

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

TINA VANDERBURG,
Petitioner,

vs.

CITY OF ALBANY,
Respondent.

LUBA No. 2022-082

FINAL OPINION
AND ORDER

Appeal from City of Albany.

Tina Vanderburg filed the petition for review and argued on behalf of themselves.

M. Sean Kidd filed the respondent's brief and argued on behalf of respondent. Also on the brief was Delapoer Kidd, P.C.

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

AFFIRMED

01/05/2023

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

NATURE OF THE DECISION

Petitioner appeals Ordinance 5988, in which the city council vacated a portion of a public right-of-way (ROW vacation).

BACKGROUND

The challenged decision is a city-initiated ordinance which vacates a 66-by-150-foot portion of a public right-of-way called Jefferson Street SE in an area designated and zoned Light Industrial (LI). The aerial photo below shows the vacated right-of-way with crosshatching.

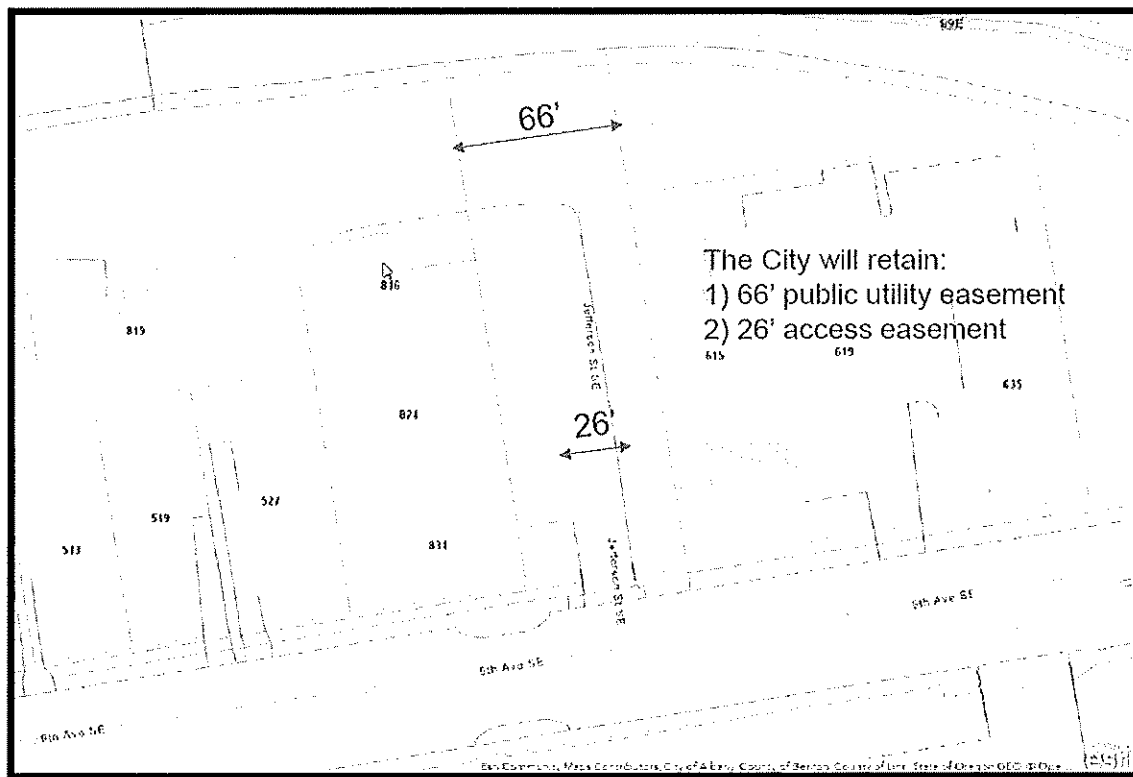


Record 184.

Uses surrounding the vacated right-of-way include a state highway to the north, the Ninth Avenue right-of-way to the south, a shelter for those

1 experiencing homelessness to the east, and single-family residences and vacant
2 property to the west. Record 11.

3 Petitioner's home is located at the corner of Jefferson Street SE and Ninth
4 Avenue. The property to the east of Jefferson Street SE is owned by Albany
5 Helping Hands (Helping Hands), which operates a shelter for those experiencing
6 homelessness. The properties to the east and west of the vacated right-of-way
7 will each obtain ownership of half of the vacated right-of-way, divided along the
8 center line. In the ROW vacation, the city retained a utility easement over the
9 entire right-of-way and a public access easement over the center 26 feet of the
10 right-of-way.



11
12 Record 117.

1 The ROW vacation would enable Helping Hands to develop a parking area
2 on the east side of the vacated right-of-way, outside the area of the public access
3 easement.¹ Record 137-38.

4 The city initiated the ROW vacation proceedings. Albany Development
5 Code (ADC) 2.630 provides:

6 “A vacation request may be approved if the review body finds that
7 the applicant has shown that all of the following review criteria are
8 met:

9 “(1) The requested vacation is consistent with relevant
10 Comprehensive Plan policies and with any street plan, city
11 transportation or public facility plan.

12 “(2) The requested vacation will not have a negative effect on
13 access between public rights-of-way or to existing properties,
14 potential lots, public facilities or utilities.

15 “(3) The requested vacation will not have a negative effect on
16 traffic circulation or emergency service protection.

17 “(4) The portion of the right-of-way that is to be vacated will be
18 brought into compliance with Code requirements, such as
19 landscaping, driveway access, and reconstruction of access
20 for fire safety.

21 “(5) The public interest, present and future, will be best served by
22 approval of the proposed vacation.”

¹ Helping Hands proposed to expand its shelter to add dormitory space in a separate application for a conditional use permit, which is not on review in this appeal. City staff recommended approval of that application with a condition of approval requiring Helping Hands to develop the parking area to city standards. Record 123, 134-46.

1 On July 18, 2022, the planning commission held a Type IV quasi-judicial
2 public hearing and recommended approval to the city council. On August 10,
3 2022, the city council held a public hearing and continued the matter to the
4 August 24, 2022 city council meeting, at which the city council adopted
5 Ordinance 5988. This appeal followed.

6 **PETITION FOR REVIEW DEFICIENCIES**

7 On October 28, 2022, petitioner filed a petition for review (Original
8 Petition) that did not comply with our rules in several respects. On November 1,
9 2022, we issued an order noting that the Original Petition failed to comply with
10 our rules in the following respects: (1) it was filed without a copy, as required by
11 OAR 661-010-0030(1); (2) it did not “[c]ontain a copy of the challenged
12 decision, including any adopted findings of fact and conclusions of law,” as
13 required by OAR 661-010-0030(4)(e); (3) it was not double-spaced, as required
14 by OAR 661-010-0030(2)(f); (4) it did not include a certificate of filing, as
15 required by OAR 661-010-0075(2)(a)(C); and (5) it did not include a certificate
16 of service, as required by OAR 661-010-0075(2)(b)(D). Our order instructed
17 petitioner to file and serve an amended petition for review that complies with our
18 rules.²

² OAR 661-010-0030 provides, in part:

“(3) If the Board determines that the petition for review fails to conform with the requirements of section (2) of this rule, it shall notify the author, and a brief conforming with the

1 On November 7, 2022, petitioner filed an amended petition for review
2 (Amended Petition) that included the items identified in our November 1, 2022
3 order, as well as additional items, and served the city with the same.

4 Under OAR 660-010-0030(4), the petition for review must:

5 “(a) State the facts that establish petitioner’s standing;

6 “(b) Present a clear and concise statement of the case, in the
7 following order, with separate section headings:

8 “(A) The nature of the land use decision or limited land use
9 decision and the relief sought by petitioner;

10 “(B) A brief summary of the arguments appearing under the
11 assignments of error in the body of the petition;

12 “(C) A summary of the material facts. The summary shall be
13 in narrative form with citations to the pages of the
14 record where the facts alleged can be found. Where
15 there is a map in the record that helps illustrate the
16 material facts, the petitioner shall include a copy of that
17 map in the summary of the material facts or attach it as
18 an appendix to the petition.

requirements of section (2) shall be filed within three (3) days
of notification by the Board. The Board may refuse to
consider a brief that does not substantially conform to the
requirements of this rule.

“* * * * *

“(6) Amended Petition: A petition for review which fails to
comply with section (4) of this rule may, with permission of
the Board, be amended. The Board shall determine whether
to allow an amended petition for review to be filed in
accordance with OAR 661-010-0005.”

1 “(c) State why the challenged decision is a land use decision or a
2 limited land use decision subject to the Board’s jurisdiction;

3 “(d) Set forth each assignment of error under a separate heading.
4 Each assignment of error must demonstrate that the issue
5 raised in the assignment of error was preserved during the
6 proceedings below. Where an assignment raises an issue that
7 is not identified as preserved during the proceedings below,
8 the petition shall state why preservation is not required. Each
9 assignment of error must state the applicable standard of
10 review. Where several assignments of error present
11 essentially the same legal questions, the argument in support
12 of those assignments of error shall be combined;

13 “(e) Contain a copy of the challenged decision, including any
14 adopted findings of fact and conclusions of law; and

15 “(f) Contain a copy of any comprehensive plan provision,
16 ordinance or other provision of local law cited in the petition,
17 unless the provision is quoted verbatim in the petition.”

18 The Amended Petition fails to comply with OAR 661-010-0030(4) in at
19 least seven respects: (1) it does not state the facts that establish petitioner’s
20 standing; (2) it does not include a brief summary of arguments; (3) it does not
21 include a summary of material facts, in narrative form, with citations to the
22 record; (4) it does not state why the challenged decision is a land use decision or
23 a limited land use decision subject to the LUBA’s jurisdiction; (5) it does not set
24 forth each assignment of error under a separate heading; (6) it does not
25 demonstrate that the issues raised were preserved during the proceedings below;
26 and (7) it does not state the standard of review applicable to each issue raised.

27 As the party seeking relief from LUBA, the petitioner bears the burden of
28 establishing error in the land use decision on review. *See Morse Bros., Inc. v.*

1 *Clackamas County*, 18 Or LUBA 188, 215 n 25 (1989) (“It is petitioner’s
2 responsibility to explain the basis upon which we may grant relief.”). A petitioner
3 establishes error by assigning error, demonstrating that the issue was preserved,
4 identifying the applicable standard of review, and providing substantive
5 argument supporting the assignments of error. As explained further below, in the
6 analysis of arguments, our review function is hindered by petitioner’s failure to
7 conform the Amended Petition to the requirements of OAR 660-010-0030(4).

8 For example, because petitioner did not provide a statement of material
9 facts with citations to the record, we cannot tell whether the facts alleged by
10 petitioner in the petition for review are contained in the record. Petitioner’s
11 failure to state assignments of error and applicable standards of review and to
12 establish preservation makes it difficult for us to determine what error petitioner
13 alleges and whether petitioner has established a basis for relief. “It is not our
14 function to supply petitioner with legal theories or to make petitioner’s case for
15 petitioner.” *Deschutes Development v. Deschutes Cty.*, 5 Or LUBA 218, 220
16 (1982); *see also Freels v. Wallowa County*, 17 Or LUBA 137, 140 n 1 (1988)
17 (“The requirement for separate assignments of error is important. The
18 assignments of error should identify precisely what the petitioner believes the
19 local government did wrong so that the parties and LUBA can understand the
20 issue to be resolved before considering arguments advanced for resolving the
21 issue in a particular way.”).

1 Importantly, clearly stated assignments of error allow a respondent to
2 understand and respond to the specific bases on which petitioner challenges a
3 decision. *See Standard Insurance Co. v. Washington County*, 16 Or LUBA 30,
4 46 n 1 (1987) (“If errors are not clearly identified, respondents may not provide
5 adequate responses, and the Board may not address all issues in its review.”). The
6 city responds to petitioner’s three arguments by addressing them as three separate
7 assignments of error. The city challenges petitioner’s standing and argues that the
8 issue raised in the second assignment of error was not preserved. We address
9 those issues below.

10 **STANDING**

11 Only a person who has standing to appeal may prosecute an appeal before
12 LUBA. It is petitioner’s responsibility to establish standing. *Strauss v. Jackson*
13 *County*, 28 Or LUBA 56 (1994). ORS 197.830 governs standing and provides, in
14 part:

15 “(1) Review of land use decisions or limited land use decisions
16 under ORS 197.830 to 197.845 shall be commenced by filing
17 a notice of intent to appeal with [LUBA].

18 “(2) Except as provided in ORS 197.620, a person may petition
19 the board for review of a land use decision or limited land use
20 decision if the person:

21 “(a) Filed a notice of intent to appeal the decision as
22 provided in subsection (1) of this section; and

23 “(b) Appeared before the local government, special district
24 or state agency orally or in writing.

1 “(3) If a local government makes a land use decision without
2 providing a hearing, except as provided under ORS
3 215.416(11) or 227.175(10), or the local government makes
4 a land use decision that is different from the proposal
5 described in the notice of hearing to such a degree that the
6 notice of the proposed action did not reasonably describe the
7 local government’s final actions, a person adversely affected
8 by the decision may appeal the decision to the board under
9 this section:

10 “(a) Within 21 days of actual notice where notice is
11 required; or

12 “(b) Within 21 days of the date a person knew or should
13 have known of the decision where no notice is
14 required.”

15 As explained above, the petition for review does not include a statement
16 establishing petitioner’s standing. The city argues that petitioner has not
17 established standing in the petition for review and that petitioner is not adversely
18 affected by the city’s decision for purposes of standing under ORS 197.830(3).
19 However, ORS 197.830(3) does not apply here. Instead, ORS 197.830(2) applies
20 here, where the city provided a hearing and it is undisputed that petitioner
21 appeared before the city council during the local proceedings and filed a timely
22 notice of intent to appeal. Thus, petitioner has standing under ORS 197.830(2),
23 which does not require petitioner to establish that they are adversely affected or
24 aggrieved. We conclude that petitioner has standing to prosecute this appeal. *See*
25 *Dobson v. City of Newport*, 47 Or LUBA 267, 272-73 (2004) (LUBA will deny
26 a motion to dismiss based on a petitioner’s failure to allege facts demonstrating
27 their standing to appeal where the party moving to dismiss alleges facts

1 demonstrating that petitioner filed a timely notice of intent to appeal and appeared
2 during the local proceedings).

3 **FIRST ASSIGNMENT OF ERROR**

4 As quoted above, ADC 2.630(2) requires the city to find that “[t]he
5 requested vacation will not have a negative effect on access between public
6 rights-of-way or to existing properties, potential lots, public facilities or utilities.”

7 With respect to this criterion, the city found that “[a]ll properties adjacent to the
8 right-of-way proposed for vacation will have access to Ninth Avenue SE if an
9 access easement is retained over the vacated right-of-way. Vacating the right-of-
10 way will not have a negative effect on any properties.” Record 12.

11 Petitioner argues that due to the 26-foot-wide access easement retained as
12 part of the ROW vacation, they will no longer have space to park on the east side
13 of their house, as is their practice, and that is a “negative effect on access” to their
14 property. The city responds that the ROW vacation and access easement will not
15 affect petitioner’s practice of parking within the vacated right-of-way to the east
16 of their property. The city asserts that the property where petitioner parks will
17 become petitioner’s private property. We understand petitioner to dispute that
18 fact and conclusion. Instead, petitioner asserts that the current paved surface of
19 Jefferson Street SE is 20 feet wide and that a 26-foot-wide public access easement
20 will encroach into the area where petitioner parks. Petitioner argues that the
21 access easement should be limited to the existing 20-foot-wide roadway or the
22 proposed vacation will violate ADC 2.630(2).

1 Our review of this assignment of error is hindered by petitioner's failure
2 to concisely state the alleged error and applicable standard of review, identify
3 where the issue was raised in the local proceedings, or point to any findings or
4 evidence in the record to support petitioner's factual assertions. Nevertheless, we
5 understand petitioner to argue that the city's finding that "[v]acating the right-of-
6 way will not have a negative effect on any properties" is not supported by
7 adequate findings or substantial evidence. Record 12.

8 Generally, findings must (1) identify the applicable standards, (2) set out
9 the facts relied upon, and (3) explain how those facts lead to the conclusion that
10 the standards are met. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992).
11 Findings must address and respond to specific issues relevant to compliance with
12 applicable approval standards that were raised in the proceedings below. *Norvell*
13 *v. Portland Area LGBC*, 43 Or App 849, 853, 604 P2d 896 (1979). Where a
14 petitioner does not explain why challenged findings are inadequate but, rather,
15 disagrees with the conclusion reached in those findings, petitioner's challenge to
16 the findings will not be sustained. *Knapp v. City of Corvallis*, 55 Or LUBA 376,
17 380-81 (2007).

18 Petitioner has not demonstrated that the factual allegations regarding their
19 parking were raised to the city during the local proceedings so that the city was
20 required to make responsive findings under the standard articulated in *Norvell*.
21 Specifically, petitioner has not established that they argued to the city that a 26-
22 foot-wide public access easement would impede access to their property.

1 Accordingly, we cannot say that the findings are inadequate. The city found that
2 all properties adjacent to the Jefferson Street SE right-of-way would retain access
3 to Ninth Avenue over the public access easement. In the absence of a more
4 developed argument from petitioner, we conclude that those findings are
5 adequate.

6 Substantial evidence is evidence that a reasonable person would rely on in
7 making a decision. *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608
8 (1993). A finding of fact is supported by substantial evidence if the record,
9 viewed as a whole, would permit a reasonable person to make that finding.
10 *Younger v. City of Portland*, 305 Or 346, 360, 752 P2d 262 (1988). In reviewing
11 the evidence, LUBA may not substitute its judgment for that of the local decision-
12 maker. Rather, LUBA must consider all the evidence to which it is directed and
13 determine whether, based on that evidence, a reasonable local decision-maker
14 could reach the decision that the respondent did. *Id.*

15 Petitioner has not demonstrated that the factual allegations regarding their
16 parking were raised to the city during the local proceedings. It is not clear to us
17 from the parties' briefs that the factual dispute in the parties' briefs was raised
18 before the city for resolution.

19 The undisputed evidence is that the ROW vacation will result in petitioner
20 gaining private property. Twenty feet on either side of the 26-foot public access
21 easement are not subject to the public access easement, so both petitioner and
22 Helping Hands can use and develop those 20 feet, subject to the utility easement.

1 Even if the city was required to consider petitioner's practice of parking within
2 the Jefferson Street SE right-of-way as an aspect of access to their property, a
3 reasonable person could conclude that the vacation will not have a negative effect
4 on petitioner's access to their property. After the vacation, petitioner will own
5 additional property along their eastern property line, and there is no indication
6 that they would be prohibited from parking in the 20-foot area between their old
7 property line and the edge of the public access easement. We conclude that
8 substantial evidence in the record supports the city's conclusion that the vacation
9 will not have a negative effect on access to existing properties and that ADC
10 2.630(2) is satisfied.

11 The first assignment of error is denied.

12 **SECOND ASSIGNMENT OF ERROR**

13 ADC 2.630(4) requires the city to find that "[t]he portion of the right-of-
14 way that is to be vacated will be brought into compliance with Code
15 requirements, such as landscaping, driveway access, and reconstruction of access
16 for fire safety." With respect to this criterion, the city found that "[n]o changes
17 are needed to bring the vacated area into compliance" and that "[t]he vacated
18 right-of-way will be in development code compliance without changes." Record
19 13.

20 Petitioner argues that Helping Hands might not have the resources or will
21 to maintain the proposed ROW vacation and public access easement areas. The
22 city responds that this issue is waived because no party raised it below.

1 Issues before LUBA on review “shall be limited to those raised by any
2 participant before the local hearings body as provided by ORS 197.195 or
3 197.797, whichever is applicable.” ORS 197.835(3). To be preserved for LUBA
4 review, an issue must “be raised and accompanied by statements or evidence
5 sufficient to afford the governing body, planning commission, hearings body or
6 hearings officer, and the parties an adequate opportunity to respond to each
7 issue.” ORS 197.797(1).

8 Petitioner replied at oral argument that the issue raised in the second
9 assignment of error was raised during the July 18, 2022 planning commission
10 meeting. The city maintained its position that the issue was waived.

11 We have reviewed the video recording of the July 18, 2022 planning
12 commission meeting. During that meeting, a planning commissioner asked the
13 community development director who would be responsible for maintaining the
14 street after the vacation. Video Recording, Albany Planning Commission, July
15 18, 2022, at 12:30. The director responded that the abutting property owners
16 would be responsible for maintaining the public access easement. A public works
17 staff person explained to the planning commission that there was no maintenance
18 agreement as part of the ROW vacation and that a condition of approval of a
19 conditional use permit for Helping Hands would require Helping Hands to
20 maintain the shelter’s parking area and the public access easement. The planning
21 commissioner then confirmed their understanding that, if the planning
22 commission recommended the ROW vacation for approval and approved the

1 separate Helping Hands conditional use permit application, then Helping Hands
2 would be responsible for maintaining the 26-foot-wide public access easement.
3 No party raised the issue of whether Helping Hands had the resources or will to
4 maintain the public access easement. We agree with the city that the issue is
5 waived.

6 Even if it was not waived, the second assignment of error provides no basis
7 for remand. ADC 2.630(4) requires the city to find that “[t]he portion of the right-
8 of-way that is to be vacated will be brought into compliance with Code
9 requirements, such as landscaping, driveway access, and reconstruction of access
10 for fire safety.” The city found that “[n]o changes are needed to bring the vacated
11 area into compliance” and that “[t]he vacated right-of-way will be in
12 development code compliance without changes.” Record 13. Petitioner does not
13 challenge that finding or argue that the current area is not in compliance with
14 code requirements. Instead, petitioner argues that, in the future, Helping Hands
15 might not have the resources or will to maintain the vacated right-of-way. That
16 argument provides no basis for remand.

17 The second assignment of error is denied.

18 **THIRD ASSIGNMENT OF ERROR**

19 Petitioner asserts that vacating the right-of-way will make the street private
20 and, therefore, parking and trespassing issues will be harder to resolve. Petitioner
21 does not direct this argument to any applicable criterion. However, we understand
22 the argument to implicitly refer to ADC 2.630(5), which requires the city to find

1 that “[t]he public interest, present and future, will be best served by approval of
2 the proposed vacation.” With respect to that criterion, the city found that “[t]he
3 vacated right-of-way will become part of adjacent lots, rather than being a public
4 right-of-way,” and that “[i]t is in the public interest to have the unused right-of-
5 way incorporated into the adjacent lots.” Record 13.

6 The city responds that vehicles may not legally park in the public access
7 easement area. If people obstruct the public access easement by parking or
8 loitering, then the Albany Police Department (APD) has jurisdiction to intervene
9 and remove any obstructions. Petitioner will have the legal right to remove any
10 trespassers from their newly obtained private property and may contact APD for
11 assistance removing trespassers.

12 Our review of this assignment of error is hindered by petitioner’s failure
13 to concisely state the alleged error and applicable standard of review, identify the
14 applicable criteria, identify where the issue was raised in the local proceedings,
15 or point to any evidence in the record to support their factual assertions. We
16 understand petitioner to argue that the city’s finding that “[t]he public interest,
17 present and future, will be best served by approval of the proposed vacation” is
18 not supported by adequate findings or substantial evidence.

19 Petitioner has not demonstrated that their concerns about loitering and
20 parking were raised to the city during the local proceedings so that the city was
21 required to make responsive findings under the standard articulated in *Norvell*.
22 Specifically, petitioner has not established that they argued and provided

1 evidence to the city that parking and loitering occurs within the public access
2 easement area or that the ROW vacation would hinder resolution of those
3 conflicts. Accordingly, we cannot say that the city's findings are inadequate.

4 Petitioner has not demonstrated that the factual dispute in the parties' briefs
5 about whether and how parking and trespassing conflicts will be resolved was
6 raised below or that any evidence in the record is contrary to the city's conclusion
7 that the vacation will best serve the public interest and that ADC 2.630(5) is
8 satisfied.

9 The third assignment of error is denied.

10 The city's decision is affirmed.