

NATURE OF THE DECISION

Petitioners appeal a city decision that denies their request for an adjustment to allow a higher wall along the front of their residential lot than is allowed under the Portland City Code (PCC).

FACTS

Petitioners own a single-family residence at the corner of NE 102nd Avenue and NE Beech Street in the city’s residential R7 zone. NE 102nd Avenue is a busy major street:

“* * * NE 102nd Avenue is designated a Major City Traffic Street, a Major City Transit Street, a City Bikeway, a City Walkway and a Major Truck Street. This street has a right-of-way of 80 feet and is improved with 66 feet of paving, curbs, (and adjacent to the site) no parkways (planter strip), a 7-foot-wide sidewalk and no right-of-way between the back of the sidewalk and the private property line. There is a bus stop at the corner in front of the site. * * *” Record 3.

Petitioners’ corner lot has 150 feet of frontage along NE 102nd Avenue on the west side of the lot and 162 feet of frontage along NE Beech Street along the south side of the lot. Under the PCC, the front lot line of a corner lot is the lot line along the shortest road frontage, in this case the side of the lot along NE 102nd Avenue. Under the PCC, walls or fences may be constructed in the front, side and rear yard building setback areas. Walls may be up to eight feet tall in the side and rear yard setback areas, but may not exceed three and one-half feet in height in the front yard setback. The front yard setback in the R7 zone is 15 feet.

Petitioners constructed a wall within the 15-foot front yard setback along NE 102nd and within their side yard setback along NE Beech Street. The challenged decision describes the wall as follows:

“The [petitioners] have built a [six]-foot high, concrete/stucco wall along the entire [NE] 102nd Avenue frontage with one pedestrian opening in the middle. The fence continues around the corner and for the first 48 feet along Beech Street.” Record 3.

1 Petitioners' fence is taller than is allowed under the PCC. For petitioners' wall to conform to
2 PCC requirements in its present location, the six-foot wall along NE 102nd Avenue would
3 have to be lowered to three and one-half feet and the first 15 feet of the wall back from NE
4 102nd Avenue along NE Beech Street would have to be lowered to three and one-half feet.
5 Rather than lower these parts of the six-foot tall fence, petitioners seek an adjustment to
6 allow the fence to remain at its present height and in its present location.¹

7 The disputed wall has both positive and negative effects. The challenged decision
8 describes petitioners' description of the positive effects of the wall as follows:

9 "The [petitioners] state they enclosed their yard because NE 102nd Avenue is a
10 busy street with heavy traffic and noise (both vehicular and pedestrian) and
11 that trash from the street and bus stop were accumulating in their yard every
12 day. This has diminished with the wall. They also feel that before the fence
13 was installed, their privacy was negatively impacted by people and motorists
14 passing by, and by people waiting for the bus, looking into their house[,]
15 especially at night.

16 "[The petitioners] noted that a car lost control and landed in their front yard,
17 that there are 66 sex offenders in their zip code area and drug paraphernalia
18 and human feces have been found in their front yard. In their application,
19 they noted that the wall has increased their privacy, lessened street noise,
20 protects their children and pets and stopped the accumulation of trash. They
21 also noted the wall does not inhibit police surveillance as there is a gate on the
22 west and only a partial fence on the south side and these allow for emergency
23 access to the site." Record 3-4.

¹ An adjustment is similar to a zoning variance. PCC 33.805.010 describes the purpose of adjustments as follows:

"The regulations of the zoning code are designed to implement the goals and policies of the Comprehensive Plan. These regulations apply city-wide, but because of the city's diversity, some sites are difficult to develop in compliance with the regulations. The adjustment review process provides a mechanism by which the regulations in the zoning code may be modified if the proposed development continues to meet the intended purpose of those regulations. Adjustments may also be used when strict application of the zoning code's regulations would preclude all use of a site. Adjustment reviews provide flexibility for unusual situations and allow for alternative ways to meet the purposes of the code, while allowing the zoning code to continue to provide certainty and rapid processing for land use applications."

1 As discussed more fully below, a number of negative effects of the fence were also
2 identified during the local proceedings. Based on these negative effects, the city denied
3 petitioners’ application, and petitioners appealed to LUBA.²

4 **MOTION TO ALLOW REPLY BRIEF**

5 Petitioners move for permission to file a reply brief. The city argues that the reply
6 brief that is attached to petitioners’ motion is not limited to responding to new issues in the
7 city’s response brief, as OAR 661-010-0039 requires. Instead, the city argues that petitioners
8 improperly attempt to raise an issue that was neither raised during the local proceedings nor
9 raised in the petition for review and attempt to embellish arguments in the petition for
10 review.³ We agree with the city, and petitioners’ motion to allow a reply brief is denied.

11 **ASSIGNMENT OF ERROR**

12 The criteria that must be met for the city to grant an adjustment are set out at PCC
13 33.805.040. The criteria that are relevant in this appeal are set out below:

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

16 “B. If in a residential zone, the proposal will not significantly detract from
17 the livability or appearance of the residential area * * *; and

18 “* * * * *

19 “E. Any impacts resulting from the adjustment are mitigated to the extent
20 practical[.]

21 With regard to criterion A, the city found that the requested adjustment would not
22 equally or better meet the purpose of the wall height limitation. The city’s findings explain
23 that a six-foot fence that is set back 15 feet from the front lot line or a three and one-half foot

² Petitioners’ application was initially denied by the city Bureau of Development Services. Petitioners appealed that decision to the city Adjustment Committee, which also denied the application.

³ For the first time in the reply brief, petitioners question whether their lot fronts on NE 102nd Avenue rather than on NE Beech Street.

1 fence in the existing location within the 15-foot front yard setback would also provide
2 petitioners privacy “without an adjustment or negative impacts to the neighborhood.”

3 Record 5. The city’s findings under criterion A go on to explain:

4 “While the wall provides positive benefits for the residents of the site, the
5 subject wall, as built, creates negative * * * impacts for the general
6 community. The height and material of the wall creates a solid street wall that
7 inhibits police and community surveillance into and out of the site. The wall
8 also isolates the house away from the neighborhood, decreasing the sense of
9 community. Emergency access is now limited to the southeast portion of the
10 lot from the driveway area. This could hinder emergency access. The
11 neighborhood association, a nearby property owner and Portland
12 Transportation have stated that the wall, as built, hinders the safe movement
13 of pedestrians and vehicles.

14 “As seen from the two streets, the front yard of this site is not open. Solid,
15 [six]-foot-high walls are not typically found in front yards in this residential
16 area. While some homes in the general area have a combination of retaining
17 wall with fences above and others have mature hedges, they do not create the
18 street wall effect that this solid wall does. With the wall located so close to
19 the sidewalk along [NE] 102nd Avenue, there is no room to plant typical
20 ground cover or visually pleasing vegetation associated with a residential
21 building.” Record 5.

22 For reasons similar to those set out above regarding criterion A, the city found that
23 petitioners failed to demonstrate that granting the adjustment would be consistent with
24 livability criterion B. With regard to mitigation criterion E, the city’s findings explain:

25 “It has been determined there are negative impacts as a result of the subject
26 wall. *Since the wall is adjacent to the front property line and the public*
27 *sidewalk, there is no means of mitigating for its height so close to the street.*
28 *The applicants’ mitigation measure to plant shrubs in front of the fence*
29 *cannot be done as that area is within the public right-of-way, not on private*
30 *property. Therefore, this criterion cannot be met.” Record 6 (emphasis*
31 *added).4*

32 Reduced to essentials, the city’s decision expresses three reasons for denying the
33 requested adjustment. First, the wall obstructs vehicular and pedestrian vision and results in

⁴ Petitioners contend the fence is set back two feet from the sidewalk which runs along the front lot line. Petitioners argue the area between the sidewalk along NE 102nd Avenue and the wall is their property.

1 a dangerous intersection at NE 102nd Avenue and NE Beech Street. Second, the wall is too
2 close to the sidewalk to plant vegetation that might screen and soften the appearance of the
3 wall, making mitigation impossible. Third, the six-foot wall along NE 102nd Avenue, with
4 only a single break for pedestrian access, presents a visual and physical barrier that inhibits
5 community surveillance and emergency access.

6 In their petition for review, petitioners first question whether reducing the six-foot
7 fence to three and one-half feet in the present location or relocating the 6-foot fence wall 15
8 feet back from NE 102nd Avenue would have a different impact on the neighborhood than the
9 existing wall. Petitioners' disagreement with the city on this point is essentially a
10 disagreement with the city over the wisdom and efficacy of the city's wall and fence height
11 restriction. That disagreement provides no sufficient basis for reversal or remand.

12 Petitioners next argue the city erred by failing to consider the changes they are
13 willing to make in the wall to mitigate its impacts on the neighborhood.

14 "In other words, respondent's determination regards the fence only 'as is'—
15 not as it could be—and, therefore, is without substantial evidence to support
16 it." Petition for Review 4.

17 The city responds that petitioners were invited to amend the application to respond to
18 the adjustment committee's concerns and declined to do so. Record 108. Because
19 petitioners declined to submit an amended application, respondent contends that petitioners
20 cannot now complain that their adjustment application was reviewed by the city as submitted
21 and denied. We agree with the city. Any one of the three cited concerns about the wall is
22 independently sufficient to require that we sustain the city's decision.⁵

⁵ As we note below, it may be that the city's second reason for denying the application is based on an incorrect factual premise. However, since it is only one of three reasons the city adopted for denying the application, even if the city is wrong about whether petitioners own the area between the wall and the sidewalk, that error would not provide a sufficient basis for remanding the city's decision.

1 While our agreement with the city requires that we affirm the city’s decision, we
2 believe some additional comment on the three reasons that the city gave for denying the
3 application is warranted.

4 First, the city’s concerns regarding the safety hazard the six-foot tall wall creates at
5 the intersection at NE 102nd Avenue and NE Beech Street apparently can be corrected by
6 reducing the height of the wall in the vicinity of the intersection. Moreover, petitioners
7 apparently are willing to do so. Petitioners were under the mistaken impression that the city
8 would review their application with an understanding that the wall would be modified to
9 eliminate safety concerns, even though petitioners declined the city’s offer to allow
10 petitioners additional time to submit an amended application. Despite that mistake on
11 petitioners’ part, we understand petitioners to be willing to make any changes that are
12 necessary to eliminate this reason for denial.

13 Second, the city’s decision may have rested in part on an erroneous understanding
14 that the area between the wall and the sidewalk along NE 102nd Avenue is part of the NE
15 102nd Avenue right-of-way. If there is room to plant screening vegetation along NE 102nd
16 Avenue, such a vegetative screen would potentially eliminate the second of the city’s three
17 reasons for denying the application. The city found that petitioners do not own the area
18 between the wall and sidewalk and for that reason that area could not be used by petitioners
19 to plant screening vegetation. In its brief, the city cites a statement in a transcript that is
20 attached to its brief to establish that the wall is built on the property line, which if true would
21 leave no room to plant screening vegetation. Respondent’s Brief 5 n 1. However, the
22 statement in the attached transcript supports the opposite conclusion, *i.e.*, that the area
23 between the sidewalk and the wall is *not* included in the NE 102nd Avenue right of way. In
24 response to a question from an adjustment committee member about where the front property
25 line is located, the planning staff person stated “I believe its at the edge of the sidewalk, the

1 interior of the sidewalk is [the front property line].”⁶ Respondent’s Brief App B-5. If the
2 edge of the sidewalk abuts the front property line, which appears to be the case, the record
3 clearly shows that the fence is built approximately two feet back from the edge of the
4 sidewalk and the front property line. Record 63, 64, 72, 74. The city’s finding that the wall
5 is located at the front property line is not supported by any evidence in the record that we can
6 find. Contrary to the city’s finding, it would appear that there is some room between the
7 sidewalk and the wall to plant some vegetative screening. If so, that might eliminate the
8 city’s second cited reason for denying the application.⁷

9 The city’s third reason for denying the application is more problematic. There is only
10 one opening in the wall along NE 102nd Avenue. Record 75. Apparently the city believes
11 that single opening is insufficient to prevent the wall from creating “a solid street wall that
12 inhibits police and community surveillance into and out of the site” and isolating the house
13 from the rest of the community. Record 5. Reducing the height of the wall at the
14 intersection of NE 102nd Avenue and NE Beech Street and planting vegetation along NE
15 102nd Avenue between the sidewalk and the wall might or might not eliminate this third
16 concern. If not, it is not clear whether additional modifications of the wall along NE 102nd
17 Avenue (short of reducing it to three and one-half feet for its entire length) might eliminate
18 the city’s third concern. This lack of certainty might have been one of the reasons that
19 petitioners declined to return with a modified application.

⁶ That statement is consistent with other findings in the decision, quoted earlier in this opinion, that describe the NE 102nd Avenue right-of-way as an 80-foot right of way improved with 66 feet of paving, curbs and seven foot sidewalks. If, as appears to be the case, there are seven-foot sidewalks on both sides of 102nd Avenue and there is a 66-foot paved roadway, the roadway and sidewalks completely occupy the 80-foot right-of-way, and the edge of the sidewalk along the front of petitioners’ property would be coterminous with their front property line.

⁷ We emphasize that we do not decide here that the area between the wall and the sidewalk is not public right-of-way or that it belongs to petitioners. We only decide that the statement that the city cites to support its finding that petitioners’ wall is located at the front lot line contradicts that finding, and we are unable to locate any evidence in the record that supports the city’s finding.

1 Assuming that the city is wrong about who owns the land between the wall and the
2 sidewalk along NE 102nd Avenue and petitioners can plant vegetative screening along the
3 wall, and assuming petitioners amend the application to propose that the height of the wall at
4 the intersection of NE 102nd Avenue and NE Beech be reduced to eliminate the hazard that
5 has been created by the six-foot wall, it may be that the city would approve the application.
6 If those measures are not sufficient to eliminate all of the city's concerns, it may be that
7 additional measures short of reducing the wall to three and one-half feet for its entire length
8 in the front yard setback area might result in approval of an amended application. However,
9 whether an amended adjustment application will be approved cannot be known unless
10 petitioners submit an amended application. Petitioners' desire for more certainty from the
11 city regarding their prospects for approval of an amended adjustment request before they
12 incur the additional expense of preparing that amended application is understandable.
13 However, the city's reluctance to give such a guarantee is equally understandable. The city
14 simply cannot provide a binding guarantee in advance that it will approve an amended
15 application.⁸

16 The city's decision is affirmed.

⁸ Presumably city planning staff might be able to give petitioners at least an educated guess about whether a specific amended application would likely address the city's concerns and allow the amended application to be approved.