

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

3
4 DEADRA HALL,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF PORTLAND,
10 *Respondent.*

11
12 LUBA No. 2007-170

13
14 FINAL OPINION
15 AND ORDER

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17 Appeal from the City of Portland.

18
19 Peggy Hennessy, Portland, filed the petition for review and argued on behalf of
20 petitioner. With her on the brief was Reeves, Kahn & Hennessy.

21
22 Kathryn S. Beaumont, Senior Deputy City Attorney, Portland, filed the response brief
23 and argued on behalf of respondent.

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

26
27 BASSHAM, Board Member, did not participate in the decision.

28
29 AFFIRMED

08/20/2008

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

NATURE OF THE DECISION

Petitioner appeals a city decision that grants design review approval of a triplex.

FACTS

The subject property is located on N. Vancouver Avenue in the city of Portland, in the city-designated Albina Community Plan area, as well as in the Boise Neighborhood. The Albina Community Plan Area encompasses a large portion of the north side of the city, stretching generally from the Willamette River, Willamette Boulevard, N. Chautauqua and North Portland Road on the west, to the Columbia River on the north, to NE 42nd Avenue on the east, to NE Broadway on the south. Response Brief App. 26. The property is zoned Single Family Residential (R 2.5), with an “a” overlay zone (R2.5a) that allows a triplex in the zone if the triplex meets maximum height, minimum setbacks, maximum building coverage and other standards of the R 2.5 base zone.

The subject property is located in the block bounded by N. Vancouver on the west, N. Williams on the east and N. Mason to the north and N. Shaver to the south. The six lots in the northwestern quarter of that block are zoned R 2.5a. The subject property is the fourth lot south of N. Mason Street, with frontage on N. Vancouver. The remaining properties on the block are zoned Central Employment, with a design zone overlay (EXd). All of the properties across N. Vancouver Avenue in the vicinity of the subject property are also zoned R 2.5a. A map showing the zoning of the subject property and surrounding blocks is attached as an appendix to this opinion.

The applicant applied for design review approval for a triplex to be constructed on the subject property. The proposed triplex is two stories high with an elevated front entry fronting the triplex unit located on N. Vancouver Avenue, large windows, metal canopies, a

1 flat roof, a rear courtyard with a fountain, and horizontal siding.¹ Because the proposed
2 triplex is subject to design review, it is required to satisfy the city’s Community Design
3 Guidelines. Portland City Code (PCC) 33.825.065.B. The application also included a
4 request for a modification to reduce the required perimeter landscaping area for the parking
5 area from 5 feet to 2.8 feet.

6 The planning department approved the application, and petitioner appealed that
7 decision to the city’s adjustment committee, which denied the appeal and adopted the
8 planning department’s decision. This appeal followed.

9 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

10 In these assignments of error, petitioner argues that the city misconstrued Community
11 Design Guideline (CDG) - P1 and made a decision that is not supported by substantial
12 evidence in the record when it found the proposal satisfies CDG - P1.² CDG - P1 requires a
13 finding that the proposal will:

14 “Enhance the sense of place and identity by incorporating site and building
15 design features that respond to the area’s desired characteristics and
16 traditions.”³

17 Petitioner points out that the proposed triplex is a modern looking largely horizontal structure
18 with large windows on all sides. Petitioner next points out that the development in the block
19 immediately adjacent to the subject property consists of residential, single-family, traditional,

¹ Design review was required because the proposed triplex has a flat roof. Portland City Code (PCC) 33.405.070.D.1.

² Contained within the CDGs are subsets of guidelines. One subset of guidelines is called “Portland Personality Guidelines.” Response Brief App. 29. Portland Personality Guideline 1 is referred to as “CDG - P1” in the first and second assignments of error. PCC 33.825.065.A specifically provides that the community design guidelines are approval criteria.

³ In the response brief, the city points out that the planning department’s initial decision and the adjustment committee’s final decision quotes an earlier version of CDG - P1 that contains language that is similar to the current version. Response Brief 6-7. Petitioner does not assign error to the city’s use of that version of the guideline in the decision, and we do not consider any issues related to the city’s reference in the decision to a prior version of CDG - P1.

1 “old Portland” style homes that include pitched roofs, small-paned windows, and large front
2 porches. Petitioner argues that the “sense of place and identity” referenced in CDG - P1 is
3 represented by those single family residential old-Portland style homes, and that the city
4 erred in failing to focus its analysis on nearby residential properties and instead relying on
5 design features of non-residential properties that are not located in the immediate vicinity of
6 the subject property in applying CDG - P1.

7 The city responds that petitioner’s reading of CDG - P1 as requiring the city to look
8 only at residential site and building design features present in the immediate vicinity of the
9 property is too narrow, and is inconsistent with the language of the guideline. The city points
10 out that CDG - P1 directs the city to look at “the area’s” desired characteristics, and explains
11 that “the area” is the entire Albina Community Plan area. The city explains that the decision
12 first identifies “*the area’s* desired characteristics and traditions,” next identifies how the
13 proposal “incorporat[es] site and building design features” present in *the area*, and finally
14 determines that the proposal incorporates those site and building design features and thus,
15 enhances the area’s sense of place and identity.

16 The decision includes the following findings:

17 “Single family residential neighborhoods characterize two-thirds of the Albina
18 Community Plan Area. The remaining third is industrial, commercial, and
19 multifamily dwellings, in order of land use area and zoning. The Boise
20 Neighborhood has a fairly high percentage of commercial, employment, and
21 industrial zoned sites.

22 “The surrounding businesses include mostly single-story concrete
23 construction auto-oriented industrial buildings with large parking lots and
24 commercial buildings remnant of the N. Vancouver Avenue and N. Williams
25 Ave. streetcar corridor. Nearby quality residential single dwelling
26 development includes Folk Victorian, Craftsman and Bungalow, and Old
27 Portland Style (modified craftsman). Quality multi-dwelling development *in*
28 *the neighborhood and community plan area* includes wood framed and
29 masonry walk up apartments and single story garden apartments from the
30 1920s through the mid-1940s.” Record 9 (Emphasis added.)

1 After identifying the relevant characteristics of the plan area and the neighborhood, the city
2 concluded:

3 “[t]he proposed site layout draws from quality garden apartments in [the]
4 neighborhood and plan area through an elevated main entrance and individual
5 units facing toward open and landscaped areas. The proposed architectural
6 form responds to nearby flat-roofed industrial buildings, streetcar era
7 commercial buildings and Folk Victorian Houses. * * *” Record 12.

8 As the city explains, the findings identify the Albina Community Plan Area as a mix of
9 industrial, commercial and residential uses, some of which are transitional in nature,
10 including “remnants of the original streetcar era residential and commercial buildings mixed
11 in with later automobile-oriented, industrial type buildings.” Record 11. In fact, the block
12 where the proposed triplex is to be sited includes a mix of vacant lots and commercial,
13 residential and industrial uses, and across the street from the proposed triplex, one block to
14 the north is a restored two-story streetcar era commercial building.

15 The Albina Community Plan Area is large and diverse and includes both a variety of
16 “characteristics and traditions,” and a variety of “site and building design features.”
17 Similarly, the area of the Albina Community Plan Area surrounding the block where the
18 subject property is located is developed residentially, commercially and industrially and
19 includes a variety of “site and building design features” that potentially may be
20 “incorporate[ed]” to comply with CDG - P1. Petitioner points to nothing in the text of the
21 guideline, or any other PCC provision or guideline, that supports her interpretation of the
22 guideline as requiring the city to focus *only* on residential development in the immediate
23 vicinity of the proposal in order to determine whether CDG - P1 is met. Rather, petitioner’s
24 argument tends to ignore the language of CDG - P1 that references the entire plan area, and
25 instead focuses on residential development immediately adjacent to the property where the
26 proposal is located. That argument does not explain why the city’s interpretation of the
27 guideline is a misconstruction, in light of the guideline’s directive to “respond to the area’s”
28 characteristics and traditions. We conclude the city did not err in identifying the

1 characteristics and traditions of the large and diverse Albina Community Plan Area and did
2 not err in determining that the proposal responds to those characteristics.

3 In the second assignment of error, petitioner argues that the city’s decision that CDG
4 - P1 is met is not supported by substantial evidence in the record. ORS 197.835(9)(a)(C).
5 Petitioner points to evidence and testimony in the record that she argues demonstrates that
6 the proposal does not “enhance the sense of place and identity” of the residential properties
7 in the immediate vicinity of the property. Petitioner’s substantial evidence argument is
8 premised on her contention in the first assignment of error that the city misconstrued the
9 guideline. Because we have rejected petitioner’s challenge to the city’s construction of CDG
10 - P1, we similarly reject petitioner’s substantial evidence challenge.

11 The first and second assignments of error are denied.

12 **THIRD AND FOURTH ASSIGNMENTS OF ERROR**

13 In the third and fourth assignments of error, petitioner argues that the city
14 misconstrued CDG –D7.⁴ CDG - D7 requires the city to find that the proposal will:

15 “[r]educe the impact of new development on established neighborhoods by
16 incorporating elements of nearby quality buildings such as building details,
17 massing, proportions, and materials.”

18 In the third assignment of error, petitioner argues that the city misconstrued CDG - D7 and
19 that the findings are inadequate to explain how the proposal complies with CDG - D7.
20 Petitioner argues that the city erred by focusing on design features of apartment buildings
21 that are located approximately six blocks away from the subject property and on commercial
22 and industrial buildings located nearby, rather than on the features of the residential uses in
23 the immediate vicinity of the property.

24 The city responds that, as with the first and second assignments of error, petitioner’s
25 interpretation of CDG - D7 to require that the city to look only at buildings adjacent to the

⁴ As noted, the Community Design Guidelines contain subsets of guidelines. One subset is called “Project Design Guidelines.” Response Brief App. 40. Project Design Guideline 7 is referred to as “CDG - D7.”

1 proposed development is too narrow, and inconsistent with the text of the guideline. The city
2 explains that the focus of CDG - D7 is ensuring that new development does not too greatly
3 impact the “established neighborhood.”

4 As noted, the city identified the Boise Neighborhood as the “established
5 neighborhood.” Petitioner does not challenge the city’s identification of the Boise
6 Neighborhood as the “established neighborhood.” The Boise Neighborhood includes many
7 blocks. In determining whether the guideline was met, the city first described the features of
8 all types of buildings in the neighborhood. The city explained that the proposed triplex
9 incorporated aspects of commercial and industrial buildings in the neighborhood by using
10 large windows and metal canopies, white stucco material, and flat roofs. The city also found
11 that the triplex incorporated aspects of nearby residential development, including garden
12 style and walk up apartments as well as single family residences, by using horizontal siding,
13 a front porch entry to the unit fronting N. Vancouver, landscaped areas, and a courtyard with
14 a fountain.⁵ Thus, the city concluded, CDG - D7 was met.

⁵ The city found:

“As noted in the findings for P1, the proposed development is informed by nearby low scale industrial buildings, streetcar era commercial buildings and Folk Victorian houses. The site layout incorporates elements of quality garden apartments developed in the 1920s through mid-1940s located in the neighborhood. Specific elements incorporated into the design include:

“height is limited to two stories;

“floor to ceiling height comparable to Folk Victorian houses in the immediate vicinity;

“horizontal siding;

“front porch entry on unit facing N. Vancouver Ave.;

“generous windows and broad metal canopies relate to streetcar era commercial buildings;

“traditional white stucco references residential and commercial buildings in the neighborhood; and

“flat roof form is informed by nearby low-scale industrial buildings.” Record 15.

1 As with the first assignment of error, we agree with the city that petitioner has not
2 identified anything in the text of CDG - D7 or any other provision of the PCC that required
3 the city to evaluate the new development's impact only on residential buildings adjacent to or
4 in the immediate vicinity of the subject property. We think the city's interpretation of CDG -
5 D7 as requiring the triplex to incorporate design features of multiple types of buildings found
6 in the neighborhood is not inconsistent with the text of CDG - D7, and the city's findings are
7 adequate to explain how the triplex satisfies the guideline.

8 In the fourth assignment of error, petitioner argues that the city's findings regarding
9 CDG - D7 are not supported by substantial evidence. As with the second assignment of
10 error, petitioner's substantial evidence challenges are premised on her contention that the city
11 misconstrued CDG - D7 by finding that the triplex incorporates design features of industrial
12 and commercial buildings located nearby. Because we reject petitioner's challenge to that
13 interpretation of CDG - D7, we reject petitioner's substantial evidence challenge.

14 The third and fourth assignments of error are denied.

15 **FIFTH AND SIXTH ASSIGNMENTS OF ERROR**

16 In the fifth and sixth assignments of error, petitioner argues that the city misconstrued
17 applicable law and that the findings are inadequate to explain the city's decision to allow the
18 applicant to reduce the perimeter landscaping for the parking area under PCC 33.825.040.⁶
19 The city responds that the issue presented in the fifth and sixth assignment of error was not

⁶ PCC 33.825.040 provides in relevant part:

“The review body may consider modification of site-related development standards, * * * as part of the design review process. * * * The review body will approve requested modifications if it finds that the applicant has shown that the following approval criteria are met:

- “A. Better meets design guidelines. The resulting development will better meet the applicable design guidelines; and
- “B. Purpose of the standard. On balance, the proposal will be consistent with the purpose of the standard for which a modification is requested.”

1 raised below and that petitioner is precluded from raising the issue for the first time on
2 appeal to LUBA under ORS 197.763(1) and ORS 197.835(3). Petitioner has not responded
3 to the city's waiver argument. The issue is waived.

4 The fifth and sixth assignments of error are denied.

5 The city's decision is affirmed.

