

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

3
4 BEVERLY PEARMAN and JOHN LOOMIS,
5 *Petitioners,*

6
7 vs.

8
9 CITY OF PORTLAND,
10 *Respondent.*

11
12 LUBA No. 2007-243

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from City of Portland.

18
19 Beverly Pearman, and John Loomis, Portland, filed the petition for review and argued
20 on their own behalf.

21
22 Peter A. Kasting, Chief Deputy City Attorney, Portland, filed the response brief and
23 argued on behalf of respondent.

24
25 HOLSTUN, Board Member; RYAN, Board Chair; BASSHAM, Board Member,
26 participated in the decision.

27
28 AFFIRMED

05/08/2008

29
30 You are entitled to judicial review of this Order. Judicial review is governed by the
31 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a city decision that grants an adjustment to an off-street parking requirement to allow construction of a duplex without any off-street parking.

FACTS

SE Salmon Street is an east-west street; SE 36th Avenue is a north-south street. Both streets are designated as Local Service Streets in the city Transportation System Plan (TSP). Those streets intersect in the city’s Sunnyside Neighborhood. The subject property, a 3,300 square foot corner lot, is located at the northeast corner of that intersection. The 3,300 square foot lot size is typical in the neighborhood, but lots in the immediate vicinity range from 1,600 square feet to 6,600 square feet. The neighborhood is primarily made up of late 19th and early 20th century vintage detached single family dwellings, but the neighborhood also includes some newer duplex and multi-family dwellings.

Until 2005 the subject lot was included in a single tax account with the adjoining lot to the north, which has frontage on SE 36th Avenue only. That adjoining lot is developed with a residence and access to an off-street parking space on the east side of that adjoining lot to the north is via a driveway from SE Salmon Street, which crosses the eastern edge of the subject lot. The proposed duplex is to be developed in a way that preserves that driveway access from SE Salmon Street to the adjoining lot to the north.

A three-story duplex is proposed for the subject property. Each duplex unit will have three bedrooms. The subject property is zoned Single-dwelling R2.5. Under Portland City Code (PCC) 33.110.240(E)(3), a duplex is a permitted use in the R2.5 zone on a corner lot that is at least 3,000 square feet in size. Under PCC 33.266.110(B)(1) and Table 266-2, one off-street parking space per unit, a total of two off-street parking spaces, is required for the duplex. The disputed adjustment allows the duplex units to be developed without any off-street parking. The applicant submitted an alternative duplex design that incorporates a

1 garage into each duplex unit with access onto SE Salmon. The alternative proposal would
2 comply with the PCC 33.266.110(B)(1) requirement for off-street parking. However, that
3 alternative proposal did not comply with a different PCC requirement that garage entrances
4 be set back 18 feet from SE Salmon. The alternative proposal therefore would require an
5 adjustment to the 18-foot setback requirement to allow the garage entrance to be set back
6 only 5 feet from SE Salmon. The city denied the adjustment for the alternative proposal.

7 The subject corner lot is located approximately 700 feet south of SE Belmont Street,
8 approximately 800 feet north of SE Hawthorne Street and approximately 850 feet west of SE
9 39th Avenue.¹ SE Belmont and SE Hawthorne are east-west Major Transit Priority Streets,
10 with bus service at an interval of less than 20 minutes. SE 39th is a north-south Transit
11 Access Street with bus service at an interval of less than 20 minutes. All three of those
12 transit streets are also designated as City Walkways in the TSP. In addition to the nearby
13 transit opportunities, an east-west designated bikeway along SE Taylor Street, SE 35th
14 Avenue and SE Salmon passes within a block of the subject property.

15 There is significant commercial development along SE Belmont to the north and SE
16 Hawthorne to the south. The traffic generated by those nearby commercial areas competes
17 for available on-street parking spaces in the adjoining neighborhood. There is evidence in
18 the record that, at times, the demand for off-street parking near the subject lot exceeds the
19 supply. However, relying primarily on the nearby transit opportunities, the city granted an
20 adjustment to the PCC 33.266.110(B)(1) off-street parking requirement to allow construction
21 of the duplex without any off-street parking. Petitioners, who are neighbors, appeal that
22 decision.

¹ All three streets are three blocks from the subject property, although there is some dispute about the precise distance from the subject property to each street. The distances given in the text reflect petitioners' position.

1 **FIRST ASSIGNMENT OF ERROR**

2 The city’s adjustment procedure set out at PCC Chapter 33.805 is a variation on the
3 traditional zoning variance. Like the traditional zoning variance, an adjustment allows the
4 city to approve development that does not comply with specific zoning ordinance
5 requirements, if certain criteria are met. PCC Chapter 33.805 is made up of four sections.
6 Two of those four sections are relevant in this appeal. PCC 33.805.010 is entitled
7 “Purpose.”² PCC 33.805.040 is entitled “Approval Criteria.”³ Under their first assignment
8 of error, petitioners allege the city improperly construed PCC Chapter 33.805 in three ways.
9 We address those three arguments separately below.

² PCC 33.805.010 is set out below:

Purpose

“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.” (Emphasis added.)

³ As relevant, PCC 33.805.040 is set out below:

Approval Criteria

“[A]djustment requests will be approved if the review body finds that the applicant has shown that * * * approval criteria A. through F * * * have been met. * * *

“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 * * *; and

“* * * * *

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

1 **A. The Site is not Unusual and There is no Need for Flexibility**

2 Petitioner’s first argument is quoted in part below:

3 “[T]he City did not discuss or even evaluate why flexibility is needed or why
4 this situation is ‘unusual’ so as to necessitate an adjustment, especially in light
5 of the fact that the owner has an alternate design that it can implement if
6 required to adhere to the zoning code requiring two off-street parking spaces.
7 * * * “ Petition for Review 7.

8 The above argument is based on a descriptive statement in the adjustment chapter purpose
9 statement that “[a]djustment reviews provide flexibility for unusual situations * * *.” *See n*
10 2. Petitioners appear to read that descriptive statement as a standard or criterion that the city
11 must address and find is satisfied before it can grant an adjustment. In other words,
12 petitioners contend that an adjustment can only be allowed if needed for flexibility due to an
13 unusual situation.

14 The city responds that petitioner misreads the PCC Chapter 33.805. The city
15 contends that the approval criteria for reviewing an adjustment request are set out at
16 PCC 33.805.040. *See n* 3. The city contends that the PCC 33.805.010 purpose statement
17 does not establish approval standards and does not operate to limit the permissible scope of
18 adjustments. The city points to PCC 33.800.050, which the city contends makes it clear that
19 the approval criteria for reviewing an adjustment request are set out at PCC 33.805.040 and
20 that the city is not required to adopt findings to demonstrate that the requested adjustment is
21 consistent with all aspects of the PCC 33.805.010 purpose statement.⁴ We agree with the
22 city.

⁴ 33.800.050(A) provides:

“The approval criteria that are listed with a specific review reflect the findings that must be made to approve a request. The criteria set the bounds for the issues that must be addressed by the applicant and which may be raised by the City or affected parties. A proposal that complies with all of the criteria will be approved. A proposal that can comply with the criteria with mitigation measures or limitations will be approved with conditions. A proposal that cannot comply with the criteria outright or cannot comply with mitigation measures will be denied.”

1 This subassignment of error is denied.

2 **B. The Adjustment is Inconsistent with the Purpose for Requiring Parking**
3 **Spaces**

4 To grant an adjustment, the city must find that the approval criteria set out at
5 PCC 33.805.040 are satisfied. One of those approval criteria is PCC 33.805.040(A), which
6 requires that the city find “[g]ranted the adjustment will equally or better meet the purpose
7 of the regulation to be modified.” The regulation to be modified is PCC 33.266.110(B)(1),
8 which as we have already explained requires two off-street parking spaces. The purpose of
9 PCC 33.266.100, which sets out minimum required parking spaces, is set out at
10 PCC 33.266.110(A).⁵ Focusing exclusively on the first sentence of PCC 33.266.110(A),
11 petitioners argue:

12 “[T]he purpose of the parking requirement is ‘to provide enough off-street
13 parking to accommodate the majority of traffic generated by the range of uses
14 which locate at the site over time.’ However, the city did not construe the
15 approval criteria as requiring it to analyze the number of cars needing parking
16 at the site. [T]he adjustment criteri[on] at a minimum requires the City to
17 consider the number of cars likely to need parking at the site. * * *” Petition
18 for Review 7 (citations omitted).

19 Petitioners go on to object that in applying PCC 33.266.110(A) the city improperly
20 speculated that nearby transit opportunities make it less likely the residents of the duplex will
21 be dependent on cars.

⁵ PCC 33.266.110(A) is set out below:

A. Purpose. *The purpose of required parking spaces is to provide enough on-site parking to accommodate the majority of traffic generated by the range of uses which might locate at the site over time. Sites that are located in close proximity to transit, have good street connectivity, and good pedestrian facilities may need little or no off-street parking. Transit-supportive plazas and bicycle parking may be substituted for some required parking on a site to encourage transit use and bicycling by employees and visitors to the site. The required parking numbers correspond to broad use categories, not specific uses, in response to this long term emphasis. Provision of carpool parking, and locating it close to the building entrance, will encourage carpool use.”* (Italics and underlining added).

1 The city instead focused on the second sentence of PCC 33.266.110(A), *see* n 4, and
2 PCC 33.266.110(B)(3), which creates an “exception” to the off-street parking requirements
3 set out at PCC 33.266.110(B)(1).⁶ The city adopted the following findings:

4 “* * * The purpose of the required parking spaces standard is to provide
5 enough on-site parking to accommodate the majority of traffic generated by
6 the range of uses which might locate at the site over time. Sites that are
7 located in close proximity to transit, have good street connectivity and good
8 pedestrian facilities may need little or no off-street parking.

9 “The site is in a close-in neighborhood of Southeast Portland, within three
10 blocks of the commercial districts on Hawthorne Blvd. and Belmont Street.
11 Both commercial districts have a strong pedestrian orientation and are
12 destinations for people arriving by multiple modes of travel, due to excellent
13 transit service, pedestrian quality, and high levels of service and
14 accommodations for pedestrians and bicyclists.

15 “The zoning code does not require parking in areas that are within 500 feet of
16 a street that has high levels of transit service, i.e. service a minimum of every
17 20 minutes during the morning and afternoon peak hours. The code does not
18 account for situation such as this in which residents of the subject site will
19 have access to three different bus lines, all of which are called ‘frequent
20 service’ lines by Tri-Met because service is at least every 15 minutes most
21 times of the day. In areas of frequent service it is more common for residents
22 to be less car-dependent and more multi-modal. *With a walk of three blocks
23 in three directions to a bus stop rather than two blocks (500 feet), residents of
24 this site are generally not any less likely to take the bus over their neighbors
25 one block away who, because they are 500 feet from a bus line, are not
26 required to have off-street parking.* Families living in such areas often choose
27 to have [fewer] vehicles because of the transportation options available to
28 them, and likewise residents of these areas often choose to live there due to
29 the same transportation choices. The applicant noted in their response that
30 there are also four Flexcar locations within 4 to 8 blocks of the site, making
31 this an additional option for residents who either choose not to have a car, or
32 to own [fewer] cars for their family. This adds yet another alternative mode
33 of travel for residents of this close-in neighborhood. For these reasons, the
34 request to waive the required parking is consistent with the purpose of the
35 regulation. Thus, this criterion is met.” Record 9 (emphasis added).

⁶ PCC33.266.110(B)(3) provides, in relevant part:

“Exceptions for sites well served by transit. There is no minimum parking requirement for sites located less than 500 feet from a transit street with 20-minute peak hour service. * * *”

1 The different positions of the city and petitioners are unsurprising, given their
2 different understanding of the purpose of the regulation to be modified. The city effectively
3 viewed the first two sentences of the PCC 33.266.110(A) purpose statement together. As the
4 city views PCC 33.266.110(A), the purpose of providing “enough on-site parking to
5 accommodate the majority of traffic generated” by site development is replaced by a second,
6 different purpose when there is high frequency transit nearby. That second purpose
7 recognizes that sites “located in close proximity to transit, have good street connectivity, and
8 good pedestrian facilities may need little or no off-street parking.” Those purposes are
9 implemented and given regulatory effect by PCC 33.266.110(B)(1), which generally requires
10 off-street parking when sites are developed, and PCC 33.266.110(B)(3), which allows sites to
11 be developed with no off-street parking if the site is within 500 feet of a well-served transit
12 street. We understand the city to take the position that the exception provided by
13 PCC 33.266.110(B)(3) does not mean that all sites developed within 500 feet of a well-
14 served transit street will in fact generate no additional parking demand. It simply represents
15 a policy choice by the city not to require off-street parking where proximity to transit makes
16 it less likely that site development will significantly increase the need for additional parking.
17 The city effectively found that policy choice, which presumably reflects the purpose
18 expressed in the second sentence of PCC 33.266.110(A), is equally or better met by allowing
19 the disputed adjustment. The city argues:

20 “This finding reflects a judgment that the mass transit opportunity provided
21 by three bus lines within 750 feet, providing access to three sets of
22 destinations, with more frequent service, is at least as good as the service
23 provided by one bus line within 500 feet, providing access to one set of
24 destinations, with less frequent service. This is a reasonable conclusion that
25 reflects the kind of balancing inherent in the PCC’s ‘equally or better’
26 standard for this approval criterion.” Respondent’s Brief 7-8.

27 We agree with the city.

28 This subassignment of error is denied.

1 **C. Failure to Consider the Size and Design of the Duplex**

2 The city recognized neighborhood opponents’ concerns about the size and design of
3 the proposed duplex, but found that the proposed duplex complies with all dimensional and
4 setback standards. The city then found:

5 “* * * Through this process to waive the parking standard, staff cannot make a
6 legal nexus between the structure’s design and the standard subject to the
7 requested adjustment—there is no connection to be made to concerns that the
8 neighbors expressed about height, bulk, window placement, and roof pitch.”
9 Record 10.

10 Petitioners argue the city erred by refusing to consider the size and design of the proposed
11 duplex in granting the disputed adjustment:

12 “[T]he City improperly concluded that there is no ‘legal nexus between the
13 structure’s design and the standard subject to the requested adjustment.’ It is
14 axiomatic that the design of the project controls the potential number of
15 residents which in turn determines the amount of traffic at the site. * * *
16 Again, the City focused only on the proximity of the site to bus lines * * * and
17 failed to consider that a three-bedroom duplex is likely to attract at least two
18 residents per unit, if not more. * * *” Petition for Review 8.

19 The PCC 33.266.110(A) purpose statement distinguishes between areas where off-
20 street parking may be required and areas near transit opportunities where little or no off-
21 street parking is needed, but it does not do so based on the size or design of development.
22 Neither is size or design a factor in drawing that distinction. The PCC 33.266.110(B)(1) and
23 Table 266-2 requirement for one off-street parking is not affected by the size or design of
24 development. One off-street parking space is required for each household living unit,
25 regardless of its size or design. Similarly, the PCC 33.266.110(B)(3) exception that allows a
26 site to be developed without any off-street parking is unaffected by the size or design of the
27 proposed development. Given that the regulatory framework that is the subject of the
28 exception assigns no significance to the size or design of site development, we understand
29 the city to argue that it was appropriate for the city to refuse to require the analysis of size
30 and design that petitioners argue is required. We understand the city to argue that the zoning

1 code simply allows “good mass transit access to be use as an alternative to off-street
2 parking,” without regard to the size or design of the actual development. Respondent’s Brief
3 8. We agree with the city.

4 This subassignment of error is denied.

5 The first assignment of error is denied.

6 **SECOND ASSIGNMENT OF ERROR**

7 Petitioners’ second assignment of error concerns adjustment approval criteria PCC
8 33.805.040(B) and (E), which require that the city find that “the proposal will not
9 significantly detract from the livability or appearance of the residential area,” and “impacts
10 resulting from the adjustment are mitigated to the extent practical.” *See* n 3.

11 **A. Livability or Appearance of the Residential Area**

12 Neighborhood opponents and a representative from the Sunnyside Neighborhood
13 Association submitted written testimony to establish that the currently available on-street
14 parking in the vicinity of the subject property is insufficient to meet current demands and that
15 granting the requested exception will only exacerbate that mismatch between demand for on-
16 street parking and the supply of on-street parking. Record 61-75, 86-87, 129-38, 172-73,
17 182-83. They also submitted photographs taken on two weekend days to show that available
18 on-street parking spaces were all occupied. Record 139-48. Petitioners fault the city for
19 citing and relying in part on other testimony and photographic evidence that shows much less
20 congested on-street parking in the vicinity of the lot. That other evidence includes
21 photographs in a staff PowerPoint presentation to the Adjustment Committee at its October
22 2, 2007 hearing (Record 154-60) and an October 9, 2007 staff memorandum with attached
23 photographs (Record 178-79).

24 Petitioners fault the city for relying on photographic evidence of parking congestion
25 at 7:30 a.m. and between 5:30 and 7:30 p.m. on weekdays and at 9:00 a.m. on Sunday, rather
26 than on weekends when traffic generated by the nearby Hawthorne and Belmont commercial

1 areas competes for neighborhood parking spaces. In the October 9, 2007 memorandum, a
2 city staff person points out that one of the weekend days the opponents took pictures was
3 August 18, 2007, which was the date of the Hawthorne Street Fair. That staff person pointed
4 out that the Hawthorne Street Fair attracts an unusually large number of people to the
5 commercial area. Petitioners respond that the photos of traffic congestion on a different
6 weekend day also show that all available parking spaces are occupied.

7 Although city staff noted the opponents' use of the August 18, 2007 photographs, we
8 do not understand the city's decision in this matter to have found that the neighborhood does
9 not experience parking congestion on weekends during shopping hours. The city's findings
10 explicitly recognized that the parking congestion in the vicinity is probably worse on
11 weekends than is reflected on the staff's photos.⁷ In any event, under PCC 33.805.040(B) the
12 city is not required to find that the adjustment will not produce additional competitors for
13 parking spaces that are already in short supply during weekend shopping hours. Instead,
14 PCC 33.805.040(B) requires the city to find that "the proposal will not significantly detract
15 from the livability or appearance of the residential area." Parking congestion was only a
16 factor in answering that question.⁸

17 In assessing substantial evidence challenges LUBA's role is not to duplicate the role
18 of the city or to reweigh the evidence in the record. *1000 Friends of Oregon v. Marion*
19 *County*, 116 Or App 584, 587-88, 842 P2d 441 (1992). Our role is simply to determine

⁷ The city's findings explain:

“* * * Staff found in an evening visit to the site (7:30 p.m. weekday) that there was ample opportunity for parking in this block on both the Salmon St. and 36th Ave frontages. While undoubtedly there is somewhat higher demand for parking on the weekends due to the site's proximity to the two commercial streets, it is likely significantly higher on the blocks that are even closer to those streets and the adjacent blocks that are closer to the Fred Meyer store at 39th / Hawthorne. * * * ” Record 10.

⁸ The city also found there are very few houses in the neighborhood with garages and many of those are used for purposes other than parking cars. Record 10. The city also found that the garages proposed in the alternative design, which are larger than the few existing garages in order to accommodate larger modern vehicles, “would likely not fit in with the older character of the neighborhood.” *Id.*

1 whether a reasonable person could have relied on the evidence to adopt the challenged
2 finding. *Id.* We conclude that a reasonable person could have found, based on this record,
3 that the proposed duplex without on-street parking “will not significantly detract from the
4 livability or appearance of the residential area.” That being the case, it does not matter that a
5 reasonable decision maker perhaps also could have relied on that same evidence to adopt the
6 opposite finding. Where reasonable persons could reach contrary conclusions based on
7 conflicting evidence, either conclusion is supported by substantial evidence. *Bradley v.*
8 *Washington County*, 47 Or LUBA 11, 19 (2004); *Douglas v. Multnomah County*, 18 Or
9 LUBA 607, 617 (1990).

10 This subassignment of error is denied.

11 **B. Mitigation**

12 PCC 33.805.040(E) requires the city to find that “impacts resulting from the
13 adjustment are mitigated to the extent practical.” The city cited two ways the impact on
14 competition for on-street parking that may result from the proposal is mitigated.

15 First, the city cites the same proximity to transit streets that it cited in applying the
16 PCC 33.805.040(A) “equally or better meets” criterion. Citing the fact that the lot is more
17 than 500 feet from those transit streets, petitioners contend the available transit opportunities
18 will provide no practical mitigation.

19 We do not agree. A reasonable person could conclude that the availability of
20 frequent bus service on SE Hawthorne Street 800 feet to the south, SE Belmont Street 700
21 feet to the north and SE 39th Avenue 850 feet to the east will operate to mitigate the impact
22 on on-street parking demand.

23 Second, the city’s decision points out that providing off-street parking to serve the
24 two duplex units likely would come at the expense of one or two on-street parking spaces.
25 Allowing the duplex to be built without requiring off-street parking spaces, and thus
26 preserving one or two existing on-street parking spaces, operates to mitigate the impact of

1 the adjustment. Petitioners’ challenge to the city’s reliance on eliminating the need for
2 additional curb cuts that could eliminate on-street parking spaces is based largely on
3 petitioners’ argument that it might be possible for the applicant to utilize the existing
4 driveway that will continue to serve the lot to the north to provide access to the off-street
5 parking for the duplex. The city disputes that argument, and takes the position that even if an
6 easement to provide shared access is a possibility, based on PCC limitations on off-street
7 parking at least one additional curb cut would be required to serve both duplexes.
8 Respondent’s Brief 11.

9 Regardless of the potential for using the existing driveway, there does not appear to
10 be any dispute that the alternative proposed by the applicant would have required additional
11 curb cuts that would in turn have eliminated one or two on-street parking spaces. The point
12 is that if the applicant is forced to provide off-street parking as petitioners urge, the applicant
13 would then be entitled to seek permission for the curb cuts to provide access to the garages.
14 Petitioners cite no PCC provisions under which the applicant could be forced in that
15 circumstance to seek an easement arrangement that would perhaps allow the existing
16 driveway to be used to provide access to some or all of that off-street parking. We reject
17 petitioners’ argument that it was error for the city to cite the elimination of the possibility
18 that one or two on-street parking will be lost to provide two off-street parking, as a
19 mitigating factor in this case.

20 This subassignment of error is denied.

21 **C. Petitioners’ Remaining Argument**

22 Finally, petitioners appear to argue that because the applicant could design and
23 propose a smaller duplex, with fewer bedrooms and off-street parking spaces instead of the
24 proposed three bedroom duplex units that do not have off-street parking, the city has failed to
25 require that “impacts resulting from the adjustment are mitigated to the extent practical,” as
26 required by PCC 33.805.040(E).

1 The city offers the following response to that argument.

2 Petitioners' argument misses the point of the approval criteria for adjustments.
3 The approval criteria exist to address proposals that do need adjustments, not
4 to require that applicants redesign projects to make adjustments unnecessary.
5 Petitioners' argument reflects a premise that influences their earlier
6 arguments, i.e. the idea that adjustments should not be allowed if a different
7 project could be built without obtaining adjustments. Petitioners might prefer
8 such a policy but it is not the policy contained in the zoning code.
9 Adjustments provide opportunity for flexibility and are allowed if the
10 approval criteria in PCC 33.805.040 are met." Respondent's Brief 12.

11 We agree with the city. This subassignment of error is denied.

12 The second assignment of error is denied.

13 The city's decision is affirmed.