

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

3
4 CHRISTINE YUN,
5 *Petitioner,*

6
7 and

8
9 BUCKMAN COMMUNITY ASSOCIATION,
10 *Intervenor-Petitioner,*

11
12 vs.

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14 CITY OF PORTLAND,
15 *Respondent,*

16
17 and

18
19 JOHN NELMS and
20 MERIDIAN GROUP NW, LLC,
21 *Intervenor-Respondents.*

22
23 LUBA No. 2007-069

24
25 FINAL OPINION
26 AND ORDER

27
28 Appeal from City of Portland.

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30 Gary P. Shepherd, Portland, filed the petition for review and argued on behalf of
31 petitioner and intervenor-petitioner. With him on the brief was Oregon Land Law.

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33 Peter A. Kasting, Chief Deputy City Attorney, Portland, filed a joint response brief
34 and represented respondent. With him on the brief were John M. Junkin and Bullivant
35 Houser Bailey PC.

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37 John M. Junkin, Portland, filed a joint response brief and argued on behalf of
38 intervenor-respondents. With him on the brief were Peter A. Kasting and Bullivant Houser
39 Bailey PC.

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

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44 AFFIRMED

07/11/2007

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

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NATURE OF THE DECISION

Petitioner appeals a city decision granting an adjustment to city loading space standards for a mixed-use building.

MOTIONS TO INTERVENE

Buckman Community Association moves to intervene on the side of petitioner (collectively petitioners). John Nelms and Meridian Group NW, LLC (intervenors) move to intervene on the side of the city. There is no opposition to the motions, and they are granted.

FACTS

The subject property is split-zoned, with the northern portion zoned R1 - Multi Dwelling Residential and the southern portion zoned CS – Storefront Commercial. Intervenors are proposing to build a mixed-use building containing 40 residential units and approximately 4,850 square feet of retail space. The proposed building is four stories tall and will have an underground parking garage that will provide 53 on-site residential parking spaces and two loading spaces.¹

Intervenors applied for an adjustment to allow the loading spaces to be 10 by 18 feet with 10 feet of vertical clearance. The city issued an administrative decision that partially approved the adjustment by allowing one 9 by 18 foot loading space and one 9 by 24 foot loading space, and requiring 10.5 feet of vertical clearance for both spaces. Petitioners appealed the administrative decision to the adjustment committee, which affirmed the adjustment. This appeal followed.

ASSIGNMENT OF ERROR

PCC 33.805.040 sets forth the relevant approval criteria for adjustments:

¹ The Portland City Code (PCC) requires a minimum of two loading spaces, each at least 10 by 35 feet with a vertical clearance of 13 feet. PCC 33.266.310(C)(2) and (D). Under the PCC, the proposed building is not required to provide on-site residential parking spaces.

1 “* * * All other adjustment requests will be approved if the review body finds
2 that the applicant has shown that either approval criteria A. through F. or
3 approval criteria G. through I., below, have been met. * * *.”

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

6 “B. If in a residential zone, the proposal will not significantly detract from
7 the livability or appearance of the residential area, or if in an OS, C, E,
8 or I zone, the proposal will be consistent with the classifications of the
9 adjacent streets and the desired character of the area; and

10 “ * * * * *

11 “E. Any impacts resulting from the adjustment are mitigated to the extent
12 practical; * * *.”

13 Petitioners argue that the adjustment request does not satisfy subsections A, B, and E.

14 **A. PCC 33.805.040(A)**

15 PCC 33.805.040(A) requires that “[g]ranting the adjustment request will equally or
16 better meet the purpose of the regulation to be modified.” The “regulation[s] to be modified”
17 are found at PCC 33.266.310(C) and (D), which provide that the development must have two
18 loading spaces that must be at least 35 feet long, 10 feet wide, and have vertical clearance of
19 13 feet. PCC 33.266.310(A) describes the purpose of the loading space regulations:

20 “A minimum number of loading spaces are required to ensure adequate areas
21 for loading for larger uses and developments. These regulations ensure that
22 the appearance of loading areas will be consistent with that of parking areas.
23 The regulations ensure that access to and from the loading facilities will not
24 have a negative effect on the traffic safety or other transportation functions of
25 the abutting right-of-way.”

26 The city found that the adjusted loading spaces would be adequate for commercial and
27 residential uses and would not adversely affect traffic. Record 14.

28 Petitioners argue that because evidence in the record shows that some delivery
29 vehicles cannot fit into the adjusted space, the city’s decision is not supported by substantial

1 evidence.² Although it is not entirely clear, petitioners appear to argue that PCC
2 33.805.040(A) requires that the adjusted loading spaces must provide the same level of
3 access as a loading space that meets the loading space standards required by the code without
4 an adjustment.

5 Petitioners' argument is based on a misconstruction of the purpose statement and
6 approval criteria. The purpose statement requires that access to and from the loading spaces
7 will not negatively affect traffic safety or other transportation functions of the right-of-way.
8 Presumably, those transportation functions include parking. The adjusted loading spaces
9 may still "ensure that access to and from the loading facilities will not have a negative effect
10 on the traffic safety or other transportation functions of the abutting right-of-way" without
11 accommodating every potential delivery vehicle that the unadjusted loading spaces could
12 accommodate. Once a loading space is reduced in size, there will almost always be some
13 vehicles that will not fit into the adjusted space that could have fit in the unadjusted space.
14 The city need only find that the adjusted loading areas will not negatively affect traffic
15 safety, not that the adjusted loading areas can accommodate delivery vehicles of every size.

16 The city considered the array of vehicles that would be likely to use the loading
17 spaces for both residential and commercial purposes and concluded that the allowed
18 adjustment would ensure that traffic safety is not negatively affected. The city relied upon
19 expert testimony from the Portland Department of Transportation (PDOT) that the adjusted
20 loading spaces would be adequate to accommodate moving vans used for residential moving

² As a review body, we are authorized to reverse or remand the challenged decision if it is "not supported by substantial evidence in the whole record." ORS 197.835(9)(a)(C). Substantial evidence is evidence a reasonable person would rely on in reaching a decision. *City of Portland v. Bureau of Labor and Ind.*, 298 Or 104, 119, 690 P2d 475 (1984); *Bay v. State Board of Education*, 233 Or 601, 605, 378 P2d 558 (1963); *Carsey v. Deschutes County*, 21 Or LUBA 118, *aff'd* 108 Or App 339, 815 P2d 233 (1991). In reviewing the evidence, however, we may not substitute our judgment for that of the local decision maker. Rather, we must consider and weigh all the evidence in the record to which we are directed, and determine whether, based on that evidence, the local decision maker's conclusion is supported by substantial evidence. *Younger v. City of Portland*, 305 Or 346, 358-60, 752 P2d 262 (1988); *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 588, 842 P2d 441 (1992).

1 purposes, and that due to the limited size of the commercial use a van-sized space would also
2 be adequate for commercial loading purposes. Record 12. The city also found that many
3 delivery services such as UPS do not use underground loading spaces but instead use on-
4 street loading spaces for efficiency of delivery.³ Therefore, the size of the underground
5 loading spaces would not be a particularly relevant factor in determining whether those
6 delivery vehicles could or would use the underground loading spaces since those spaces
7 would not be used no matter what size the spaces were.

8 Petitioners place great emphasis on evidence showing that some delivery vehicles are
9 too tall to fit in the adjusted loading spaces. While that may be true, the approval criterion
10 does not require that the loading spaces accommodate all delivery vehicles. The approval
11 criterion requires that the adjusted loading spaces will not negatively affect traffic safety or
12 other transportation features. Based on the evidence, the city found that the adjusted loading
13 spaces would be adequate for the delivery vehicles that are most likely to come to the
14 building. Petitioners' conflicting evidence is not so overwhelming that no reasonable person
15 could have relied upon the evidence the city relied upon. We cannot substitute our judgment
16 on that evidence for that of the city. *See* n 2. The city found that because there would be
17 adequate areas for loading, and that there would be no adverse effect on traffic safety on
18 adjacent streets. A reasonable person could find that the adjustment will not have an adverse
19 effect on traffic safety.

20 This subassignment of error is denied.

21 **B. PCC 33.805.040(B)**

22 PCC 33.805.040(B) requires that to approve the adjustment the proposal “will not
23 significantly detract from the livability or appearance of the residential area” and “will be
24 consistent with * * * the desired character of the area.” To a large extent, this subassignment

³ There is an on-street loading zone reserved for service vehicles on one side of the building, although that on-street loading zone could be eliminated in the future. Record 435-36.

1 of error is dependent upon the first subassignment of error in that petitioners argue that
2 because there are inadequate loading areas, delivery vehicles will be forced to park on the
3 street and thereby detract from the livability, appearance, and desired character of the
4 neighborhood.⁴ We deny petitioners' argument under this subassignment of error for the
5 reasons expressed earlier.

6 Petitioners also argue that the delivery vehicles that will park on the street regardless
7 of the size of the loading spaces will detract from the livability of the area. Petitioners do not
8 adequately explain why the use of adjacent on-street parking that already exists rather than
9 the underground loading spaces will adversely affect the livability and desired character of
10 the area. Presumably, petitioners believe the delivery trucks will park illegally rather than
11 use the on-street loading area that currently exists. Petitioners also argue that the continued
12 existence of that on-street loading area is not guaranteed to continue indefinitely. While
13 PDOT could not guarantee that the existing on-street parking area would never be
14 eliminated, PDOT stated that it was very unlikely that space would be eliminated in the
15 future. We agree with the city that speculation that at some point in the indefinite future that
16 the city might eliminate the on-street parking area, which might result in some delivery
17 vehicles parking illegally, which might adversely effect the livability or desired
18 characteristics of the neighborhood, does not compel the conclusion that the approval
19 criterion is not met.

20 This subassignment of error is denied.

⁴ Petitioners also argue that the city did not address many allegedly applicable policies of the local neighborhood plan. The city's decision, however, explains that only two policies are applicable and addresses those policies. Petitioners do not provide any basis for why the city is incorrect that only two policies apply. Petitioners' arguments regarding the other neighborhood plan policies are not sufficiently developed for our review and are denied without further comment.

1 **C. PCC 33.805.040(E)**

2 PCC 33.805.040(E) requires that “[a]ny impacts resulting from the adjustment are
3 mitigated to the extent practical.” Petitioners’ arguments are again dependent on the first
4 subassignment of error. Because we agree with the city that the conditions imposed will
5 result in the adjustment not having any adverse impacts, there is no need for any mitigation.
6 The city imposed conditions of approval sufficient to ensure that there will be no adverse
7 impacts from the adjustment. Given that the city’s decision that there will be no adverse
8 impacts from the adjustment is supported by substantial evidence, the city did not need to
9 require any mitigation in excess of the conditions it imposed.

10 This subassignment of error is denied.

11 The city’s decision is affirmed.