

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 EDMUND JORDAN, CHARLES CRAIG JR.,
5 JONATHAN C. SHIELDS, M. CRISELDA SHIELDS,
6 ISAIS HENRIQUEZ, SCOTT McKAY, CHERYL DOOLEY,
7 VELDA RODRIGUEZ, JAVIER RODRIGUEZ,
8 JEFFERY L. WALTERS, KIMBERLY WALTERS,
9 PATRICIA HALVORSON, MARY MOYER,
10 RAYNOLD FOSTER, LAURA FOSTER, ALAN ALLEN,
11 DEBRA ALLEN, DONALD J. SADLER, NORMA L. FORD,
12 BARRY FORD, PATRICIA H. KNAPP, MELODY CURRY,
13 CANDI BUTTERFIELD, JOANNE K. ELY, CONNIE SOUTH,
14 LYNN SOUTH, DAVID L. WILSON, LEROY D. GRIFFITH
15 and DOUGLAS MITCHELL,
16 *Petitioners,*

17
18 vs.

19
20 CITY OF PORTLAND,
21 *Respondent.*

22
23 LUBA No. 2003-024

24
25 FINAL OPINION
26 AND ORDER

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28 Appeal from City of Portland.

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30 Edmund Jordan, Portland, filed the petition for review and argued on his own behalf.

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32 Linly Rees, Deputy City Attorney, Portland, filed the response brief and argued on
33 behalf of respondent.

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35 BASSHAM, Board Chair; BRIGGS, Board Member; HOLSTUN, Board Member,
36 participated in the decision.

37
38 AFFIRMED

05/28/2003

39
40 You are entitled to judicial review of this Order. Judicial review is governed by the
41 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal city approval of a final plat for a nine-lot subdivision.

FACTS

The subject property is a 38,224-square foot strip of land adjacent to Interstate 205, with an access strip to SE 97th Avenue. On June 18, 1998, the applicant received tentative subdivision plat approval for a nine-lot subdivision, to allow development of nine attached dwellings. The approved tentative plat proposed a private street and sidewalk within Tract A, which connects the subdivision to SE 97th Avenue. The tentative plat approval was processed as a “Type III” decision with a hearing before the city land use hearings officer and an opportunity for appeal to the city council. No appeal of the tentative plat decision was filed, and it became final and effective on July 3, 1998.

One of the conditions of tentative plat approval was that the applicant receive design review approval for the attached housing. The applicant subsequently applied for and obtained design review approval. That decision was appealed to LUBA, but was ultimately dismissed for failure to file a timely petition for review. *Jordan v. City of Portland*, __ Or LUBA __ (LUBA No. 2000-004, March 15, 2000).

On September 22, 2000, the applicant submitted the final plat for city review. The city reviewed the plat through a “Type I” process, which results in a final decision by a staff planner, after providing notice and an opportunity for comment. The city provided notice of the application to interested persons. On January 27, 2003, a staff planner approved the final plat. This appeal followed.

1 **FIRST, THIRD AND FOURTH ASSIGNMENTS OF ERROR**

2 Under these assignments of error, petitioner argues that the city erred in approving
3 the final subdivision plat without resolving issues regarding an alleged encroachment
4 between lot 4 of the subdivision and an adjacent lot east of the subdivision (lot 29).¹

5 Petitioner cites to evidence that a fence located partially on lot 29 extends 1 foot, 4
6 inches into lot 4 of the proposed subdivision. Record 94. According to petitioner, the
7 encroachment is significant because the setback in the applicable zone is five feet, which
8 means that the proposed attached dwelling on lot 4 will be only three and one-half feet from
9 the encroaching fence.

10 The city’s final plat approval addresses that contention as follows:

11 “Setbacks are measured from property lines, not existing structures that might
12 encroach on a site. However, all existing encroachments at this site have been
13 resolved through the following means:

14 “a. One encroachment was resolved through a quitclaim [deed] * * *.

15 “b. One encroachment was resolved through an agreement with the
16 abutting property owners * * *.” Record 6.

17 Petitioner argues that the above-quoted resolution of the encroachment issue does not
18 address the encroachment from lot 29 onto lot 4. According to petitioner, neither the
19 quitclaim deed nor the agreement cited in the findings involve lot 29.

20 The city responds that under ORS 92.040(1) and Portland City Code (PCC)
21 34.20.070(A) final plat review is limited to two issues (1) whether the final plat conforms to
22 the tentative plat and (2) whether the final plat satisfies any conditions of approval imposed
23 by the tentative plat approval.² According to the city, the tentative plat decision imposed

¹ The only petitioner to file a petition for review in the present appeal is petitioner Jordan. Accordingly, in discussing the assignments of error our references to “petitioner” are to petitioner Jordan.

² ORS 92.040(1) provides, in relevant part:

1 eight conditions of approval, none of which requires the applicant to correct encroachments.
2 The city argues that petitioner fails to cite any code, statute or condition of tentative plat
3 approval that requires the city to consider or resolve questions regarding encroachments prior
4 to final plat approval. The closest petitioner comes is to cite to an unsigned document on city
5 planning department stationery stating that “[a]ll encroachments shall be resolved prior to
6 submission of the final plat.” Record 111. However, the city points out, that document also
7 states that “[t]he following are not conditions of this approval, but have been noted as
8 requirements that will be imposed by City bureaus at the time building permits are issued or
9 final plat is approved.” *Id.* According to the city, while the document at Record 111
10 indicates the city’s *expectation* that the applicant will attempt to resolve any existing
11 encroachments prior to final plat approval, the document itself states that that expectation is
12 not a *requirement* for final plat approval. In addition, the city argues that the above-quoted
13 finding adequately addresses the issue raised regarding the effect of the alleged
14 encroachment on the setback for lot 4, in noting that setbacks are measured from the property
15 line, not encroaching structures.

16 We agree with the city that petitioner fails to cite any code, statute or condition of
17 approval that requires the city to address or resolve issues regarding encroachments before
18 granting final plat approval. Absent such a requirement, the city’s failure to address or
19 resolve encroachments before granting final plat approval does not provide a basis for

“* * * Approval of the tentative plan shall not constitute final acceptance of the plat of the proposed subdivision or partition for recording; however, approval by a city or county of such tentative plan shall be binding upon the city or county for the purposes of the preparation of the subdivision or partition plat, and the city or county may require only such changes in the subdivision or partition plat as are necessary for compliance with the terms of its approval of the tentative plan for the proposed subdivision or partition.”

PCC 34.20.070(A) provides:

“The Subdivision or major partition plat and other data shall be submitted to the Bureau of Planning. Upon receipt the Planning Director shall determine whether it conforms to the approved tentative plan and with these regulations.”

1 reversal or remand. Whatever the document at Record 111 purports to say regarding
2 encroachments, it does not require either the city or the applicant to resolve issues regarding
3 encroachments as a condition precedent to final plat approval. To the extent issues regarding
4 setbacks must be addressed in the city’s final plat decision, we agree with the city that the
5 above-quoted finding adequately addresses petitioner’s concern regarding the impact of any
6 existing encroachments on setbacks. Petitioner does not explain why the city’s finding that
7 setbacks are measured from the property line rather than from an encroaching structure is
8 error, and we do not see that it is.

9 The first, third and fourth assignments of error are denied.

10 **SECOND ASSIGNMENT OF ERROR**

11 The city’s 1998 tentative plat approval required that the final plat provide a four-foot
12 wide sidewalk along the proposed private street. Record 196. However, the site plans
13 submitted and approved during the city’s 1999 design review decision depicted a five-foot
14 wide sidewalk. Record 172. The design review decision required that, as part of any
15 building permit application submittal, the site plans required for building permit approval
16 must reflect the “information and design approved” by the design commission, and further
17 that “[n]o field changes allowed.” Record 167. During the final plat review, the city
18 determined that the tentative plat condition of approval to require four-foot sidewalks
19 remains in effect and will be met at the time of building permit review. Record 4.

20 Petitioner argues that the city erred in allowing a four-foot wide sidewalk, contrary to
21 the design approved by the design review decision, and contrary to the design review
22 decision’s injunction against “field changes.” In order to approve a four-foot wide sidewalk,
23 petitioner argues, the city must undertake another review to modify the design commission
24 decision.

25 The city responds, and we agree, that there is no inconsistency between the design
26 review decision and the final plat approval regarding sidewalk width. Although it is not clear

1 to us why the site plan submitted to the design commission depicted a five-foot sidewalk,
2 there is no dispute that the design review decision did not address sidewalk width or approve
3 any particular sidewalk design. Whatever the design commission intended by prohibiting
4 “field changes” during building permit review, we do not see that it intended to modify the
5 tentative plat approval of condition to substitute a five-foot wide sidewalk, or that it could
6 modify that condition under the applicable design review criteria. The final plat decision is
7 consistent with the tentative plat condition of approval, and petitioner has not demonstrated
8 that the city erred in allowing a four-foot wide sidewalk or that a further review process is
9 necessary to reconcile the two decisions.

10 The second assignment of error is denied.

11 **FIFTH ASSIGNMENT OF ERROR**

12 Petitioner contends that the city erred in not requiring approval by the Portland
13 Department of Transportation (PDOT) of “street ingress engineered drawings” prior to
14 approving the final plat. Petition for Review 14.

15 Petitioner does not explain what condition of approval or other requirement makes
16 PDOT approval of “street ingress engineered drawings” a prerequisite to final plat approval.
17 Absent such a requirement, this assignment of error provides no basis for reversal or remand.

18 The fifth assignment of error is denied.

19 **SIXTH ASSIGNMENT OF ERROR**

20 Petitioner contends that the city erred in approving the 1998 tentative plat application,
21 because that approval assumed that the subject property had 36 feet of frontage on SE 97th
22 Avenue, which the tentative plat approval found adequate to accommodate the proposed
23 private street and sidewalk.³ However, petitioner argues, the subject property no longer has

³ The 1998 tentative plat approval states, in relevant part:

1 36 feet of frontage on SE 97th Avenue, after a quitclaim deed between the applicant and an
2 adjoining landowner reduced the subject property's frontage.

3 The city explains that the original frontage was 36 feet, but that a quitclaim deed
4 reduced the frontage to 35.53 feet. The city argues that that frontage is adequate to
5 accommodate the "two six-inch monument strips," "two six-inch curbs," "one four-foot
6 sidewalk," "a twenty-foot roadway," and "a nine-foot parking space, for a total of 35 feet," as
7 required by the tentative plat approval. Response Brief 13, n 5. The city argues that, to the
8 extent petitioner alleges an inadequacy in the 1998 tentative plat decision, such a challenge
9 may not be advanced in the present appeal of the final plat decision. *Bauer v. City of*
10 *Portland*, 38 Or LUBA 715, 719 n 5 (2000). To the extent the width of the frontage may be
11 challenged in the present appeal, the city argues, the city's findings and the evidence in the
12 record demonstrate that a frontage of 35.53 feet is adequate to accommodate the required
13 private roadway, sidewalk and other right-of-way improvements.

14 We agree with the city that petitioner has not demonstrated error in the city's final
15 plat approval. Contrary to petitioner's apparent understanding of the 1998 tentative plat
16 approval, it did not state that a 36-foot width was necessary to accommodate the proposed
17 private street and sidewalk. Although it is not entirely clear, petitioner may be arguing that a
18 35.53-foot frontage is inadequate to accommodate the private street and a *five*-foot wide
19 sidewalk. If that is petitioner's argument, it is disposed of by our ruling, above, that the city
20 did not err in approving a four-foot wide sidewalk.

21 The sixth assignment of error is denied.

"The site's 36-foot-wide frontage on SE 97th Avenue allows for construction of the proposed private roadway and sidewalk serving the interior of the project. The proposed sidewalk will be located in the Tract A and extend from SE 97th Avenue * * *." Record 190.

1 **SEVENTH ASSIGNMENT OF ERROR**

2 Petitioner contends that the quitclaim deed filed by the applicant was intended to
3 resolve a fence encroachment along the proposed private street and sidewalk on Tract A.
4 However, petitioner argues that the quitclaim deed was insufficient to make the proposed
5 sidewalk comply with city pedestrian design guidelines, which require that fences or other
6 encroachments along sidewalks must be set back at least one foot from the sidewalk.

7 The city responds that no party raised the issue of compliance with any pedestrian
8 design guidelines before the decision maker below and that, in any case, pedestrian design
9 guidelines are not applicable criteria in approving a final subdivision plat.

10 We agree with both points. Petitioner does not cite to any portion of the record
11 demonstrating where an issue of compliance with pedestrian design guidelines was raised
12 below. Nor does petitioner explain why such design guidelines are approval criteria
13 applicable to the challenged final plat decision.

14 The seventh assignment of error is denied.

15 **EIGHTH ASSIGNMENT OF ERROR**

16 Petitioner argues that the city design commission committed several errors in
17 granting design review approval for the proposed attached dwellings. The city responds, and
18 we agree, that petitioner may not challenge errors in the design review decision, in an appeal
19 of the city’s final subdivision plat decision. This assignment of error is denied.

20 **NINTH ASSIGNMENT OF ERROR**

21 Petitioner contends that city staff committed procedural error in advising petitioner
22 and others that written comments regarding the proposed tentative subdivision plat would
23 suffice and there was no need to appear and offer testimony at the hearing before the
24 hearings officer on the tentative plat approval. The city responds that, even assuming the
25 above actions constitute error, petitioner may not challenge procedural errors in the *tentative*

- 1 plat decision, in appealing the city's *final* plat decision. We agree. This assignment of error
- 2 is denied.
- 3 The city's decision is affirmed.