

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

CORBETT/TERWILLIGER/LAIR HILL)	
NEIGHBORHOOD ASSOCIATION and)	
ROBERT NECKER,)	
)	
Petitioners,)	
)	
vs.)	
)	LUBA No. 89-018
CITY OF PORTLAND,)	
)	FINAL OPINION
Respondent,)	AND ORDER
)	
and)	
)	
BEARTREE BUILDINGS,)	
)	
Intervenor-Respondent.)	

Appeal from City of Portland.

Lawrence R. Derr, Portland, filed the petition for review and argued on behalf of petitioners.

Ruth M. Spetter, Portland, filed a response brief and argued on behalf of respondent.

Susan G. Whitney, Portland, filed a response brief and argued on behalf of intervenor-respondent. With her on the brief was Seifer, Yeats, Whitney and Mills.

HOLSTUN, Referee; SHERTON, Chief Referee; KELLINGTON, Referee, participated in the decision.

AFFIRMED IN PART; REVERSED IN PART 03/02/90

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a Portland City Council order granting (1) design review approval for a parking lot and adjustments to walkway and plaza superblock requirements; and (2) a variance from Portland City Code (PCC) requirements that parking spaces be accessible without moving vehicles.

MOTION TO INTERVENE

BearTree Buildings moves to intervene on the side of respondent. There is no objection to the motion, and it is allowed.

FACTS

In Corbett/Terwilliger Neigh. Assoc. v. City of Portland, 16 Or LUBA 49 (1987)(Corbett I), we remanded an earlier decision by the city approving the parking lot and variance. After conducting additional local proceedings, the city adopted the decision appealed in this proceeding.

The subject property is zoned General Commercial (C2). The property is the southern one third of a superblock located near downtown Portland.¹ The superblock is located

¹A "superblock" is defined in the Portland City Code as

"a continuous area, either in single or divided ownership, with a total gross area in private property of 75,000 square feet or more within the enclosure formed by surrounding streets where the area in private or public ownership includes at least 5,000 square feet of vacated street." PCC 33.12.765.

southern boundaries of the property along Barbur and Meade are steeply sloped and supported by retaining walls. Although the portion of Third Avenue adjoining the northern two thirds of the superblock is improved, the Third Avenue right of way adjoining the subject property to the east, between Arthur and Meade, is not improved and provides no connection between Arthur and Meade. The Third Avenue right of way has been vacated between Meade and S.W. Hooker Street (Hooker), a parallel east-west street south of Meade. Where it adjoins the subject property, Meade is a gravel street serving four dwellings. Meade deadends before intersecting Barbur.

Pedestrian circulation in the area is complicated by a number of factors. Barbur is a busy street. The sidewalk along the east side of Barbur south of Sheridan ends at a point adjoining the subject property but at an elevation approximately 40 feet above the subject property. At the point where the sidewalk ends, there is no controlled crossing of Barbur. There is no sidewalk along the east side of Barbur from Hooker north to where the sidewalk south from Sheridan ends. Traffic controlled crossings of Barbur are provided at Hooker and Sheridan. Due to its topographic separation from Barbur, the only usable legal access from the subject property to the intersection of Barbur and Sheridan to the north is along Third Avenue. Because Third Avenue does not connect with Meade and the right of way has

been vacated between Meade and Hooker, the only legal access from the subject site to the controlled crossing of Barbur at Hooker is along Arthur east to S.W. Second Avenue, then south to Hooker and west to Barbur.

FIRST ASSIGNMENT OF ERROR

"In approving adjustments to the requirements of (1) a walkway through the superblock, and (2) a plaza having an area of at least five percent of the area of the superblock, the City improperly construed and violated the approval criteria, made insufficient findings, and made a decision not supported by substantial evidence in the whole record."

Because the subject property is zoned C2 and is part of a superblock, the city's superblock development regulations apply. PCC 33.91.010. The superblock development regulations require in part:

"Walkways, open spaces, and plazas may be located anywhere on the site the developer chooses. However, where the site runs continuously between two parallel streets which were formerly connected by a now vacated street, a walkway connecting the two parallel streets shall be provided as a substitution for the vacated streets. * * *"
(Hereafter the walkway requirement.) PCC 33.91.030(c).

"Within the superblock site, one or more plazas shall be provided. At least one of these plazas shall have an area of at least 5 percent of the total area of the superblock including vacated streets." (Hereafter the plaza requirement.) PCC 33.91.030(d).

Superblock development regulations, such as the walkway and plaza requirements of PCC 33.91.030, may be adjusted following the "Alternative Design Adjustment" provisions of

PCC 33.98.250 -.300.² Rather than require the applicant to provide an east-west walkway to replace the vacated Arthur connection between Barbur and Third Avenue, as required by PCC 33.91.030(c), the city approved an adjustment allowing the applicant to provide a walkway and stairway along the unimproved portion of Third Avenue to connect the subject property with Meade. In addition, the city approved an adjustment to the plaza requirement of PCC 33.91.030(d) to allow the applicant to provide a plaza of 2,580 square feet rather than 7,400 square feet.³

PCC 33.98.280 specifies approval criteria for alternative design adjustments. In Corbett I our remand was based in part on the city's failure to adopt findings addressing PCC 33.98.280(k), which requires that the city make the following determination:

"The benefit of granting the adjustment in support of a specific policy has been weighed against other relevant Comprehensive Plan policies and public concerns and has been found to be in the public interest."

On remand the city adopted additional findings

²Alternative Design Adjustments are one of seven different types of adjustments allowed under PCC 33.98. PCC 33.98 is the "Exceptions" chapter of the PCC and provides a number of mechanisms for relaxing or eliminating PCC requirements in specified circumstances. "Exceptions" include "Variances," "Revocable Permits," and "Adjustments."

³The city explains in its decision that five percent of the 148,000 square foot superblock results in a required plaza area of about 7,400 square feet.

addressing the requirement of PCC 33.98.280(k).⁴ We address the city's findings concerning the walkway adjustment and plaza adjustment separately below.

A. The Walkway Adjustment

The city's findings addressing the public interest in granting the adjustment, in view of relevant comprehensive plan policies, are as follows:

"A walkway along Third Avenue to Hooker Street is consistent with Comprehensive Plan Policy 6.2, which is to create and maintain traffic patterns that protect the livability of established residential neighborhoods while improving access and mobility within commercial and industrial areas. A Third Avenue walkway will connect Lair Hill Park with SW Arthur Street which leads to Downtown.

"The walkway adjustment is consistent with Comprehensive Plan Policy 6.9, to provide support for alternative forms of urban travel, such as bicycling and walking. The adjustment will provide a pleasant walkway for pedestrians to move from the commercial area surrounding the parking lot to and through the residential neighborhood to a safe crossing of Barbur Boulevard at the YMCA.

"The walkway adjustment is the only configuration for this site which is consistent with Comprehensive Plan Policy 11.15, which requires provision for safe pedestrian movement along streets, and encourages provision of additional pedestrian pathways, where needed for safe, direct access to schools, parks and other community facilities. Here, the evidence overwhelmingly

⁴The requirement of PCC 33.98.280(k) quoted in the text was formerly codified at PCC 33.98.120(d). The requirement was not substantively amended as part of the recodification. We cite to the recodified PCC section in this opinion.

established that a walkway to Barbur Boulevard would not be safe for pedestrians. The walkway adjustment allows a convenient, usable, safe walkway which provides access to and through the Superblock and also provides access from the commercial area to the residential area and ultimately to the YMCA via a signaled crosswalk. Eliminating a walkway along Arthur to Barbur Boulevard will reduce the risk that a pedestrian might be injured with the potential consequent liability to the applicant for such injuries. This is consistent with Policy 5.1 that the City should be responsive to the economic needs of Portland's businesses.

"The walkway adjustment is consistent with the adopted policy and intent of the City to develop the existing connections at Sheridan and Hooker Streets. The 'South Portland Circulation Study,' adopted by the City Council on November 30, 1978, considered the transportation and redevelopment needs in the South Portland area. The study included recommendations for pedestrian and bicycle links:

"'Marked pedestrian crossings of Barbur Boulevard are proposed at grade at Hooker, Whitaker (unsignalized), Sheridan, and Hamilton Streets. These would link the neighborhood to Duniway Park, the Medical Hill, and the Terwilliger Bikeway.' * * *

"No connection or crosswalk at Arthur and Barbur has ever been recommended or adopted by any official planning body. The connection along Third Avenue to Hooker Street is consistent with adopted City policy." (Emphases in original omitted.) Record 56-57.⁵

⁵The parties agree the record in this proceeding includes the record in Corbett I. In this opinion we cite the record compiled after our remand in Corbett I as "Record" and the record in Corbett I as "Corbett I Record." The Corbett I record includes a supplemental and second supplemental record.

We do not understand petitioners to argue that requiring a walkway across the subject property, with a stairway connecting to the existing sidewalk south from Sheridan near where it ends, would provide a safe crossing of Barbur at that location. Pedestrians would be required to proceed north to the controlled crossing at Sheridan, and barriers would be required to discourage illegal crossing of Barbur at the point where the sidewalk ends.

Petitioners' central complaint under the first assignment of error is that the findings quoted above assume that safe pedestrian access south from Meade to Hooker across the vacated Third Avenue right of way now exists. Petitioners concede that if such a connection existed, safe pedestrian crossing of Barbur would be facilitated by the approved walkway and stairway along Third Avenue to Meade. However, petitioners point out that although the Metro YMCA (the owner of the vacated Third Avenue right of way between Meade and Hooker) has expressed an interest in developing a walkway across its property to connect Meade and Hooker, no such arrangement has been made.

Petitioners contend connection of the subject property to Meade along Third Avenue, without a connection to Hooker, will simply encourage unsafe crossings of Barbur where Meade deadends. Therefore, petitioners argue, the plan policies cited by the city are not furthered by the adjustment allowing connection of the subject property to Meade via a

walkway and staircase.

The city contends that the findings read as a whole make it clear that the city was aware that the Third Avenue right of way between Meade and Arthur was vacated. However, the city points out the pathway from the subject property to Meade, via a stairway, eliminates the existing topographic barrier between Meade and the property. This makes a safe pathway connection from the property to Meade, and then on to Hooker, at least possible. The city also points out there are no physical barriers to access across the former Third Avenue right of way between Meade and Hooker.⁶

We conclude the city's findings are adequate to demonstrate compliance with PCC 33.98.280(k). The findings explain that requiring a walkway across the property to connect Arthur with the sidewalk along the east side of Barbur will encourage illegal and dangerous crossings of Barbur where that sidewalk ends. Although there is evidence in the record that it might be possible to effectively bar such illegal crossings with a barricade, the walkway at that location would provide no real improvement over the existing pedestrian access along Third Avenue to the crossing of Barbur at Sheridan.

We do not interpret the city's findings to be based on

⁶There is also evidence in the record that while there is no improved sidewalk on the east side of Barbur between Meade and Hooker, pedestrians currently travel along an unimproved pathway along the east side of Barbur from Meade to Hooker.

an assumption that access across the vacated Third Avenue right of way between Meade and Hooker now exists. We interpret the findings to state that the walkway and stairway from the subject property along Third Avenue to Meade, that are provided through the adjustment, are a necessary part of a pedestrian way that ultimately will make safe access to the Barbur crossing at Hooker possible.

Even if the immediate effect of connecting the subject property to Meade is to increase the likelihood of unsafe crossings of Barbur at Meade, there is nothing in the record to suggest such illegal crossings at Meade are any more likely or hazardous than illegal crossings that may be stimulated by the walkway across the subject property which petitioners seek. More importantly, the walkway and stairway connecting the property to Meade clearly increases the possibility that safe pedestrian access from the property to Hooker will be secured in the future. If such access were secured, petitioners do not appear to dispute that the cited plan policies would be furthered by the city's action.

The subassignment of error challenging the walkway adjustment is denied.

B. The Plaza Adjustment

The findings adopted by the city to demonstrate the plaza adjustment complies with PCC 33.98.280(k) are as follows:

"The Council finds that the adjustment granted regarding the size of the plaza is also consistent with all relevant goals and policies set forth in the Comprehensive Plan as follows:

"The plaza on this superblock is an amenity required as a result of the vacation of Arthur Street. Comprehensive Plan Policy 11.18^[7] allows consideration of the opportunities for bicycle ways, pedestrian ways, parkland or other public uses in connection with the street vacations. A plaza qualifies as a public use. Here, the adjustment does not eliminate the plaza, but simply reduces it in size consistent with the percentage ownership of the applicant of the entire Superblock. There is already an existing plaza on the other portion of the Superblock so that the square footage plaza requirements for this Superblock are met, and there is no reduction in the total amount of plaza in the entire Superblock." (Emphases in original omitted.) Record 60-61.

It is not clear to us why an adjustment to the plaza requirement was required by the city. A plaza with an area of more than 5 percent of the total area of the superblock, including vacated streets, already exists on the northern two-thirds of the superblock. As far as we can tell, the existing plaza on the northern portion of the superblock fully satisfies the requirement of PCC 33.91.030(d) that "[a]t least one of [the required] plazas have an area of at least 5 percent of the total area of the superblock

⁷Plan policy 11.18 provides as follows:

"When considering requests for street vacations, give consideration to the opportunities for bicycle ways, pedestrian ways, parkland or other public use."

including vacated streets."⁸ Therefore, although the city's requirement that the applicant provide an additional plaza is consistent with PCC 33.91.030(d) (which envisions the possibility of more than one plaza being required) we see nothing in the code language requiring that a plaza of any particular size be provided by the applicant in this case.

In these circumstances, we do not believe a plaza adjustment was required. Therefore, even if the city's findings do not adequately explain why an adjustment is justified, those findings provide no basis for reversal or remand.

Petitioners subassignment challenging the plaza adjustment is denied.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

"In approving a variance to the requirement of individual access to each vehicle space in a parking lot, the City improperly construed the approval criteria, made insufficient findings, and made a decision not supported by substantial evidence in the whole record."

PCC 33.82.030(2)(e) states the following design requirement for parking lots:

⁸Petitioner also contends the record does not contain substantial evidence to support the finding that the existing plaza on the northern two thirds of the superblock exceeds the 5 percent requirement of PCC 33.98.030(d). However, petitioner does not explain why the staff report supporting the city's decision in Corbett I is not sufficient to establish that the existing plaza includes 7,684 square feet. Corbett I Second Supplemental Record 41-42.

"Each parking space shall be accessible without moving another vehicle."

PCC 33.98.015(b)(1) specifies that parking requirements may be modified, if approved as a major variance.

The PCC distinguishes between major and minor variances. Approval of a major or minor variance requires the city to find "literal interpretation and enforcement of the regulations of this Title applicable to a property would result in practical difficulties or unnecessary hardships."

PCC 33.98.010. PCC 33.98.010(a) imposes general conditions applicable to both minor and major variances. In addition, PCC 33.98.010(b)(2) imposes the following special conditions for approval of a major variance:

"Major Variances. A major variance * * * may be granted when any of the following applicable conditions can be satisfied:

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

"B. The variance is required in order to allow enjoyment of the appellant [sic] of a property right possessed by a substantial portion of the owners of properties in the same vicinity, while resulting in the comparatively trivial detriment to the neighborhood."

The city approved a major variance to the parking space accessibility requirement of PCC 33.82.030(2)(e) to allow

valet/attendant parking.⁹ Petitioners contend the findings adopted by the city fail to show the variance is required to avoid "practical difficulties or unnecessary hardships" or to modify "exceptional or extraordinary circumstances or conditions that apply to the property," as required by PCC 33.98.010.¹⁰

As we noted earlier in this opinion, the city provides a number of ways by which PCC requirements may be modified. See n 2, supra. For variances, the city has retained the traditional and demanding standards quoted above. As we explained in Corbett I:

"Practical difficulties or unnecessary hardship is a demanding standard, requiring proof that the benefits of property ownership would be prevented by strict enforcement of zoning regulations. Erickson v. City of Portland, [9 Or App 256, 496 P2d 726 (1972)]. While no precise definition of the terms is available to guide decisionmakers,

⁹Actually, as petitioners point out, no variance is required to allow valet/attendant parking. The effect of the variance is to allow stacking of parked cars, thus increasing the number of cars that can be accommodated on the subject property.

¹⁰Petitioners also contend the city failed to demonstrate the variance complies with one of the general conditions applicable to all variances, "[the variance] will not be contrary to the public interest or to the intent and purpose of this Title and particularly to the zone involved." PCC 33.98.010(a)(1).

Petitioners may not raise issues that could have been raised in Corbett I, but were not. See Hearn v. Baker County, 89 Or App 282, 288 (1988); Mill Creek Glen Protection Assoc. v. Umatilla Co., 88 Or App 522, 746 P2d 728 (1987). Similarly, petitioners may not reassert issues that were raised in the prior appeal, and were rejected. We rejected petitioners' challenge to the city's determination that the variance satisfies PCC 33.98.010(a)(1) in Corbett I. 16 Or LUBA at 62. Therefore, we do not consider that challenge in this decision.

judicial precedent makes it clear that the difficulties must be more than an obstruction of the personal desires of the landowner. * * *"
Corbett I, 16 Or LUBA at 60-61.

See also Fay Wright Neighborhood Planning Council v. Salem, 3 Or LUBA 17, 20 (1981).

The "exceptional or extraordinary circumstances or conditions" standard of PCC 33.98.010(b)(2)(A) similarly is a demanding standard. Bowman Park v. City of Albany, 11 Or LUBA 197, 222 (1984); Patzkowski v. Klamath County, 8 Or LUBA 64, 70 (1983).

The city's findings point out that if there were no setbacks or other regulatory requirements imposed on the 49,000 square foot subject property, 197 unattended parking spaces would be possible.¹¹ As petitioners correctly note

¹¹Intervenor explains:

"The City found that there were a myriad of regulations in Chapter 33 which apply to BearTree's property: Superblock walkways, Superblock open spaces, Superblock plazas, access drives, parking space size, parking lot screening, parking lot landscaped buffering, internal landscaping for parking lots, and front yard requirements. All of the foregoing regulations reduce the usable space on this site, and the Code allows a variance from any or all of the foregoing regulations.

"Because this parking lot received so much opposition from the neighborhood, even though a parking lot is a permitted use for this site in this zone, the applicant chose not to request a variance from any of the above mentioned 'design' requirements, such as landscaping, buffering, open space, or setbacks. Rather, the applicant requested a variance of the one element which would increase the parking spaces to a number consistent with what could be accommodated if there were no topographical restraints, but which would not in any way reduce the design requirements and amenities required to make this an attractive lot which is fully screened and buffered from the surrounding properties. The variance applied for and granted has no

this is a largely meaningless observation because the site is heavily regulated by the city in ways that necessarily reduce the amount of space that may actually be used for parking. The fact that such regulations exist cannot provide a basis for a variance from those regulations under the variance standards quoted above. See Cope v. Cannon Beach, 15 Or LUBA 546, 550-551; Crumley v. Union County, 11 Or LUBA 267, 271 (1984). The city is required to explain why the particular characteristics of the property constitute "exceptional or extraordinary circumstances or conditions" resulting in practical difficulties or unnecessary hardship" such that a variance from compliance with the applicable regulations is warranted.

The city's findings explain as follows:

"The applicant has submitted a rough sketch, showing that 155 non-attended spaces could be made available on the site, and the applicant would still be able to provide the required five-foot perimeter planting, internal landscaping of 3,200 square feet, and a plaza of 2,580 square feet. However, the topography of of the site and the set-back and open space requirements reduce the number of available non-attended parking spaces to only 133." (Emphasis added.) Record 15.

Stripped to its essentials, the above finding simply

physical effect on the design or structure of the parking lot. The curbing, sidewalks, plaza, buffering, screening, open space, and the amount of paving all remain exactly the same. The only difference is that approximately 155 cars can be parked on the lot instead of 133 cars. * * *"
Intervenor-Respondent's Brief 15-16.

says compliance with some of the applicable regulations reduces the number of parking spaces otherwise possible on the site from 197 to 155. Further, the 155 parking spaces possible if some applicable regulations are imposed are further reduced to 133 parking spaces by the steep topography along the western and southern boundaries of the site, and by set-back and open space requirements. These additional regulatory and topographic constraints, therefore, eliminate 22 parking spaces. In other words, something less than 22 potential parking spaces are eliminated due to the steep topography that exists on a part of the site.¹²

Petitioners contend that the inability to increase the number of parking spaces from 133 to 155 does not constitute a "practical difficulty or unnecessary hardship." Petitioners also contend the topographic constraints that reduce the total number of parking spaces possible by less than 22 spaces are not "exceptional or extraordinary circumstances or conditions." We agree with petitioners. See Hutmacher v. City of Salem, 16 Or LUBA 187, 190 (1987); Patzkowsky v. Klamath Co., supra; Pierron v. Eugene, 8 Or LUBA 113, 126 (1983).

The record shows there is a shortage of parking in the

¹²The city's regulatory requirements are not properly considered as extraordinary circumstances. Cope v. Cannon Beach, supra; Crumly v. Union County, supra. The steep topography is the only extraordinary circumstance affecting the property identified by the city.

area. The record also shows that although property to the north is impacted by steep topography, the subject property is more significantly impacted by steep slopes than most other properties in the area. However, it is also clear that most of the loss of parking spaces is due to various regulatory requirements that reduce the amount of land which may be developed. Part of the steep slopes on the property are included in the setbacks and open space and could not be developed in any event. As note above, less than 22 spaces are lost due to the steep topography.

As we explained in Corbett I, there is no precise definition of what constitutes practical difficulties or unnecessary hardship. Neither are we aware of a clear, objective definition of what constitutes "exceptional or extraordinary circumstances or conditions." However, as we noted in Corbett I, these are demanding standards. These standards require more than a showing that parking lot capacity is reduced from 155 to 133 parking spaces, only in part because of the site's topographic constraints. The record in this appeal demonstrates the above-quoted variance standards are not met in this case as a matter of law.

The second assignment of error is sustained.

The portion of the city's decision granting design review approval and approving the walkway and plaza adjustments is affirmed. The portion of the city's decision granting a variance from the parking space access

requirements of PCC 33.82.030(e) is reversed.