university regarding the fair
26 market value of the vacated right-of-way. Record 55. After there was additional discussion

1 on the new motion, the city attorney reminded the city council that there was a 30-day
2 deadline for their action on the requested vacations:

3 “[The city attorney] reminded the Council that Section 9.7450 of the City
4 Code required them to make a decision within thirty days of the close of the
5 record which in this case would be September 10, 2008, unless a longer time
6 frame was agreed to by the persons or entity initiating the application. He
7 said if the Council wanted to consider new evidence such as a new appraisal
8 they would need to re-open the record, which could not be done given the
9 processes involved and the upcoming Council break.” Record 55-56.

10 In a subsequent vote by the City Council, the second motion failed. Record 56.

11 Erroneous information, if relied on by the city council, might result in a decision that
12 is not supported by substantial evidence, but we have some difficulty seeing how city
13 council’s receipt of erroneous information could result in a procedural error that would
14 prejudice intervenor-petitioner’s substantial rights. In any event, in our view, intervenor-
15 petitioner has not identified any “false information” that was relied on by the city council.

16 Intervenor-petitioner’s second assignment of error is denied.

17 The city’s decision is affirmed.