

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

JUSTIN KULONGOSKI
and CAREY KULONGOSKI,
Petitioners,

vs.

CITY OF PORTLAND,
Respondent,

and

ITO, MENDEZ & ASSOCIATES, LLC,
Intervenor-Respondent.

LUBA No. 2021-004

FINAL OPINION
AND ORDER

Appeal from City of Portland.

William Kabeiseman filed the petition for review and reply brief and argued on behalf of petitioners. Also on the brief was Bateman Seidel Miner Blomgren Chellis & Gram, PC.

Lauren King and James D. Howsley filed the joint response brief and argued on behalf of respondent and intervenor-respondent. Also on the brief was Jordan Ramis PC.

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

ZAMUDIO, Board Chair, did not participate in the decision.

REMANDED

07/08/2021

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

NATURE OF THE DECISION

Petitioners appeal a decision by the city's Design Review Commission approving a two-story addition to an existing two-story dwelling and two modifications to the applicable side yard setbacks.

FACTS

The existing dwelling is a two-story dwelling on property zoned Single-Dwelling Residential 5,000 (R5), located on SW Miles Place, south of Willamette Park, a city park. SW Miles Place is part of the Willamette River Greenway Trail (Greenway Trail). Park land is located between the subject property and the river.

The existing dwelling was remodeled in 1971 and, in connection with that remodel, the city approved a variance to allow reduced setbacks on the north and south side yards.¹ However, as constructed, the remodeled dwelling does not conform to the approved variance from the setback standard.

In 2020, intervenor applied to add two stories to the existing two-story dwelling and, as a part of the application, sought modifications to the applicable five-foot setback standard for the north and south side yards in Portland City Code (PCC) Table 110-3. The city's planning staff approved the application, and petitioners appealed the decision to the city's Design Review Commission

¹ Due to its riverfront location, the front of the dwelling faces west, the east side of the dwelling faces the Willamette River, and the side yards are located on the north and south sides of the dwelling.

1 (DRC). The DRC held a hearing on the appeal and, at the conclusion, voted to
2 deny the appeal and approve the application, including the modifications to the
3 setback standard. This appeal followed.

4 **FIRST ASSIGNMENT OF ERROR**

5 PCC 33.825.040 allows a review body to approve modification of site-
6 related development standards:

7 **“Modifications That Will Better Meet Design Review** 8 **Requirements**

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

14 **“A. Better meets design guidelines.** The resulting development
15 will better meet the applicable design guidelines; and

16 **“B. Purpose of the standard.** On balance, the proposal will be
17 consistent with the purpose of the standard for which a
18 modification is requested.” (Boldface in original.)

19 Development of the property is subject to the Macadam Corridor Design
20 Guidelines (Guidelines). Guideline 1, which is the Guideline at issue in this
21 appeal, is to “[c]reate public views to the river, Greenway Trail and Willamette
22 Park from Macadam Avenue and other public parks and rights-of-way west of
23 Macadam as well as views from the river and the Greenway to the west.”

24 On the south side of the dwelling, the application proposed to remove a
25 bay window that protrudes 18 inches from the existing dwelling and allow other

1 portions of the existing dwelling to extend into the five-foot setback by 19 1/4
2 inches. On the north side of the dwelling, the application proposed to remove a
3 two-foot roof overhang and allow other portions of the existing dwelling to
4 extend into the five-foot setback by between 24 3/4 and 25 1/4 inches.

5 The city found that the proposed modifications to the setback standard
6 “better meet” Guideline 1:

7 “South. The proposal better meets the visual connection goal on the
8 south side of the building by removing the portion of the house
9 which encroaches the closest to the south property line. This area is
10 currently a bay window on the second-floor protruding 18” from the
11 building face. * * * The removal of this bay increases the visual
12 connection to the river. Additionally, this proposal removes existing
13 roof overhangs (see next paragraph).

14 “North. The proposal better meets the visual connection goal on the
15 north side of the building by removing the roof overhangs on all
16 existing portions of the house which encroach 24” from the building
17 face. The proposed design has no roof overhangs at the first or
18 [second] floor (or anywhere on the side elevations). * * * The
19 removal of these roof lines increases the visual connection to the
20 river.” Record 10 (underscoring in original).

21 In their first assignment of error, petitioners argue that the city improperly
22 construed PCC 33.825.040 and, therefore, the decision “does not comply with
23 applicable provisions of the land use regulations.” ORS 197.828(2)(b).
24 Petitioners argue that the city wrongly compared the existing non-compliant
25 setbacks with the proposed non-compliant setbacks to find that the proposed
26 setbacks better meet Guideline 1, when the city should have compared the

1 proposed non-compliant setbacks to compliant, five-foot setbacks in order to
2 determine whether the proposed setbacks “better meet” Guideline 1.

3 In support of their argument, petitioners point to the plain language of PCC
4 33.825.040, which allows the review body to consider “modification of site-
5 related development standards.” Petitioners argue that that plain language means
6 that the review body may approve a modification of “development standards,” in
7 this case the five-foot setback in PCC Table 110-3. According to petitioners, PCC
8 33.825.040 does not authorize the city to modify an existing non-compliant
9 setback because existing non-compliant setbacks are not “site-related
10 development standards.”

11 The city and intervenor-respondent (together, respondents) respond that
12 the DRC properly considered the project as a whole in determining whether the
13 proposed modifications to the setback standard “better meet” Guideline 1.
14 Respondents cite *Michaelson v. City of Portland*, 77 Or LUBA 504 (2018), *aff’d*,
15 296 Or App 248, 437 P3d 1215 (2019), in support of their argument.

16 Petitioners respond, and we agree, that *Michaelson* does not stand for the
17 proposition that respondents describe. *Michaelson* involved an application for
18 development of new buildings that sought five modifications to various height,
19 dimensional, retail space, and setback standards. The city council approved all of
20 the proposed modifications, concluding that they better met the applicable
21 guidelines. 77 Or LUBA at 511. The Court of Appeals specifically found that
22 nothing in the city council’s decision compared a proposed modification of a

1 development standard to a different proposed modification of the same
2 development standard:

3 “Throughout the city’s discussion of the five requested
4 modifications, the city consistently compared the overall project
5 design with modifications (that is, the ‘resulting development’) to a
6 building design that instead met the particular design standard at
7 issue, to determine if the modification better met the identified,
8 applicable guidelines implicated by the modification. In doing so,
9 the city used as a comparison either the standard-meeting design that
10 was part of the proposal before the modification request—*see, e.g.*,
11 the modification to the building height at the southwest corner—or
12 a hypothetical standard-meeting design—*see, e.g.*, the modification
13 to retail frontage—depending on what was appropriate under the
14 circumstances for the particular modification request at issue.
15 However, contrary to some of petitioners’ assertions, the city did not
16 in any instance compare the resulting development to a design that
17 also did not meet the design standard at issue.” 296 Or App at 256.

18 LUBA’s and the court’s opinions in *Michaelson* do not sanction the approach
19 that the DRC took in this case, because it is not the approach that the city council
20 took in *Michaelson*. *Michaelson* does not assist respondents.

21 We agree with petitioners that the DRC’s decision incorrectly compared
22 the existing non-compliant development with the proposed non-compliant
23 development. On remand, the DRC must compare the proposed modifications to
24 a development that conforms with the five-foot setback standard.

25 In the remainder of their first assignment of error, petitioners argue that the
26 proposed modifications do not “better meet” Guideline 1 and that the DRC should
27 have denied the modifications. However, we need not address that argument here.
28 Because of the city’s analytical error in evaluating the proposed modifications,

1 the city will need to adopt a new decision on remand that includes the proper
2 comparison.

3 The first assignment of error is sustained, in part.

4 **SECOND ASSIGNMENT OF ERROR**

5 Apart from the proposed modifications, the proposed two-story addition
6 itself must satisfy Guideline 1. Again, that guideline is to “[c]reate public views
7 to the river, Greenway Trail and Willamette Park from Macadam Avenue and
8 other public parks and rights-of-way west of Macadam as well as views from the
9 river and the Greenway to the west.” During the proceedings before the DRC,
10 petitioners argued that the proposed addition does not create public views “from
11 the river and the Greenway to the west.” The city adopted findings that the
12 proposed addition satisfies Guideline 1:

13 “SW Miles Place is considered part of the Greenway trail, and it
14 provides an important connection from Willamette Park to the north
15 to the rest of the riverside bike and pedestrian path network to the
16 south. This proposal supports visual connections to the river with
17 the following moves:

18 “• The rooftops of the building have been designed to enhance
19 views to the river from the house by incorporating a series of
20 step downs toward the river. Additionally, the new third and
21 fourth floors step back from the side property lines to allow
22 views past the house towards the river to preserve views of
23 the river.

24 “• As noted in the Greenway review approval while most of the
25 subject property is developed with residential use, riverward
26 of the Greenway Setback (sea wall) has remained in a natural
27 state. The proposed Planting Plan approved through that

1 review, will aid in enhancement of view corridors to the river,
2 the natural riverbank and its ecosystem.

3 “*This guideline is met.*” Record 7 (italics in original; citations
4 omitted).

5 In their second assignment of error, petitioners argue that the city’s findings are
6 inadequate to explain why the DRC concluded that the proposed addition will
7 “[c]reate public views * * * *from the river and the Greenway to the west*” because
8 the findings do not address that portion of Guideline 1 at all.

9 Respondents first respond by citing findings that address why the *proposed*
10 *modifications* better meet Guideline 1:

11 “In conclusion, the subject property is not on Macadam and is not
12 visible from the majority of the neighborhood west of Macadam,
13 and the elevation gain west of Macadam allows for views over the
14 1st and 2nd floors of the property. The proposed design is along the
15 Greenway Trail, however, and in response the existing overhanging
16 roof lines and the south bay which encroaches the most into the
17 south setback will be removed. The proposed design thus allows
18 greater view lines and better meets visual connections.” Record 10-
19 11.

20 Even if we assume that findings adopted to address one requirement (*i.e.*, that the
21 proposed modifications better meet Guideline 1) can be adequate to address
22 another requirement (*i.e.*, that the proposed addition meets Guideline 1), the
23 findings that respondents cite do not adequately explain why the proposed
24 addition will “[c]reate public views * * * from the river and the Greenway to the
25 west.” We agree with petitioners that the findings are inadequate to explain why
26 the proposed addition meets the second part of Guideline 1. Findings must

1 address and respond to specific issues relevant to compliance with applicable
2 approval standards that were raised in the proceedings below. *Norvell v. Portland*
3 *Area LGBC*, 43 Or App 849, 853, 604 P2d 896 (1979).

4 Respondents also respond that LUBA should affirm the city's decision
5 under ORS 197.835(11)(b), even in the absence of findings addressing the second
6 part of Guideline 1, because the evidence in the record "clearly supports" a
7 conclusion that the proposed addition will satisfy Guideline 1. ORS
8 197.835(11)(b) authorizes LUBA to overlook minor discrepancies or deficiencies
9 in findings. *Del Rio Vineyards, LLC v. Jackson County*, 70 Or LUBA 368, 384
10 (2014); *Terra v. City of Newport*, 36 Or LUBA 582, 589-90 (1999). The "clearly
11 supports" standard is generally only appropriately applied to approval standards
12 that are objective or do not require interpretation or much discretionary judgment.
13 *Waugh v. Coos County*, 26 Or LUBA 300, 306-08 (1993). Guideline 1 is too
14 subjective for LUBA to find that the evidence clearly supports a conclusion that
15 Guideline 1 is met.

16 The second assignment of error is sustained.

17 The city's decision is remanded.