

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

3
4 SHARON BOHAN,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF PORTLAND,
10 *Respondent,*

11 and

12
13
14 ALEXANDER REVENKO,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2019-055

18
19 FINAL OPINION
20 AND ORDER

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22 Appeal from City of Portland.

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24 Sharon Bohan, Portland, filed the petition for review on her own behalf.

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26 Nikesh J. Patel, Assistant Deputy City Attorney, Portland, filed a response
27 brief and argued on behalf of respondent. With him on the brief was Linly F.
28 Rees, Chief Deputy City Attorney.

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30 Olga Groat, Portland, filed a response brief on behalf of intervenor-
31 respondent.

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33 RYAN, Board Chair; RUDD, Board Member, participated in the decision.

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35 ZAMUDIO, Board Member, did not participate in the decision.

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37 AFFIRMED

08/27/2019

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

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NATURE OF THE DECISION

Petitioner appeals a city decision approving a partition.

REQUEST FOR REHEARING

In an order dated July 2, 2019, LUBA scheduled oral argument in this appeal for August 14, 2019, at 1:45 p.m. Petitioner did not appear at oral argument. On August 15, 2019, LUBA notified petitioner by letter that, pursuant to OAR 661-010-0040(2), the cause was deemed submitted without oral argument as to petitioner.¹ Petitioner subsequently filed a “Request for Rehearing” that seeks to hold a second oral argument in order for her to appear.

OAR 661-010-0040(2) allows the Board to deem the cause submitted without oral argument as to that party, and we have done so as to petitioner. Accordingly, petitioner’s request is denied.²

¹ OAR 661-010-0040(2) provides:

“If a party waives the right to present oral argument, the Board shall consider the case based on that party’s brief and the briefs and oral arguments presented by other parties. The parties may, with consent of the Board, stipulate to submit a case to the Board on briefs without oral argument. If a party fails to appear at the time set for oral argument, the Board may deem the cause submitted without oral argument as to that party. A party’s failure to so appear shall not preclude oral argument by other parties.”

² Petitioner’s lack of appearance at oral argument played no role in our resolution of this appeal.

1 **FACTS**

2 Intervenor-respondent (intervenor) applied to partition an approximately
3 9,728 square-foot property zoned Residential 5000 (R5) into two parcels, with
4 one parcel as a flag lot. The property includes an existing dwelling that includes
5 a covered deck above ground, as well as a few sheds. Petitioner submitted
6 comments opposing the application. The city approved the application, and this
7 appeal followed.

8 **ASSIGNMENT OF ERROR**

9 The approval criteria for land divisions is in Portland City Code (PCC)
10 33.660.020. PCC 33.700.015.A.1 requires that if a proposed land division will
11 cause existing development to become nonconforming with “any regulation of
12 the zoning code,” the land division application must include a request for an
13 adjustment.

14 In her assignment of error, petitioner first argues that the city improperly
15 construed PCC 33.110.235. PCC 33.110.235 is a development standard that
16 applies at the time of application for a zoning permit or a building permit. PCC
17 33.110.235.C.2 requires in relevant part that a minimum of 250 square feet of
18 outdoor area must be provided for each lot:

19 “The area must be surfaced with lawn, pavers, decking, or sport
20 court paving which allows the area to be used for recreational
21 purposes. User amenities, such as tables, benches, trees, planter
22 boxes, garden plots, drinking fountains, spas, or pools may be placed
23 in the outdoor area. It may be covered, such as a covered patio, but
24 it may not be fully enclosed.”

1 Due to concerns raised by petitioner about the parcel that includes the existing
2 dwelling (Parcel 1) satisfying the required minimum outdoor area after a land
3 division, the city evaluated the proposed parcels' compliance with PCC
4 33.110.235.

5 The city found that for Parcel 1, two distinct areas satisfy the minimum
6 outdoor area requirement. First, the city found that an existing covered deck
7 attached to the rear of the dwelling on proposed Parcel 1 is more than 250 square
8 feet, above ground, covered, and not fully enclosed, and therefore satisfied the
9 minimum outdoor area requirement. Second, the city also found that an area east
10 of the existing dwelling on proposed Parcel 1, labeled on a revised plan as
11 "existing concrete pad," meets the minimum outdoor area standard, for a total of
12 two distinct areas that meet the minimum outdoor area standard. Record 23, 31,
13 54.

14 In her assignment of error, petitioner first argues that the existing deck
15 cannot satisfy the minimum outdoor area requirement because, according to
16 petitioner, the existing deck is not a "patio," because it is attached to the existing
17 dwelling. According to petitioner, it is a "porch," and a porch does not qualify
18 under PCC 33.110.235 to meet the minimum outdoor area requirement. Petitioner
19 also argues that because the deck contains several stored items, it is not "outdoor
20 area." In a portion of her assignment of error, petitioner also argues that a graphic
21 at Record 134 "shows a shocking level of bias as the city level as well as
22 confirming the city's own understanding of the weakness of their contention that

1 the roofed storage porch meets the requirements of the outdoor area.” Petition for
2 Review 8.

3 Petitioner next argues that the existing concrete pad does not satisfy the
4 minimum outdoor area requirement because two heat pumps are located on the
5 concrete pad. According to petitioner, the square footage occupied by the heat
6 pumps and the clearance that is needed to reach them for servicing means that the
7 existing concrete pad is less than 250 square feet.

8 The city responds that the city correctly construed PCC 33.110.235 to
9 conclude that a covered deck that is attached to the dwelling, but not enclosed,
10 can satisfy the minimum outdoor area requirement. The city also responds that
11 petitioner is precluded from challenging the city’s conclusion that the existing
12 concrete pad satisfies the minimum outdoor requirement based on the location of
13 the heat pumps on the concrete pad because she failed to raise the issue during
14 the city’s proceedings on the application and ORS 197.195(3)(c)(B) precludes
15 her from raising the issue for the first time at LUBA.³ The city also responds that

³ The city’s decision is a limited land use decision as defined in ORS 197.015(11). ORS 197.195(3)(c)(B) requires the local government to provide notice to nearby property owners that includes a statement that “issues which may provide the basis for an appeal to [LUBA] shall be raised in writing prior to the expiration of the comment period. Issues shall be raised with sufficient specificity to enable the decision maker to respond to the issue[.]”

ORS 197.835(3) provides that issues before LUBA are “limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable.”

1 even if the issue was not waived, there is no evidence in the record regarding the
2 location of heat pumps and therefore, petitioner’s argument provides no basis for
3 reversal or remand.

4 Because only one minimum outdoor area is required and the city found
5 that two separate areas satisfy the minimum outdoor area requirement, we need
6 only determine whether one of those areas satisfies the requirement. We agree
7 with the city, however, that the city properly construed PCC 33.110.235 to find
8 that the existing covered deck and the existing concrete pad each satisfy the
9 minimum outdoor area requirement.

10 PCC 33.110.235 allows the outdoor area to be elevated “above ground,”
11 which is a common feature of decks that are attached to a dwelling. It is also
12 allowed to be covered. The example given in PCC 33.110.235 of a covered
13 outdoor area, “such as a covered patio,” is a non-exclusive example. In fact, the
14 only restriction on the outdoor area is that the outdoor area may not be “fully
15 enclosed.” Petitioner does not dispute that the deck is not fully enclosed, or
16 enclosed at all. In addition, petitioner does not develop any claim of bias by the
17 city in a way that is sufficient for our review. *Deschutes Development Co. v.*
18 *Deschutes County*, 5 Or LUBA 218, 220 (1982).

19 For the existing concrete pad, there is no evidence in the record regarding
20 the existence or location of any heat pumps or other items on the concrete pad.
21 LUBA’s review is confined to the record. ORS 197.835(2)(a). Petitioner has not
22 established the location of any items on the concrete pad based on evidence in

1 the record. Accordingly, we agree with the city that it properly concluded that the
2 existing concrete pad provides a separate minimum outdoor area that meets the
3 requirements in PCC 33.110.235.

4 Finally, petitioner quotes a portion of PCC 33.110.010.B and argues that
5 the decision affects “livability of the existing house” and that the city has ignored
6 “impact on the neighborhood.”⁴ Petition for Review 9. Petitioner argues that

⁴ PCC 33.110.010.B sets out the general purpose for single dwelling zones, including the R5 zone, and provides in relevant part:

“The single-dwelling zones are intended to preserve land for housing and to provide housing opportunities for individual households. The zones implement the comprehensive plan policies and designations for single-dwelling housing.

“ * * * * *

“B. Development standards. The development standards preserve the character of neighborhoods by providing six different zones with different densities and development standards. The development standards work together to promote desirable residential areas by addressing aesthetically pleasing environments, safety, privacy, energy conservation, and recreational opportunities. The site development standards allow for flexibility of development while maintaining compatibility within the City's various neighborhoods. In addition, the regulations provide certainty to property owners, developers, and neighbors about the limits of what is allowed. The development standards are generally written for houses on flat, regularly shaped lots. Other situations are addressed through special regulations or exceptions.”

1 because the proposed parcels eliminate the large yard that currently exists, the
2 land division affects the desirability of the existing house and makes it likely that
3 the large existing house will not be owner-occupied in the future.

4 The city's findings conclude that none of the criteria applicable to land
5 divisions require the city to consider "privacy or livability" in determining
6 whether to approve the land division. Record 14. We agree with the city that PCC
7 33.110.010.B is not an applicable approval criterion for the land division, and
8 that none of the applicable approval criteria require the city to consider "privacy"
9 or "livability." Accordingly, petitioner's argument provides no basis for reversal
10 or remand.

11 Petitioner's assignment of error is denied.

12 The city's decision is affirmed.