

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

3
4 JUSTIN KULONGOSKI and CAREY KULONGOSKI,
5 *Petitioners,*

6
7 vs.

8
9 CITY OF PORTLAND,
10 *Respondent,*

11
12 and

13
14 ITO, MENDEZ & ASSOCIATES, LLC,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2021-098

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from City of Portland.

23
24 William K. Kabeiseman filed the petition for review and reply brief and
25 argued on behalf of petitioners. Also on the brief was Bateman Seidel Miner
26 Blomgren Chellis & Gram, PC.

27
28 Lauren A. King, Deputy City Attorney, filed a joint response brief and
29 argued on behalf of respondent.

30
31 James D. Howsley filed a joint response brief and argued on behalf of
32 intervenor-respondent. Also on the brief was Jordan Ramis PC.

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

36
37 AFFIRMED

05/16/2022

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.

MOTION TO STRIKE

LUBA’s review of land use decisions and limited land use decisions is generally limited to the record. ORS 197.835(2)(a). Intervenor-respondent (intervenor) and the city (together, respondents) move to strike an illustration and arguments included in the petition for review at Petition for Review 17, lines 17-23, and Petition for Review 18, lines 1-11. Respondents argue the illustration is not included in the record, and it and the arguments that are based on it should be stricken, because the illustration is not an accurate representation of the proposal. Respondents argue that petitioners’ reliance on the illustration to argue that one of the findings in support of the decision “makes no sense” lacks a foundation in the record. *Hammack & Associates, Inc. v. Washington County*, 16 Or LUBA 75, 78, *aff’d*, 89 Or App 40, 747 P2d 373 (1987) (LUBA will disregard portions of a brief “which assert facts which lack foundation in the record”).

Petitioners describe the illustration as “incredibly crude and not to scale.” Petition for Review 18. However, citing *Barnes v. City of Hillsboro*, 61 Or LUBA 375, *aff’d* 239 Or App 73, 243 P3d 139 (2010), petitioners respond that the

1 illustration is “simply a graphical representation of the evidence that is already in
2 the [r]ecord.” Response to Motion to Strike 2.

3 We agree with respondents that there is no basis for us to consider the
4 illustration and no basis for us to consider arguments that are based on it.
5 Petitioners’ illustration is not analogous to the tables included in the response
6 brief in *Barnes*, which were tabular representations of the city’s explanation of
7 the effect of the challenged decision. 61 Or LUBA at 380-81. The illustration is
8 not a graphical representation of evidence that is already in the record. Here,
9 petitioners rely on the newly created, extra-record illustration to emphasize their
10 argument that the city’s findings are inadequate and that the city improperly
11 construed the relevant criterion. There is no reason that we can see that petitioners
12 could not have relied on an illustration from the record to emphasize their
13 argument.

14 The motion to strike is granted. LUBA will not consider Petition for
15 Review 17, lines 17 to 23, or 18, lines 1 to 11.

16 **FACTS**

17 The challenged decision is the city’s decision on remand from *Kulongoski*
18 *v. City of Portland*, ___ Or LUBA ___ (LUBA No 2021-004, July 8, 2021)
19 (*Kulongoski I*). We take the facts from *Kulongoski I*:

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

1 is located between the subject property and the river.

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

7 “In 2020, intervenor applied to add two stories to the existing two-
8 story dwelling and, as a part of the application, sought modifications
9 to the applicable five-foot setback standard for the north and south
10 side yards in Portland City Code (PCC) Table 110-3. The city’s
11 planning staff approved the application, and petitioners appealed the
12 decision to the city’s Design Review Commission (DRC). The DRC
13 held a hearing on the appeal and, at the conclusion, voted to deny
14 the appeal and approve the application, including the modifications
15 to the setback standard.” ___ Or LUBA at ___ (slip op at 3-4).

16 In *Kulongoski I*, we remanded the city’s decision on two bases. First, we
17 agreed with petitioners’ argument that, in applying Portland City Code (PCC)
18 33.825.040 and in determining whether the proposal “better meets” Macadam
19 Corridor Design Guideline 1 (Guideline 1), the city wrongly compared the
20 proposed setback modifications to the existing, non-compliant setbacks rather
21 than to a development that conforms with the setbacks. Guideline 1 is to “[c]reate
22 public views to the river, Greenway Trail and Willamette Park from Macadam
23 Avenue and other public parks and rights-of-way west of Macadam as well as
24 views from the river and the Greenway to the west.”¹

¹ Guideline 1 provides in its entirety:

“1. Visual Connections. Create public views to the river, Greenway Trail and Willamette Park from Macadam Avenue

1 Second, we sustained petitioners’ argument that the city’s findings that the
2 proposal satisfied Guideline 1 were inadequate to address views “from the river
3 and the greenway to the west,” and only addressed views to the river from
4 Macadam Avenue. We remanded the decision for the city to adopt more adequate
5 findings explaining its conclusion that the proposed development satisfies
6 Guideline 1.

and other public parks and rights-of-way west of Macadam as well as views from the river and the Greenway to the west.

“In Doing This:

- “Promote physical and visual contact between the river and the area west of Macadam Avenue.
- “Orient buildings, which front Macadam Avenue to preserve views of the river, Willamette Park, and the Greenway.
- “Integrate the east and west sides of Macadam Avenue by creating views of the river which align with streets on the east side of Macadam.
- “Take particular advantage of opportunities to create and protect views, which align with Southwest Texas, Florida, Pendleton, Idaho, Nebraska, Dakota and Hamilton Streets.
- “Rooftops of buildings should be carefully designed to enhance views.
- “Plant on site trees, which will grow to a sufficient height to soften new development and screen parking areas while selecting species and planting locations which enhance view corridors to the river.”

1 On remand, the city adopted a new decision, but did not reopen the record
2 and did not accept additional testimony or evidence. This appeal followed.

3 **FIRST ASSIGNMENT OF ERROR**

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

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

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

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

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

20 Petitioners’ first assignment of error includes three separate arguments that we
21 treat as subassignments of error.

22 **A. First Subassignment of Error**

23 In the first subassignment of error, petitioners argue that the city
24 improperly construed PCC 33.825.040(A) in relying on the fact that the third and
25 fourth floors are less than the maximum permitted by right to conclude that the
26 modifications to the side setbacks better meet the purpose of Guideline 1. The

1 rooftop deck is 350 square feet. Record 374. The city found that the smaller floor
2 area and larger rooftop deck size, combined with other factors, “opens up views
3 from the river to the west.” Record 8. Petitioners argue that intervenor was
4 *required* to have a smaller fourth floor area in order to satisfy the required outdoor
5 area standard, at PCC 33.110.240. Therefore, petitioners argue, the city may not
6 rely on the smaller than allowed fourth floor area and consequent larger rooftop
7 deck to find that the proposal better meets Guideline 1.

8 Respondents respond, initially, that the issue presented in this
9 subassignment of error was not raised prior to the close of the initial evidentiary
10 hearing and therefore petitioners may not raise the issue for the first time at
11 LUBA. ORS 197.797(1); ORS 197.835(3). Petitioners reply that the city adopted
12 the findings that construe PCC 33.825.040 and rely, in part, on the size of the
13 outdoor area to conclude that the modifications better meet Guideline 1 for the
14 first time on remand, and because the record was not reopened, petitioners were
15 not required to raise the issue. Reply Brief 1-2. We agree with petitioners.
16 Generally, to preserve issues under ORS 197.797(1), a party must raise issues
17 regarding compliance with the applicable approval criterion, but is not required
18 to anticipate the actual findings or conditions a local government adopts to
19 demonstrate compliance with that criterion, or to question the adequacy of the
20 evidence accepted into the record to support findings of compliance. *Lucier v.*
21 *City of Medford*, 26 Or LUBA 213, 216 (1993).

1 However, we agree with respondents' response that petitioners' argument
2 provides no basis for reversal or remand because petitioners' argument is based
3 on a faulty premise – that the rooftop deck is the size that it is only because its
4 size is required in order to satisfy the applicable minimum outdoor area standard.
5 Respondents' Brief 9. Respondents point out that Table 110-4 of PCC 33.110.240
6 requires an outdoor area of 250 square feet, and the rooftop deck is 350 square
7 feet, which is 60 percent larger than the minimum required. Record 374.
8 Petitioners' arguments do not establish that the size of the rooftop deck and
9 corresponding reduction in floor area were solely or even partially the result of a
10 need to comply with the required outdoor area.

11 The first subassignment of error is denied.

12 **B. Second Subassignment of Error**

13 In *Kulongoski I*, we described the existing non-compliant setbacks:

14 “On the south side of the dwelling, the application proposed to
15 remove a bay window that protrudes 18 inches from the existing
16 dwelling and allow other portions of the existing dwelling to extend
17 into the five-foot setback by 19 1/4 inches. On the north side of the
18 dwelling, the application proposed to remove a two-foot roof
19 overhang and allow other portions of the existing dwelling to extend
20 into the five-foot setback by between 24 3/4 and 25 1/4 inches.” ____
21 Or LUBA at ____ (slip op at 4-5).

22 We concluded that the city wrongly compared the existing non-compliant
23 setbacks with the proposed non-compliant setbacks to find that the proposed
24 setbacks better meet Guideline 1, when the city should have compared the
25 proposed non-compliant setbacks to compliant, five-foot setbacks.

1 In their second subassignment of error, petitioners argue that the city again
2 improperly construed PCC 33.825.040 and, therefore, “[t]he decision does not
3 comply with applicable provisions of the land use regulations.” ORS
4 197.828(2)(b). Petitioners rely on the city’s findings that refer to the removal of
5 the non-compliant bay window and non-compliant roof overhangs to demonstrate
6 that the city engaged, again, in the incorrect analysis.²

7 Respondents respond that the city correctly understood and applied the
8 appropriate comparator, and correctly compared the two proposed side setback
9 modifications to a development that complies with the side setbacks.
10 Respondents point to findings that the city adopted that make clear that the city
11 expressly compared the south setback modification to “a fully code compliant
12 design.”³ Record 13. Accordingly, respondents argue, the city’s decision
13 complies with PCC 33.825.040.

² The findings explain:

“The Design Commission reviewed the architectural drawings of the proposed change to the south elevation and the reduction of the encroachment into the side setback. This area is currently a bay window on the second-floor protruding 18” from the building face. The demolition of this is shown on sheet A2.03. The removal of this bay increases the visual connection to the river. Additionally, this proposal removes existing roof overhangs.” Record 12, 14.

³ In relevant part the city found:

“The Design Commission compared the overall project design as proposed, with the same design without the south side setback

1 Petitioners do not reference or challenge the city’s findings that compare
2 the setback modifications to a “fully compliant design,” or otherwise explain why
3 the reference in the findings to removal of the bay window and roof overhangs
4 demonstrates that the decision does not comply with PCC 33.825.040. Absent
5 any challenge to the city’s other findings, petitioners’ argument provides no basis
6 for reversal or remand. *See Protect Grand Island Farms v. Yamhill County*, 66
7 Or LUBA 291, 295-96 (2012) (to demonstrate that a local government adopted a
8 decision that improperly construes an applicable criterion, a petitioner should
9 address and as necessary assign error to all independent findings adopted in
10 support of a conclusion that a particular criterion is or is not satisfied).

11 The second subassignment of error is denied.

12 **C. Third Subassignment of Error**

13 In their third subassignment of error, petitioners argue that the city’s
14 findings are inadequate because the city only considered views “from the water’s

modification. It concludes that the overall project as proposed with the modified south and north setbacks and the reduced third and fourth floors better meets the purpose of this guideline than a fully code compliant design without a south side setback modification and with larger third and fourth floors, because those larger third and fourth floors would obstruct views more than the proposed south setback modification, including obstruction of views from the Greenway and river toward the west. Therefore, this guideline is better met by the proposed overall design than an alternative, fully compliant design.” Record 13, 15.

1 edge and Greenway beach.”⁴ Petition for Review 18. Generally, findings must:
2 (1) identify the relevant approval standards; (2) set out the facts which are
3 believed and relied upon; and (3) explain how those facts lead to the decision on
4 compliance with the approval standards. *Heiller v. Josephine County*, 23 Or
5 LUBA 551, 556 (1992).

6 Respondents respond, and we agree, that petitioners’ argument fails to
7 challenge other findings the city adopted that demonstrate that the city did not
8 only consider the views from the water’s edge and greenway beach, but views
9 from the entire river and greenway to the west. The city’s findings at Record 8

⁴ We understand petitioners’ third subassignment of error to refer to the following findings:

“The Design Commission finds that the reduced scale of the third and fourth floor additions opens up views from the river to the west, as illustrated by the architectural renderings in the Site Context Plans Set, Exhibit H.4 (City Record Exhibit A.5, pages 1-8). Regarding views from the Greenway, the Design Commission reviewed the east-west site section drawing Sheet A1.6 (City Record Exhibit C.7), and the perspective views in Exhibit H.4 (City Record Exhibit A.5, page 4) which illustrate the 11-foot sea wall, and notes that the water’s edge and Greenway beach are located at a much lower elevation below the sea wall than the single-family dwellings on the east side of Miles Place, including the subject property. It concludes that the views from the Greenway to the west are obstructed by the sea wall, which means the modified side setback does not materially impact views from the Greenway to the west, both at this site and on neighboring properties to the north and south. This view obstruction for the neighboring property to the north is shown on Sheet A4.02 (City Record Exhibit C.16).” Record 12-13.

1 demonstrate that the city did not only consider views from the water's edge and
2 the Greenway beach.⁵ Absent any challenge to those findings, petitioners'
3 arguments provide no basis for reversal or remand of the decision. *Protect Grand*
4 *Island Farms*, 66 Or LUBA at 296.

5 The first assignment of error is denied.

6 **SECOND ASSIGNMENT OF ERROR**

7 As noted, in *Kulongoski I*, we remanded the city's decision for the city to
8 adopt more adequate findings explaining how the proposal "creates views * * *
9 from the river and the greenway to the west." Petitioners' second assignment of
10 error is somewhat dependent on the third subassignment of error in its first
11 assignment of error. Petitioners' second assignment of error argues that the city's
12 findings that the proposal meets Guideline 1 are inadequate to explain how the
13 proposal *creates* views from the river and the greenway to the west, and that the
14 findings fail to consider views from the east bank of the river and the "entire
15 greenway." Petition for Review 25-26. According to petitioners, the city's

⁵ Some of those findings are:

"The Design Commission concludes that the reduced roof height promotes visual contact by reducing floor area and height in order to improve views over and around the structure from the river and Greenway toward the west, and from the west toward the river, *as well as improving the oblique views of persons traveling on the river and the Greenway that are looking toward the northwest and southwest.*" Record 8 (emphasis added).

1 findings at best demonstrate how the various features do not “interfer[e] with
2 existing views” as opposed to explaining how the features “create” views.
3 Petition for Review 25.

4 Respondents respond that petitioners are precluded from raising the issues
5 raised in the second assignment of error under the law of the case doctrine
6 because petitioners could have but failed to raise them in the proceedings that led
7 to our decision in *Kulongoski I*. In *Beck v. City of Tillamook*, 313 Or 148, 831
8 P2d 678 (1992), the court explained what has come to be known as the law of the
9 case doctrine. That principle is that a petitioner may not raise an issue in a
10 subsequent stage of a proceeding if that issue was previously decided adversely
11 to them or if they could have but failed to raise the issue below. According to
12 respondents, petitioners did not specifically argue in *Kulongoski I* that the city’s
13 findings were inadequate because they failed to explain how the proposal
14 “creates” views from the river, nor did petitioners argue that the findings were
15 inadequate because they failed to explain how the proposal creates views to the
16 west from (1) the east *bank* of the river and (2) the “entire greenway.” Petitioners
17 respond that the issue raised in the second assignment of error was raised in
18 *Kulongoski I* and that LUBA decided the issue in their favor.

19 While it is a close call, we agree with petitioners that the *issue* raised in the
20 second assignment of error was raised in *Kulongoski I*, and that petitioners’
21 challenges to the findings the city adopted on remand are not precluded by the
22 law of the case doctrine. Petitioners argued that the city’s findings were

1 inadequate to explain how the proposal “create[s] views * * * from the river and
2 greenway to the west.” We agreed with petitioners that the findings were
3 inadequate to address this part of Guideline 1. *Kulongoski I*, ___ Or LUBA at
4 ___ (slip op at 9).

5 However, we agree with respondents’ alternative response that the city’s
6 findings are adequate to explain why the city concluded that the proposal
7 “create[s] views * * * from the river and the greenway to the west.” Although the
8 findings do not specifically address petitioners’ arguments that are presented to
9 us in this appeal, that is perhaps understandable because petitioners do not appear
10 to have made those particular arguments to the city below. The city’s findings
11 explain why design features, like a flat roof that is lower than the maximum
12 height, larger than required front and rear setbacks, a larger than required outdoor
13 area on the roof, and step backs from the river allow views from the river past the
14 dwelling, and improve views over and around the dwelling from the river and the
15 greenway to the west.⁶ Record 8. Those findings are not perfect, but neither are

⁶ The city found:

“To address the second part of this criteria more directly, the second part of Guideline 1 is ‘to create public views * * * from the river and the Greenway to the west.’

“* * * * *

“The first bullet point regards the promotion of visual contact, and the Design Commission reviewed the opponents’ concerns regarding the visual connection from the river and Greenway

looking toward the west. The Commission first notes that the recent Greenway Review approval, File No. LU 19-164548, included shoreline restoration and new plantings. That decision is final and not at issue in this appeal. Therefore, the question is limited to whether the proposed dwelling design promotes a visual connection from the river and Greenway to the west.

“The Design Commission evaluated the overall project design; that is, the modified south and north side setbacks together with the third and fourth floor additions. The Design Commission finds that the third and fourth floor additions are less than the maximum permitted by right, because they are less than the maximum building height, and exceed the minimum front and rear setbacks, of 10’ in the front and 5’ in the rear, per 33.110.220 and Table 110-3.

“It notes the fourth-floor area was originally designed at 374 square feet but was then reduced to 178 square feet in order to improve views around the structure. It reviewed the height information on Sheet A4.1 (City Record Exhibit C.18) and notes the structure height is 39’ 10 ½” feet; whereas the code allows a maximum height 45 feet for this reduced floor area, which would still satisfy the average maximum height of 35 feet. See 33.550.210 and Map 550-1. The overall average height of this proposal is 28.8 feet shown in A1.3 (City Record Exhibit C.6), well under the allowed average height of 35 feet. The Design Commission concludes that the reduced roof height promotes visual contact by reducing floor area and height in order to *improve views over and around the structure from the river and Greenway toward the west, and from the west toward the river, as well as improving the oblique views of persons traveling on the river and the Greenway that are looking toward the northwest and southwest.*

“The Design Commission also evaluated the fifth bullet point of the guideline. ‘Rooftops of buildings should be carefully designed to enhance views.’ The Design Commission reviewed the applicant’s study of neighborhood roof forms in Exhibit H.4 (City Record Exhibit A.5, page 4, as well as the illustration of the reduced third

and fourth floor side setbacks in Exhibit H.4 (City Record Exhibit A.5, page 5). The Design Commission notes that earlier drafts of the project included a much larger fourth floor area with a pitched roof, which were code compliant. It finds that the applicant's reduced third floor rear and front setbacks, reduced fourth floor area, and the flat roof are architectural changes which were carefully designed to enhance views over and around the structure, *and finds that the changes will enhance views by reducing the massing and height of the fourth floor and the roof, consistent with the guideline. It concludes that this careful design of the rooftop in combination with the overall design meets the guideline, because the setback modifications are at a lower level and therefore less important to the visual connection than the reduced footprint of the upper levels and the rooftop design.*

“The Design Commission finds that the reduced scale of the third and fourth floor additions opens up views from the river to the west, as illustrated by the architectural renderings in the Site Context Plans Set, Exhibit H.4 (City Record Exhibit A.5 pages 1-8). Regarding views from the Greenway to the west, the Design Commission reviewed the east-west site section drawing Sheet A1.6 (City Record Exhibit C.7), and the perspective views in Exhibit H.4 (City Record Exhibit A.5, page 4) which illustrate the 11-foot sea wall. It notes that the water's edge and Greenway beach are located at a much lower elevation, below the sea wall, than the single-family dwellings on the east side of Miles Place, including the subject property and the adjacent properties to the north and south. It concludes that the views from the Greenway to the west are obstructed by the sea wall, which means the modified side setback does not materially impact views from the Greenway to the west, both at this site and on neighboring properties to the north and south. This view obstruction for the neighboring property to the north is shown on Sheet A4.02 (City Record Exhibit C.16).

“The Design Commission notes that the reduced third and fourth floors and the rooftop design are more visible from the Greenway because they are at a higher elevation and thus are less obstructed

1 they inadequate. *Heiller*, 23 Or LUBA at 556. We also agree with respondents’
2 response that petitioners’ proffered interpretation of the word “create” appears to
3 take the position that Guideline 1 requires proposals for design review in the
4 Macadam Corridor to propose *new* views, which would likely involve demolition
5 of all or parts of existing buildings and structures. To the extent petitioners argue
6 that is the case, we reject that understanding of Guideline 1.⁷

7 The second assignment of error is denied.

8 The city’s decision is affirmed.

by the sea wall, and therefore concludes that the reduced massing of the third and fourth floors and the rooftop design is more important to enhancing views from the Greenway to the west than the lower-level side setbacks which are not as visible. It notes the opponents have not provided any architectural evidence to demonstrate that the setback modifications will significantly obstruct any view from the river or the Greenway to the west. The Design Commission concludes the rooftop is carefully designed to enhance views, because the flat pitch and reduced height allow more views than a taller, pitched roof that covered a larger third and fourth floor area.

“In summary, by reducing the third and fourth floor area and lowering the roof, the overall design satisfies the Guideline’s mandate ‘to create public views * * * from the river and the Greenway to the west’ notwithstanding the setback modifications, because those modifications are largely screened from view by the seawall, *whereas the increased views past, over and around the reduced third and fourth floors and roof are visible from the river, greenway and upper elevations of the Macadam corridor.*” Record 7-9 (emphases added).

⁷ “Create” is defined, in part, to mean “4: b: to design (as a costume or a dress).” *Webster’s Third New Intl Dictionary* 532 (unabridged ed 2002).