BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KATHLEEN O'BRIEN,
Petitioner,

and

JAMIE OWENS,
Intervenor-Petitioner,

vs.

CITY OF PORTLAND,
Respondent,

and

RAPAPORT DEVELOPMENT COMPANY,
Intervenor-Respondent.

LUBA No. 2006-006

FINAL OPINION
AND ORDER

Appeal from City of Portland.

John T. Wittrock, Portland, filed a joint petition for review and argued on behalf of petitioner. With him on the brief were Jamie Owens and Wittrock & O'Brien, PC.

Jamie Owens, Portland, filed a joint petition for review.

Linly F. Rees, Deputy City Attorney, Portland, filed a response brief and argued on behalf or respondent.

Roger A. Alfred, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Perkins Coie, LLP.

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

AFFIRMED 06/20/2006

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 city decision that grants an adjustment to allow a mixed commercial and residential development to be constructed without an on-site loading area, which would otherwise be required under the city's zoning ordinance.[1]

FACTS

The 15,000-square foot subject property is made up of three lots, which are located south of SE Division Street at the southeast corner of the intersection of SE Division Street and SE 26th Avenue. The challenged decision includes the following general description of the surrounding area:

> "Surrounding uses and developments include a mixture of uses and building types. Immediately south and east of the site are single-dwelling residences (houses). Other uses at the same intersection of SE 26th Avenue and Division include an auto-oriented commercial building with a convenience store, a single-story commercial building with a vehicle repair use, and a two-story apartment building. Within approximately a 2-block perimeter of the site, the area is characterized predominantly by residential structures (houses and apartments), with non-residential uses clustered nearby along Division Street and at the intersection of SE 26th avenue and Clinton Street [to the south]. Record 4.

In 1995 the comprehensive plan map designation for the subject property was changed from Residential to Urban Commercial and the zoning map designation was changed from R1 and R2.5 to Mixed Commercial/Residential (CM). The ordinance that

[1] PCC 33.805.010 describes the purpose that is served by adjustments:

> "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."

rezoned the property in 1995 included a condition of approval that petitioner and intervenor-petitioner (petitioners) believe has never been satisfied.[2] When the property was rezoned in 1995, it was improved with a large historic house and accessory buildings and was employed for both residential and commercial uses. The historic house has been relocated and the remaining accessory structures have been demolished.

Intervenor proposes to construct an approximately 49,000-square foot, four-story mixed residential and commercial building on the property. That building would generally be located on the western half of the property, along 26th Avenue with lesser frontage along SE Division. A portion of the ground floor of the four-story building, approximately 4,240 square feet, would be developed for commercial use. The remainder of the building would be developed into 27 residential units. The portion of the property not occupied by the building would be improved with 25 parking spaces. Record 29. Those parking spaces would be dedicated for use by the residential units and not be available to the general public and would not be available for use by the commercial part of the development.

Although intervenor proposes to provide 25 off-street parking spaces, the PCC does not require any *parking* spaces in the CM zone, either for commercial or residential uses. PCC 33.266, Table 266-1. In some circumstances, the PCC does require off-street *loading* spaces. Generally, no off-street loadings spaces are required for residential uses of fewer than 50 units. PCC 33.266.310(C)(1)(a). In the present case, but for the 4,240 square feet of commercial space, no off-street loading spaces would be required. Even though the proposal is predominantly residential, where development incorporates any nonresidential development, one off-street loading space is required for buildings of more than 20,000

[2] That 1995 rezoning condition of approval provided:

> "The applicants must apply for a building permit for the purpose of calculating all residential and commercial area on the site. An equal or greater amount of square footage of residential development is required for each square foot of commercial development." Record 142.

square feet and less than 50,000 square feet. PCC 33.266.310(C)(2)(a). The challenged decision grants an adjustment to allow the proposed mixed use development to be built without this required off-street parking space.[3]

During the city's proceedings, opponents argued that the condition attached to the 1995 rezoning had not been satisfied with the result that the property is actually zoned R1 and R2, as it had been before 1995.[4] *See* n 2. In a November 3, 2005 e-mail message, the city planner who was handling the adjustment application advised the opponents that any questions about the 1995 rezoning condition or the property's zoning should be referred to the code services section of the Bureau of Development Services (BDS). Record 259. On December 12, 2005, petitioner O'Brien requested an "administrative determination" that the 1995 rezoning condition had not been satisfied. Record 359. In a December 13, 2005 e-mail message, a senior planner with "Compliance Services" at BDS acknowledged receipt of her "complaint regarding the Condition of Approval" for the 1995 rezoning and advised her that a building permit application had been submitted in 1996. Record 358, 362. The planner concluded "[t]he alleged complaint is unfounded and no violation of the [1995 rezoning] Condition of Approval * * * exists. Closing case as unfounded." *Id*.

On December 27, 2005, the Adjustment Committee granted the requested off-street loading area adjustment. Petitioners challenge that decision in this appeal. Petitioners did not file a local appeal of the planner's December 13, 2005 rejection of their complaint and did not separately appeal that decision to LUBA.

---

[3] Intervenor originally sought three adjustments, a building height adjustment, a building setback adjustment and an adjustment for the off-street loading requirement. Intervenor subsequently withdrew the request for the building height and setback adjustments.

[4] The city's official zoning map in fact shows the subject property is zoned CM. Record 22. Petitioners' theory apparently is that the alleged failure of subsequent property owners to comply with a condition of the 1995 rezoning has the legal effect of causing the zoning of the subject property to revert to its former R1 and R2 zoning. This issue is the subject of the first and second assignments of error.

PENDING MOTIONS

On April 29, 2006 petitioners filed three motions: (1) a motion to strike intervenor-respondent's brief, (2) a motion to deny intervenor-respondent status as an intervenor, and (3) a motion to declare the appealed decision void and moot. In a May 8, 2006 letter to the parties, we advised the parties that respondent and intervenor-respondent would be allowed until May 12, 2006 to file a written response to petitioners' motions and that all parties would be allowed to devote a portion of their oral argument on May 18, 2006 to the motions. We now turn to those motions.

A. Motion to Strike

Petitioners move to strike intervenor-respondent's brief because it was filed one day late. Intervenor-respondent's brief was filed on April 26, 2006, 21 days before oral argument. The brief is a little over five pages long and essentially supplements the city's 24-page brief. Petitioners do not allege that the late filing prejudiced their substantial rights. Given the circumstances presented in this case, we do not see that petitioners' substantial rights were affected by the late filing. The motion to strike is denied. *See Willhoft v. City of Gold Beach*, 39 Or LUBA 743, 744 (2000) (motion to strike denied where intervenor-respondent's brief was filed four days late, but 24 days before oral argument).

B. Motion to Deny Status as Intervenor-Respondent

Under ORS 197.830(7)(b) the "applicant" and persons who "appeared" during the local proceedings have standing to intervene in a LUBA appeal.[5] On January 24, 2006,

[5] As relevant, ORS 197.830(7)(b) provides:

> "[P]ersons who may intervene in and be made a party to the review proceedings, as set forth in subsection (1) of this section, are:
>
> "(A) The applicant who initiated the action before the local government, special district or state agency; or
>
> "(B) Persons who appeared before the local government, special district or state agency, orally or in writing."

Rapaport Development filed a motion to intervene on the side of respondent. In that motion, Rapaport Development alleged that it "was the applicant" and also that it "appeared before the city in support of the application." Motion to Intervene 1. No party opposed that motion and in a March 14, 2006 Order, we allowed the motion to intervene.

It is undisputed that Rapaport Development Company is the owner of the subject property. It is also undisputed that Holst Architecture was one of the owner's agents during the local proceedings and filed the application on behalf of Rapaport Development Company.[6] Petitioners' legal theory for why the motion to intervene should be denied is that "'Rapaport Develelopment' is neither the applicant of record ('Holst Architecture * * *'), nor the property owner ('Rapaport Development Co, a Washington Company,' * * *)." Motions to Strike Brief, Deny Status and Declare Moot 2.

As we have already noted, there is no dispute that Rapaport Development Company is the owner of the subject property and therefore has standing to intervene. In addition, petitioners do not contend that Rapaport Development Company failed to appear below, and the record shows that it did. Record 374. Intevenor's error in identifying itself as Rapaport Development" instead of "Rapaport Development *Company*" might justify a motion to correct the caption or a motion to require that intervenor submit an amended motion to intervene to accurately identify itself by adding the word "Company" following "Rapaport Development," but it does not justify denying Rapaport Development Company status as an intervenor. There has been no confusion about who the owner of the property is or who the real intervenor is.[7]

---

[6] The challenged decision identifies the applicant as "Kim Wilson * * * Holst Architecture" and identifies the owner as "Rapaport Development Co." Record 3.

[7] Intervenor has consistently, and apparently erroneously, referred to itself as Rapaport Development, rather than Rapaport Development Company. However, the caption of petitioners' February 17, 2006 record objection, which post-dates the motion to intervene, accurately identifies the intervenor as "RAPAPORT DEVELOPMENT CO., a Washington company." Petitioners therefore understood that it was Rapaport Development Company that sought to intervene in this appeal.

Petitioners' motion to deny Rapaport Development Company status as an intervenor is denied. We have corrected the caption in the final opinion and order to accurately identify intervenor-respondent, on our own motion.

C. Motion to Declare the Challenged Decision Void and Moot

The application that led to the disputed adjustment decision was filed on August 18, 2005. Record 119. As we have already noted, that application was filed by Holst Architecture, P.C. employee Kim Wilson. *See* n 6. According to petitioners, on October 7, 2005, Holst Architecture, P.C. was dissolved by the State of Oregon.[8] The city's final decision in this matter was adopted on December 28, 2005. Petitioners argue:

> "The applicant cannot legally conduct business in the State of Oregon as of October 7, 2005. It remains a non-entity today. This being the case, respondent City of Portland's [December 28, 2005] decision * * * cannot be given legal effect, because the applicant ceased to exist before the decision was made by the local government. Petitioners moves [LUBA] for a ruling that the respondent city's decisions herein are moot, void; invalid; and of no effect at this time, without prejudice." Motions to Strike Brief, Deny Status, and Declare Moot 4.

There are a number of problems with petitioners' arguments. As both the city and intervenor point out, petitioners cite no authority for the proposition that LUBA can declare a land use decision "moot, void or invalid," simply because an applicant failed to renew its corporate registration on time. Holst Architecture did not, as petitioners allege, "cease to exist when its registration as a professional company lapsed." Under ORS 60.651(3), "[a] corporation administratively dissolved continues its corporate existence[.]" Intervenor explains Holst Architecture, P.C.'s administrative dissolution and current status as follows:

---

[8] Petitioners' motion to declare the appealed decision void or moot post-dates petitioners' petition for review by almost a month. The evidence that petitioners rely on to contend that Holst Architecture, P.C. was dissolved on October 14, 2005 is attached to their motion and does not appear in the record. The city objects to petitioners attempt to expand on the arguments presented in the petition for review and objects to petitioners' reliance on extra-record evidence. Because we conclude that petitioners' motion is without merit, we do not consider the city's objections.

> "Holst Architecture moved its offices in 2005, and the notice regarding their corporate registration renewal was not forwarded, which resulted in their lapsed registration and the administrative dissolution. Holst submitted their reinstatement request and applicable fees to the Oregon Secretary of State's office on May 4, 2006. * * * Holst Architecture was reinstated on May 6, 2006. Reinstatement of corporations after an administrative dissolution is governed by ORS 60.654(3) which provides:
>
> > "* * * When the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the corporation resumes carrying on its business as if the administrative dissolution had never occurred." Response to Petitioner's Motions 3.

Even if the administrative dissolution of Holst Architecture, P.C. in some way could have affected its status as the applicant in this matter, both Kim Wilson and Holst Architecture, P.C. are identified as applicants. Petitioners identify nothing that might have disqualified Kim Wilson as an applicant.

Petitioners' motion to declare the challenged decision moot, void and invalid is denied.[9]

FIRST ASSIGNMENT OF ERROR

Although petitioners' first assignment of error is not easy to follow, we understand petitioners to allege that the 1995 rezoning condition has never been satisfied, with the result that the subject property is zoned R1 and R2, and those zones do not permit the type of mixed commercial/residential use that the city's adjustment makes possible. It is not clear to us whether petitioners believe the 1995 rezoning never took effect or whether they believe the CM zoning took effect in 1995, but later reverted to R1 and R2 zoning when the condition of that 1995 rezoning was not satisfied. Whatever petitioners' legal theory, we agree with the city and intervenor that petitioners' first assignment of error is without merit.

[9] The city offers additional reasons why the motion should be rejected on the merits. Because we agree with the city and intervenor that petitioners' motion is without merit, for the reasons discussed in the text, we do not need to address those additional arguments.

Because the precise nature and scope of petitioners' legal theory under the first assignment of error is unclear, in an abundance of caution, the city offers several responses. In some of those responses the city anticipates that LUBA will see arguments in the first assignment of error that are not fairly presented. Two of the city's arguments are dispositive and we address both of them below. We also briefly address other city arguments that might become important in the event our decision is appealed.

A. The 1995 Rezoning Condition

The essential premise that underlies petitioners' first assignment of error is that the 1995 rezoning condition has not been satisfied. If that essential premise is wrong, the first assignment of error must be denied.

We agree with the city that the BDS planner correctly rejected petitioners' position that the 1995 rezoning condition has not been satisfied. That condition did not require that a building permit be issued within any specified period of time. *See* n 2. Rather, that condition simply requires that a building permit must be applied for to confirm that at least half of the development on the property is residential rather than commercial. Importantly, the condition does not specify a deadline for applying for the building permit and does not require that a building permit actually be issued or be issued before any particular date. As the December 13, 2005 BDS decision points out, a building permit was applied for in 1996 and while no building permit was ever issued pursuant to that application, intervenor has now applied for a building permit for the four-story development that is the subject of this appeal. That building permit will establish that an "equal or greater amount of square footage of residential development" is proposed, and thus satisfy the 1995 rezoning condition. Petitioners' argument that the 1995 rezoning condition has not been satisfied is without merit. It follows that petitioners' first assignment of error must be denied.

B. Adjustment Committee Authority

The city also argues that the adjustment committee's authority is set out at PCC 33.710.070(E) and the adjustment committee does not have authority to consider whether the 1995 rezoning condition was never satisfied or to consider whether any such failure of the 1995 rezoning condition has the legal consequence of rendering the subject property's zoning something other than the CM zoning that is shown on the city's official zoning map.[10] The city contends that the adjustment committee is bound to assume the subject property is zoned CM, as shown on the city's official zoning map.

According to the city, the authority to consider whether the 1995 rezoning condition has been violated and the authority to determine the legal consequence of any such violation resides with the Director of BDS.[11] The opponents in the city proceedings that led to the

---

[10] PCC 33.710.070(E) provides:

> **"Powers and duties.** The Adjustment Committee has all of the powers and duties which are assigned to it by this Title or by City Council. The Committee powers and duties include:
>
> "1. Reviewing requests to adjust the development standards of Title 33, when no other land use reviews are associated with the project; and
>
> "2. Providing advice on adjustment matters to the Hearings Officer, Planning Commission, Historic Landmarks Commission, Portland Development Commission, and City Council."

[11] PCC 33.700.030 is entitled "Violations and Enforcement" and provides:

> **"A. Violations.** It is unlawful to violate any provisions of this Title, a land use decision, *or conditions of a land use approva*l. This applies to any person undertaking a development or land division, to the proprietor of a use or development, or to the owner of the land underlying the development or land division. For the ease of reference in this chapter, all of these persons are referred to by the term 'operator.'
>
> **"B. Notice of violations.** BDS must give written notice of any violation of this Title, land use decision, or conditions of land use approval to the operator. Failure of the operator to receive the notice of the violation does not invalidate any enforcement actions taken by the City.
>
> **"C. Responsibility for enforcement.** The regulations of this Title, land use decisions, and conditions of land use approvals may be enforced in one or more of the following ways:

adjustment decision that is now before us in this appeal were told that this authority resides with the Director of BDS. Petitioner O'Brien filed a complaint, was told that the complaint was without merit and failed to appeal that decision. The city contends petitioners' first assignment of error is an impermissible collateral attack on the December 13, 2005 decision by BDS to reject petitioner O'Brien's complaint regarding the 1995 rezoning condition.

For reasons that we need not go into here, we question whether the first assignment of error could be rejected solely because it is an impermissible collateral attack on the December 13, 2005 e-mail message from BDS to petitioner O'Brien. However, petitioners offer no reason to question the city's position that the Adjustment Committee lacks authority to render the legal conclusion that petitioner and others asked it to render. Again, we understand petitioner to have asked the adjustment committee to rule (1) that the 1995 rezoning condition has not been satisfied, and (2) that the legal consequence of that failure is that the CM zoning either never took effect or reverted back to the R1 and R2 zoning that formerly applied to the property. The code section cited by the city seems consistent with its position that the Adjustment Committee lacks authority to question the official city zoning map and render such judgments. Without a more developed argument from petitioners, we agree with the city that the Adjustment Committee lacked authority to render the legal judgment that petitioners ask it to render.

C. The City's Remaining Arguments

1. The 1995 Rezoning Condition

We understand the city to contend that even if the 1995 rezoning condition has not been satisfied, the 1995 rezoning took effect in 1995 when the enacting ordinance became effective and petitioners cite no legal authority that a failure of the 1995 rezoning condition would have the legal effect of causing the CM zoning to revert to R1 and R2 zoning.

"1. By the Director of BDS pursuant to Chapter 3.30 and Title 22 of the City Code[.]" (Emphasis added.)

> "The [1995 rezoning] ordinance directed that 'No change shall be made to the zoning maps until the effective date of this ordinance.' The ordinance was an emergency ordinance, meaning that the ordinance went into effect immediately * * * and the change to the zoning map cold be made immediately. In other words, the change to the zoning of the property was dependent only on the effective date of the ordinance, not on prior compliance with the condition. The City zoning map was amended to reflect the change to CM zoning." Respondent's Brief 8 (citations omitted).

> "Even assuming for the sake of argument that the prior owners had failed to meet the [1995 rezoning] condition, the zoning map amendment would not have been rendered void. In [the] Petition for Review, Petitioner[s do] not explain with arguments or citations why [they] believe that failure to comply with the condition of approval automatically voids the zone change. The failure to provide such argument is an adequate basis for LUBA to deny this assignment of error." Respondent's Brief 9.

We agree with the city that the CM zoning took effect in 1995 on the effective date of the 1995 rezoning ordinance, and the effective date of that rezoning was not conditioned on prior compliance with the 1995 rezoning condition. We also agree with the city that if petitioners' theory is that the CM zoning automatically reverted to R1 and R2 zoning upon failure of the condition, petitioners have failed to provide any legal authority for that theory, even if we were to assume the 1995 rezoning condition has not been satisfied.[12]

2. The 1995 Hearings Officer's Recommendation

The city speculates that petitioners may be relying on the following language in the Hearings Officer's report in this matter:

> "Expiration of the approval. The recorded decision expires three years from the recording date unless:
>
> "• A building permit has been issued, or
>
> "• The approved activity has begun, or

[12] As intervenor points out, automatic reversion of the zoning from CM to R1 and R2 likely would run afoul of the holding in *Neighbors for Livability v. City of Beaverton*, 168 Or App 501, 4 P3d 765 (2000), where the court held that a condition that called for automatic reversion of a comprehensive plan map amendment in the absence of substantial progress toward rezoning and development within two years was unlawful.

"• In situations involving only the creation of lots, the land division has been recorded." Record 144.

Petitioners do not cite or rely on the above language and that language does not appear in the 1995 rezoning ordinance. We also agree with the city that the quoted language appears to be boilerplate language and appears to be intended to reflect PCC 33.730.130(B), which imposes a three-year building permit requirement, but expressly does not apply to zoning map amendments.[13]

SECOND ASSIGNMENT OF ERROR

In their second assignment of error, petitioners argue the adjustment committee erred by not specifically addressing their arguments concerning the failure of the 1995 rezoning condition and the alleged effect of that failure on the property's zoning. We understand petitioners to argue that where a relevant issue is raised in a quasi-judicial land use proceeding, the city is obligated to address the issue in its findings. *City of Wood Village v. Portland Metro. Area LGBC*, 48 Or App 79, 87, 616 P2d 528 (1980); *Norvell v. Portland Area LGBC*, 43 Or App 849, 853, 604 P2d 896 (1979).

As we have already noted, the city planner assigned to this matter advised petitioners that a complaint to BDS was the correct avenue for presenting their arguments regarding the 1995 rezoning condition, and petitioner O'Brien pursued that avenue, although she did not receive the answer she wanted. Record 259, 358, 362. Given that exchange, we question

---

[13] As relevant PCC 33.730.130 provides:

"**B. When approved decisions expire.**

"1. Land use approvals, except as other wise specified in this section, expire if:

"a. Within 3 years of the date of the final decision a City permit has not been issued for approved development; or

"b. Within 3 years of the date of the final decision the approved activity has not commenced.

"2. Zoning map and Comprehensive Plan map amendments do not expire."

whether the adjustment committee can be faulted for not repeating that advice in its final written decision in this matter. In any event, we have already concluded in our discussion of petitioners' first assignment of error that petitioners have failed to demonstrate that the adjustment committee has jurisdiction to consider petitioners' argument that the property is zoned R1 and R2 when the official city zoning map shows the property zoned CM. The adjustment committee did not committee reversible error in failing to respond to an issue that it did not have authority to consider.

The second assignment of error is denied.

FOURTH AND FIFTH ASSIGNMENT OF ERROR

The approval criteria that must be satisfied to grant adjustments appear at PCC 33.805.040.[14] Petitioners' fourth assignment of error is a substantial evidence challenge; petitioners' fifth assignment of error challenges the adequacy of the city's findings. Although petitioners do not identify the adjustment criterion that is the subject of these two assignments of error, it is clear that it is PCC 33.805.040(A). That criterion requires that the city find that "[g]ranting the adjustment will equally or better meet the purpose of the regulation to be modified." *See* n 14.

Petitioners' challenge under these assignments of error almost entirely ignores the rationale expressed in the city's findings and instead focuses on a single recommendation by

---

[14] PCC 33.805.040 sets out the following relevant criteria:

> "**A.** Granting the adjustment will equally or better meet the purpose of the regulation to be modified; and
>
> "**B.** If in a residential zone, the proposal will not significantly detract from the livability or appearance of the residential area, or if in an OS, C, E, or I zone, the proposal will be consistent with the classifications of the adjacent streets and the desired character of the area; and
>
> "*** * * * ***
>
> "**E.** Any impacts resulting from the adjustment are mitigated to the extent practical[.]"

the Portland Department of Transportation (PDOT). Petitioners read that PDOT recommendation as an essential basis for PDOT's position in support of the adjustment and apparently contend that the city's findings concerning PCC 33.805.040(A) are inadequate, and are not supported by substantial evidence, because they do not acknowledge PDOT's recommendation or impose that recommendation as a condition of approval. Because PDOT's recommendation plays such a prominent role in petitioners' arguments under these assignments of error we set out the relevant text in the margin before turning to the city's finding.[15]

The city adopted the following findings in concluding that the proposed adjustment complies with PCC 33.805.040(A):

> "With regards to the adjustment to waive the required on-site loading area, the Development Review Division of [PDOT] has addressed this criterion * * *. Due to the number of residential units proposed and the small amount of storefront commercial space, the delivery demand should be small enough that a dedicated loading space should not be needed. In addition, there is on-street parking available adjacent to the site that should be able to accommodate the small amount of deliveries expected. Therefore, [PDOT] has no objections to the adjustment to waive the required loading space." Record 7.

---

[15] The record includes a December 13, 2005 letter from PDOT, which provides in relevant part:

> "With regards to the loading adjustment, [PDOT] acknowledges that the site has no parking requirement. As such, the provision of parking for the project serves as mitigation for the loading needs. If no parking was provided on-site, then there would be a higher parking demand on the street, which would leave very little room for the small number of deliveries expected for the retail uses. The small amount of retail is expected to generate a small number of deliveries during the week. A full time, full size loading space on-site is expected to sit empty much of the time. The provision of on-site parking will assist in balancing the demand for the site.
>
> "Having said that, [PDOT] feels that an even better balance is by providing a 9'X18' parking space on-site, preferably near the elevator area. This would serve the loading needs of residents moving in or out, service calls such as cable, or furnace, and small retail deliveries. An option would be to designate this space for loading use during the daytime hours (i.e. 7 AM to 6 PM, etc). This would provide a reasonable shared use of space with the higher night-time parking demand by residents. A slight change in retail space size and lobby/bicycle storage size would likely be needed in order to accommodate the 9'X18' space near the elevators." Record 361.

In its brief, the city argues that the first paragraph of PDOT's letter, which is reflected in the above quoted city findings, expresses a three-part rationale for why the proposal complies with PCC 33.805.040(A):

> "* * * First, PDOT opines that the proposed mixed-use development includes only a 'small amount of retail.' Thus the retail portion of the development does not constitute a 'larger use' within the meaning of the purpose statement.[16] Second, PDOT does not believe that a full time on-site loading space is needed for deliveries because the small square footage of retail is expected to generate only a small number of deliveries. Finally, the property could be developed with no parking for the residential use. If that were the case, the residents who owned cars would have to occupy the available on-street parking, making an on-site loading space more important. Instead, the proposal includes 24 on-site spaces. Because the residents of this development will have on-site parking, fewer cars associated with the development will park on-street, thus providing additional on-street capacity for deliveries and offsetting the need for a dedicated on-site loading space. As noted by the original application, providing an on-site loading space would require removal of four of the on-site standard vehicle spaces. Thus, the owners of four more residential units would have to park any cars they own on the street." Respondent's Brief 19-20.

With regard to petitioners' reliance on the recommendation by PDOT, it is clear that there was some interest in trying to find a compromise between a full-time dedicated off-street loading area and no off-street loading area at all.

> "BROADUS: One more quick thought I would like to share from [PDOT] and that is regarding the 9 by 18 space, preferably designed for loading needs for the property on site, they further indicate that, as an option, because it would be considered perhaps a poor tradeoff, they're also saying as an option it would be designated a space for loading during the daytime hours from 7 am to 6 pm. This would provide a reasonable shared use of the space with higher nighttime parking demands by residents. So, during certain times of the day, it could be.
>
> "Now, is there going to be violations of that? Probably, you know what I mean? But, if * * * it was designated for loading between 6 am or 7 am and 6 pm, whatever the time, then people know that they need to keep that space

[16] The city's reference to a "purpose statement" is a reference to the first sentence of the purpose statement for the city's loading area standards which states "[a] minimum number of loading spaces are required to ensure adequate areas for loading for *larger uses and developments*." PCC 33.266.310(A) (emphasis added).

> open for coming and going, but after 7, it's residential parking, I think that's reasonable." Petition for Review, Exhibit 2, page 4.

But the city correctly points out it is clear that the members of the adjustment committee simply viewed the proposal in the second paragraph of PDOT's December 13, 2005 as a mere suggestion that might be an improvement, compared to simply granting the adjustment as requested, and that the suggestion was not a condition of PDOT's support for the proposal:

> "COLE: This December 13th letter from [PDOT]; it doesn't read as though that's a recommendation; to my mind it's written as though, gee here's another good idea. They wouldn't require an offstreet loading [space]. * * *" Petition for Review, Exhibit 2, page 5.

> "BROADUS: Well as Jeff indicated, the recommendations from [PDOT] were largely, well thinking out loud type of statement, but it isn't necessary that that be required." Petition for Review, Exhibit 2, page 6.[17]

The city argues:

> "The [Adjustment] Committee also recognized this suggestion was impractical because the parking spaces are owned and assigned to individual unit owners, so they could not prevent daytime use by the owners. 'The only problem with that is in condo, condominium project[s], they sell the spaces so the spaces are owned by the occupants, it becomes a tough issue to sorta resolve.' Petition for Review, Exhibit 2, p.4. The adjustment criterion (PCC 33.805.040(E)) requires mitigation to the extent practicable. The Committee considered PDOT's suggested mitigation and determined that it was not practicable or necessary to meet the approval criteria for the adjustment." Respondent's Brief 21-22.

As the city points out in its brief, there is conflicting evidence regarding whether the lack of commercial off-street loading spaces is a problem in the area. Record 211-13, 335. We agree with the city that when the record is viewed as a whole, PDOT's suggestion regarding the possibility of a shared parking/loading area was simply that, a suggestion. It was not a condition of its support for the adjustment to the off-street loading requirement for the proposal. We also agree with the city that there was no confusion on the Adjustment

[17] Jeffery Cole and Melvin Broadus are members of the Adjustment Committee. Broadus's reference to Jeff is presumably a reference to Cole's earlier observation.

Committee's part that PDOT's suggestion was merely a suggestion. As the city points out, the Adjustment Committee apparently concluded that the suggestion's problems outweighed its benefits. Because petitioners' arguments under the fourth and fifth assignments of error largely ignore the Adjustment Committees three-part rationale in their findings addressing 33.805.040(A) and erroneously view PDOT's suggestion as an essential element of its support for the adjustment, their arguments under the fourth and fifth assignment of error provide no basis for reversal or remand.

THIRD ASSIGNMENT OF ERROR

Under their third assignment of error, petitioners contend the city's findings concerning the PCC 33.805.040(B) and (E) criteria "are unsupported by substantial evidence." Petition for Review 9. PCC 33.805.040(B) sets out different standards, depending on whether the proposal is in a "residential zone" or in an "OS, C, E, or I zone." *See* n 14. PCC 33.805.040(E) requires that impacts from the adjustment be "mitigated to the extent possible." In their arguments, petitioners do not differentiate between the two criteria and, with one exception, do not specifically identify or target any of the city's findings concerning PCC 33.805.040(B) and (E). We set out and address the city's findings concerning PCC 33.805.040(B) and (E) separately below.

A. PCC 33.805.040(B)

The city adopted the following findings regarding PCC 33.805.040(B):

> "The site is in a C (CM) zone. Based on the response from [PDOT], the proposal is not inconsistent with the classifications of the adjacent streets. The desired character of the area includes the characteristics of the statement of the base zone (33.130.030.E). The CM zone promotes development that combines commercial and housing uses on a single site. This zone allows increased development on busier streets without fostering a strip commercial appearance. Expected development will support transit use, provide a buffer between busy streets and residential neighborhoods, and provide new housing opportunities in the City. Development is intended to be pedestrian-oriented with building close to and oriented to the sidewalk, especially at corners."
>
> "As noted by the applicant:

> "'*The proposed development is storefront retail and pedestrian oriented in character, with main entrances and storefront windows for several commercial tenant spaces facing SE Division Street and SE 26th Avenue. Finish materials * * * are compatible with commercial and residential use and within the character of the area. The proposed building is located close to the sidewalk and is pedestrian friendly in nature, with emphasis on a corner tenant. The building will also act as a gateway from Division Street to the popular retail and restaurant area on the corner of SE Clinton and 26th.*'" Record 8; italics in original).

The only findings petitioners specifically challenge are the first and third sentences of the first paragraph quoted above.

> "The finding that 'the site is in a Commercial [CM] zone,' with 'the desired character of the area [to include] the characteristics statement of the base [CM] zone' is flawed in that the subject property is, at best, an island of CM zone, not 'an area' of CM Zone." Petition for Review 9.

That argument is not sufficiently developed for review. Petitioners may have intended to assert that the city's finding that the proposal is located in a "C" zone and therefore properly analyzed under the part of PCC 33.805.040(B) that requires that "the proposal will be consistent with the classifications of the adjacent streets and the desired character of the area" is not supported by substantial evidence because the record shows the proposal is in a "residential zone." Even if we were to read petitioners' argument to state that position, as the city points out, the *proposal* is the proposed adjustment to allow the development to proceed without an off-street loading space. That proposal is in the "CM" zone, which the city considers to be a "C" zone. Petitioners neither acknowledge nor challenge that interpretation. There is substantial evidence in the record that the subject property where the proposed development would be located is zoned CM rather than residential.[18]

[18] If petitioners' objection is that the adjustment committee failed to recognize that the subject property lies in an area where there is a significant amount of property that is zoned residentially, the findings at page 4 of the record, which were quoted above in our discussion of the facts, demonstrate that the adjustment committee was clearly aware of that fact.

Finally, as the city correctly notes, the argument that petitioners include under this assignment of error, and the opposition testimony they cite, are largely directed at (1) the CM zoning of the property, (2) the size and density of the proposed 49,000 square foot, four-story building, and (3) the loss of the historic house that formerly occupied the site. That argument and evidence has little or nothing to do with the city's findings regarding PCC 33.805.040(B). Petitioners' evidentiary challenge regarding the city's PCC 33.805.040(B) findings fails.

B. PCC 33.805.040(E)

Regarding the PCC 33.805.040(E) requirement to mitigate impacts "to the extent practical," the city adopted the following findings:

> "As noted [earlier], the limited floor area for commercial uses and relatively low numbers of dwelling units at the building mitigates for potential impacts associated with waiving the requirement for an on-site loading area. * * *" Record 9.

The above reference to the earlier findings presumably includes the findings addressing PCC 33.805.040(A) and (B). If any of the evidentiary arguments that petitioners present under their third assignment of error are directed at the above findings, they are inadequately developed to permit review. As those earlier findings make clear, the city ultimately relied on the low demand for loading that the city anticipates will be generated by the small amount of commercial space and the mitigation that will occur by providing the off-street parking for the residences, since that off-street parking is not required and would be reduced by four parking spaces if off-street loading were required. While petitioners presumably disagree with that rationale, we see no evidentiary shortcoming in that reasoning, and we therefore reject petitioners' evidentiary challenge regarding PCC 33.805.040(E).

The third assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

Petitioners' sixth assignment of error is that "[t]he adjustment committee reached its Final Findings and Conclusion with no regard to its deliberations." Petition for Review 11. Petitioners' entire argument in support of the sixth assignment of error is as follows:

> "Petitioner incorporates herein the argument in the Fifth Assignment of Error *supra*. The most minimal considerations of due process require that a governing body acknowledge, if not weigh, its own official's actions; and weigh, if not give heed to, the voices of the governed. Petitioner alleges that the process by which this particular decision was rendered amounts to unconstitutional denial of both procedural and substantive due process." *Id*.

To the extent petitioners are merely restating their fifth assignment of error, we deny the sixth assignment of error for the same reasons we denied their fourth and fifth assignments of error. To the extent petitioners intend to assert an independent claim under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, petitioners make no attempt to develop such a claim and we deny it for that reason.

The sixth assignment of error is denied.

The city's decision is affirmed.