

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

12/19/17 AM 8:41 LUNA

3
4 VICTOR LOCKE,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF PORTLAND,
10 *Respondent.*

11
12 LUBA No. 2017-061

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from City of Portland.

18
19 Christopher P. Koback, Portland, filed the petition for review and argued
20 on behalf of petitioner. With him on the brief was Hathaway Larson LLP.

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

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

27
28 AFFIRMED 12/19/2017

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

NATURE OF THE DECISION

Petitioner appeals a decision by the city approving in part and denying in part an application to modify a prior city decision approving his land division application.

FACTS

Petitioner owns a 10,538 square foot lot on the south side of SE Madison Street, east of SE 122nd Avenue and west of SE 127th Avenue, which are the closest streets that intersect SE Madison Street. A vicinity map from Record 99 is included in the Appendix. The lot is approximately 75 feet wide along its SE Madison Street frontage and 140 feet deep. SE Madison Street between SE 122nd Avenue and SE 127th Avenue is a block that exceeds 1,250 feet in length and contains no connections between SE Madison Street and SE Market Street to the south. SE Madison Street is improved with 28 feet of paving within a 50-foot right of way. There is no curb or sidewalk along the subject property's frontage with SE Madison Street. A large tree sits on the property line between petitioner's property and the property to the east.

In 2015, petitioner received approval to divide his lot into two parcels (2015 Decision). Parcel 1 includes approximately 55 feet fronting SE Madison Street, and Parcel 2 is located to the south of Parcel 1 and includes approximately 12 feet fronting SE Madison Street. The land division that the city approved in 2015 requires petitioner to create and dedicate to the public a

1 7.5-foot wide pedestrian pathway along the eastern boundary of the property
2 for its length, terminating at the southern property line, which abuts an existing
3 lot that fronts on SE Market Street to the south. Creation and dedication of the
4 public pedestrian pathway allowed Parcel 2 to meet the front lot line
5 requirement in Portland City Code (PCC) 33.611.200.D. of at least 30 feet,
6 because Parcel 2 “fronts” the public pedestrian pathway for 62 feet. According
7 to the 2015 decision, the public pedestrian pathway is a “street” as defined in
8 PCC 33.910.030. Also according to the 2015 decision, Parcel 2 qualifies as a
9 “through lot” pursuant to PCC 33.611.300 because it has frontage on two local
10 service streets — SE Madison Street and the public pedestrian pathway. As a
11 through lot, Parcel 2 can also be developed with a duplex, pursuant to PCC
12 33.110.240.D.¹

13 One condition of the 2015 Decision, Condition C.1, required petitioner
14 to (1) dedicate to the city the 7.5-foot wide public pedestrian pathway along the
15 eastern boundary line, (2) construct a 4-foot wide walkway and 3.5-foot wide
16 landscape buffer along that public pedestrian pathway, and (3) construct
17 improvements on the SE Madison Street sidewalk frontage.²

¹ Parcel 1 is considered a “corner lot,” which allows it to be developed with a duplex pursuant to PCC 33.110.240.E.3.

² Condition C.1 provides:

“The applicant shall meet the requirements of the City Engineer for right-of-way improvements along the site’s street frontage and for the new public pedestrian connection. The applicant shall

1 A different condition of the 2015 Decision, Condition A.1, required
2 petitioner to dedicate right-of-way along SE Madison Street to the city.
3 Condition A.1 provided that “[t]he applicant shall meet the street dedication
4 requirements of the City Engineer for SE Madison and the new public
5 pedestrian connection. The required right-of-way dedication must be shown on
6 the final plat.” Record 93. The 2015 Decision was not appealed.

7 In 2017, petitioner submitted an application to “[m]odify approval in file
8 LU-14-173928 to revise condition on how public improvements will be
9 addressed, applicant is proposing to pay the [Local Transportation
10 Infrastructure Charge] LTIC fee in [lieu] of making improvements as suggested
11 by [the Portland Bureau of Transportation] PBOT.”³ Record 73. After public
12 notice and review, the city issued a decision that modified Condition C.1 to
13 allow petitioner to pay an LTIC fee instead of constructing improvements to
14 the SE Madison Street frontage, but denied petitioner’s request to modify the
15 requirement in Condition C.1 to improve the public pedestrian pathway. This
16 appeal followed.

submit an application for Public Works Permit and provide plans and financial assurances to the satisfaction of the Portland Bureau of Transportation and the Bureau of Environmental Services for required street frontage improvements.” Record 94.

³ In 2016, the city adopted an ordinance that allows a property owner to pay a Local Transportation Infrastructure Charge (LTIC) in lieu of constructing improvements to unimproved streets.

1 **MOTION TO FILE A REPLY BRIEF**

2 Petitioner moves for permission to file a reply brief to respond to
3 arguments in the city’s brief that certain issues have been waived under ORS
4 197.763(1) and ORS 197.835(3). There is no opposition to the reply brief and it
5 is allowed.

6 **MOTION TO TAKE EVIDENCE**

7 Petitioner moves to take evidence not in the record consisting of emails
8 between the city’s planning staff and petitioner. The emails are dated after the
9 date of the city’s decision and are petitioner’s request for copies of city agency
10 responses to petitioner’s modification application and the city’s response to
11 petitioner’s request.

12 The city opposes the motion, arguing that petitioner has failed to explain
13 why the motion should be allowed under OAR 661-010-0045. We agree with
14 the city. OAR 661-010-0045(1) provides:

15 “Grounds for Motion to Take Evidence Not in the Record: The
16 Board may, upon written motion, take evidence not in the record
17 in the case of disputed factual allegations in the parties’ briefs
18 concerning unconstitutionality of the decision, standing, ex parte
19 contacts, actions for the purpose of avoiding the requirements of
20 ORS 215.427 or 227.178, or other procedural irregularities not
21 shown in the record and which, if proved, would warrant reversal
22 or remand of the decision. The Board may also upon motion or at
23 its discretion take evidence to resolve disputes regarding the
24 content of the record, requests for stays, attorney fees, or actual
25 damages under ORS 197.845.”

26 Petitioner argues that the emails are “necessary to * * * resolve a disputed
27 factual allegation concerning a defect in the Notice the city issued of the

1 proposal that warrants a remand or reversal of the City’s decision.” Motion to
2 Take Evidence Not in the Record 1. However, petitioner’s petition for review
3 does not allege that the city committed a procedural error or otherwise include
4 an assignment of error that alleges “procedural irregularities not shown in the
5 record and which, if proved, would warrant reversal or remand of the decision.”
6 OAR 661-010-0045(1). Accordingly, we agree with the city that there are no
7 grounds under OAR 661-010-0045(1) to grant the motion, and it is denied.

8 **FIRST ASSIGNMENT OF ERROR**

9 Petitioner’s first assignment of error is:

10 “The City erred in failing to amend Petitioner’s preliminary plan
11 approval to eliminate the exaction of real property after removing
12 all obligation to construct sidewalk improvements.” Petition for
13 Review 8.

14 The petition for review describes the assignment of error in more detail as
15 “[t]he first assignment of error challenges the City’s imposition of a condition
16 that Petitioner dedicate real property as a condition to obtaining a permit.”
17 Petition for Review 10. According to petitioner, in approving petitioner’s
18 requested modification to the condition requiring petitioner to construct
19 improvements to the SE Madison Street sidewalk, the city should have also
20 modified the requirement in Condition A.1 that requires petitioner to dedicate
21 right-of-way along SE Madison Street.

22 The city responds that petitioner is precluded under ORS 197.763(1) and
23 ORS 197.835(3) from raising an issue regarding the requirement in Condition

1 A.1 in the 2015 Decision that he dedicate right-of-way along SE Madison
2 Street. ORS 197.763(1) provides:

3 “An issue which may be the basis for an appeal to the Land Use
4 Board of Appeals shall be raised not later than the close of the
5 record at or following the final evidentiary hearing on the proposal
6 before the local government. Such issues shall be raised and
7 accompanied by statements or evidence sufficient to afford the
8 governing body, planning commission, hearings body or hearings
9 officer, and the parties an adequate opportunity to respond to each
10 issue.”

11 Relatedly, ORS 197.835(3) provides that in a LUBA appeal “[i]ssues shall be
12 limited to those raised by any participant before the local hearings body as
13 provided by ORS 197.195 or 197.763, whichever is applicable.” The city
14 argues that petitioner failed to request a modification of the dedication that is
15 required by Condition A.1 during the proceedings that led to the challenged
16 decision, or otherwise raise any issue during those proceedings challenging the
17 requirement in the 2015 Decision that he dedicate right-of-way along SE
18 Madison Street.

19 OAR 661-010-0030(4)(d) requires a petitioner to identify in a petition
20 for review which issues were not initially raised at the local or state levels and
21 to explain why preservation is not required:

22 “[In the petition for review, petitioners must] set forth each
23 assignment of error under a separate heading. Each assignment of
24 error must demonstrate that the issue raised in the assignment of
25 error was preserved during the proceedings below. Where an
26 assignment raises an issue that is not identified as preserved
27 during the proceedings below, the petition shall state why
28 preservation is not required. * * *”

1 Petitioner provided the following statement in a section of the petition for
2 review entitled “Preservation of the Argument:”

3 “Petitioner adequately preserved his argument below because,
4 pursuant to ORS 197.835(4), he was not required to raise
5 arguments related to this assignment of error.” Petition for Review
6 8.

7 In his reply brief, we understand petitioner to take the position that he is
8 allowed to raise the issue raised in the first assignment of error pursuant to
9 ORS 197.835(4)(b). ORS 197.835(4)(b) allows new issues to be raised for the
10 first time at LUBA if the city “made a land use decision * * * which is different
11 from the proposal described in the notice to such a degree that the notice of the
12 proposed action did not reasonably describe the local government’s final
13 action.” Petitioner argues that the city’s notice was misleading because it did
14 not expressly explain that if petitioner’s application to modify Condition C.1
15 was approved, petitioner would still be required to dedicate right-of-way along
16 SE Madison Street.⁴

⁴ According to petitioner:

“* * * The Notice in this matter was defective in that it was misleading as to what would be required of Petitioner if he paid the LTIC. The Notice has to be looked at in context. The Notice clearly stated that the reason Condition C.1 was relevant was because, in lieu of requiring public improvements, the Petitioner was paying the LTIC. In light of the express text in the LTIC ordinance, there was no reason for anyone to expect that Condition A.1 was still relevant. In the face of a clear ordinance that requires an applicant to only pay the LTIC fee and not dedicate real property, if the City intended to insist on dedication, it should

1 The city’s notice of the proposed action describes petitioner’s application
2 as seeking to modify a condition of the 2015 Decision that “calls for the
3 applicant to construct new right-of-way improvements along the site frontage
4 on SE Madison Street[,]” and describes petitioner’s proposal to pay an LTIC
5 fee in lieu of making those improvements on SE Madison Street. Record 49.
6 The notice also describes petitioner’s application as seeking to modify the
7 requirement in the 2015 Decision to construct improvements along the public
8 pedestrian pathway. Record 50. That notice is also entirely consistent with
9 petitioner’s application, which stated that he sought to:

10 “[m]odify approval in file LU-14-173928 to revise condition on
11 how public improvements will be addressed, applicant is
12 proposing to pay the LTIC fee in [lieu] of making improvements
13 as suggested by PBOT.” Record 73.

14 The city’s final decision on petitioner’s application approved petitioner’s
15 application to eliminate the requirement in the 2015 Decision to improve SE
16 Madison Street and denied his application to eliminate the requirement to
17 improve the public pedestrian pathway. There is nothing about the city’s final
18 decision on petitioner’s application that “is different from the proposal
19 described in the notice to such a degree that the notice of the proposed action
20 did not reasonably describe the local government’s final action.” ORS
21 197.835(4)(b). Accordingly, we agree with the city that petitioner may not, for

have included that in the Notice. The absence of any reference to
the dedication made the Notice defective. * * *” Reply Brief 2-3.

1 the first time in his appeal to LUBA, raise the issue raised in his first
2 assignment of error.

3 The first assignment of error is denied.

4 **SECOND ASSIGNMENT OF ERROR**

5 In the second assignment of error, petitioner challenges the city's denial
6 of the part of his application that sought to eliminate the requirement in
7 Condition C.1 to improve the public pedestrian pathway with a 4-foot sidewalk
8 and a 3.5-foot landscape buffer. Petitioner argues that because the proposed
9 dwellings on Parcels 1 and 2 will be able to access the dwellings from the
10 shared driveway located on the west side of the parcels, and because the
11 pathway terminates at the southern property line and provides no immediate
12 connectivity to anything, the pathway does not provide any public benefit and
13 is "entirely useless." Petition for Review 26. Petitioner also argues that there is
14 no regulatory basis for requiring petitioner to improve the pathway. According
15 to petitioner, the city's denial of his request to eliminate the requirement to
16 improve the public pedestrian pathway is an exaction that the city must justify
17 under the legal standard articulated in *Nollan v. California Coastal Comm'n*,
18 483 US 825, 831–32, 107 SCt 3141 (1987), and *Dolan v. City of Tigard*, 512
19 US 374, 384, 114 SCt 2309 (1994). In a footnote, petitioner cites the Supreme
20 Court's decision in *Koontz v. St. Johns Water Management District*, 568 US
21 ___, 133 SCt 2586 (2013).

1 As the Court of Appeals explained in *Brown v. City of Medford*, 251 Or
2 App 42, 283 P3d 367 (2012), *Nollan* and *Dolan* together establish a two-part
3 test for assessing the constitutionality of a government exaction of a dedication
4 of private property:

5 “First, the exaction must substantially advance the same
6 government interest that would furnish a valid ground for denial of
7 the development permit—also known as the ‘essential nexus’
8 prong of the test. *Nollan*, 483 US at 836–37, 107 SCt 3141.
9 Second, the nature and extent of the exaction must be ‘roughly
10 proportional’ to the effect of the proposed development. *Dolan*,
11 512 U.S. at 385, 114 S.Ct. 2309.” *Brown*, 251 Or App at 51.

12 In *Koontz*, the Supreme Court held that an unconstitutional taking occurred
13 when the defendant water district agreed to grant Koontz a permit to develop
14 wetlands on his property only in exchange for Koontz’s agreement to pay for
15 and perform mitigation on other district property located four miles away from
16 Koontz’s property, or on different district property located seven miles away.

17 The city disagrees with petitioner that the requirement to improve the
18 pathway to city standards is an exaction as described in *Nollan* and *Dolan*, or in
19 *Koontz*. The city argues that the requirement to improve the pathway that will
20 serve the front entrance of the dwelling on Parcel 2 is a result of regulatory
21 approval standards that applied to the 2015 decision and were re-applied to
22 deny this portion of petitioner’s modification application.⁵ The city takes the

⁵ PCC 33.660.320 sets out the approval criteria for changes to an approved preliminary land division plan. Those approval criteria essentially require that

1 position that the pathway was required to allow petitioner's proposed land
2 division to be approved at all, because the pathway is what allows Parcel 2 to
3 meet the minimum lot frontage requirements. As such, the city points to the
4 requirement in PCC 33.110.230 that the entrance of the dwelling on Parcel 2 be
5 oriented towards the pathway because the pathway is the front lot line of Parcel
6 2.

7 The city also points to PCC 33.654.120(E)(2), which specifies that the
8 standards and approval for the design and configuration of public pedestrian
9 connections are set by PBOT. A separate provision of the PCC, PCC 17.28.060
10 specifies that the width, grade and materials for construction of a pedestrian
11 connection are designated by the city engineer.

12 Petitioner proposed to dedicate the pathway to the public as part of his
13 partition proposal, and did not challenge the condition requiring improvement
14 of that pathway in the 2015 Decision. We agree with the city that no exaction
15 has occurred in requiring petitioner to improve that pathway to the width, grade
16 and materials standards designated by the city engineer, as PCC 17.28.060 and
17 Condition C.1 of the 2015 Decision require. This condition is unlike the
18 condition that the water district in *Koontz* imposed that required Koontz to pay
19 for and perform mitigation on district property several miles away from
20 Koontz's property, which in no way served to benefit Koontz's property. Here,

after a modification, the approved preliminary plan must continue to meet the approval criteria in PCC 33.660.120.

1 requiring that pathway to be improved makes it usable by the occupants of the
2 dwellings on Parcels 1 and 2, which will have front entrances facing the
3 pathway. It will also be usable by the public. The pathway serves as the front
4 lot line access for Parcel 2 that petitioner sought to have approved, and that the
5 city in fact approved. The PCC includes standards that require petitioner to
6 construct streets, such as the pathway, to city standards. The city's requirement
7 to improve the pathway to city standards is no different from a requirement to
8 improve a new public street approved as part of a land division to city street
9 standards for width, grade and materials, where the street largely serves parcels
10 located in the subdivision.

11 The second assignment of error is denied.

12 The city's decision is affirmed.

13

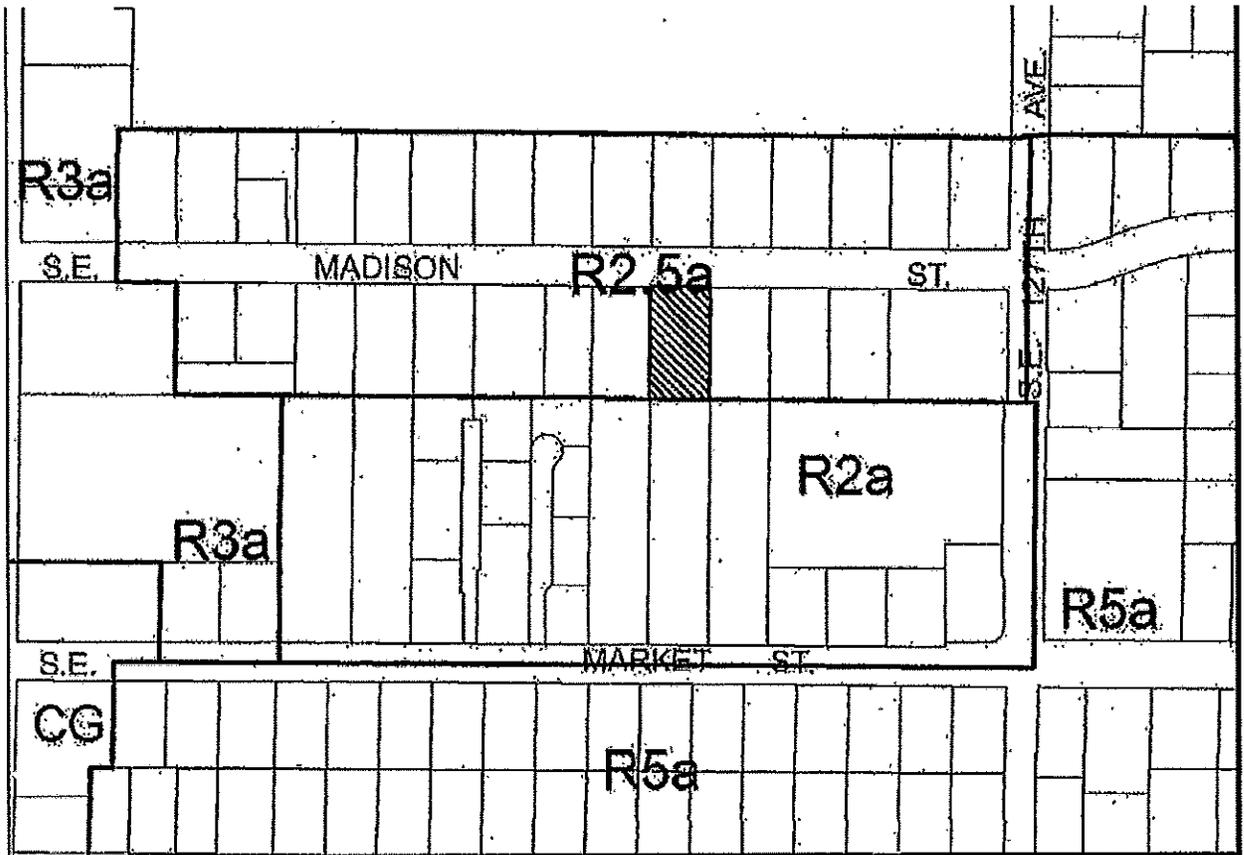
Appendix

1

2

3

4



5