

NATURE OF THE DECISION

Petitioner appeals the city’s denial of a design review application for a free-standing sign.

FACTS

The subject property is a 12,222-square foot lot adjacent to North Denver Avenue, a designated minor transit street within the Kenton neighborhood. The lot is improved with a single-story concrete-block building that currently houses an auto body shop. A majority of the lot is in a Commercial Storefront (CS) zone. The site is subject to a Design Overlay Zone, as designated in the Albina Community Plan. Further, the site is within a Conservation District, reflecting the existence of historic or contributing structures in the Kenton neighborhood.¹ The site is also within a pedestrian district designated in the Transportation Element of the city’s comprehensive plan.

On September 5, 2000, petitioner filed an application for approval of a free-standing sign advertising the auto body shop located on the property.² The proposed sign meets the applicable dimensional requirements for signs in the CS zone. The city’s decision describes the proposal as follows:

“The applicant is requesting historic design review approval for a proposal to erect a new freestanding sign on the corner of the property, at N. Denver Avenue and N. Schofield Street. The sign is to be 3 feet from an existing telephone pole on the site. The sign is proposed to be 19 feet in height and

¹Portland City Code (PCC) chapter 33.445 sets out the city’s Historic Resource Protection Overlay Zone. Among other things, it sets out provisions for “Historic Districts” and “Conservation Districts.” PCC 33.445.030(C)(2) defines “Conservation District” as follows:

“An area with common historic values significant to a neighborhood or sub-area within the City. Conservation Districts need not be as well documented as Historic Districts. Conservation Districts include areas that contribute to the preservation of significant features of Portland’s development history. * * *”

²We understand petitioner to be a company that designs and installs commercial signs. Petitioner represented the property owner and lessee of the subject property before the city.

1 99.8 square feet in area. The sign is to be constructed of painted sheet metal,
2 with neon lettering as well as a neon accent at the support pole. The round
3 medallion at the top of the sign is to be a plastic-faced internally lit logo
4 element. There are several existing signs on the site, including a roof-
5 mounted sign. These are all to be removed when the freestanding sign is
6 erected. Because the site is within a conservation district, alterations or
7 additions to exterior development are required to receive historic design
8 review.” Record 2.

9 City staff processed the application under the city’s Type I procedures, which provide
10 for an administrative decision without local appeal. PCC 33.730.015. A staff planner
11 reviewed the application under the city’s design review criteria at PCC 33.825.060, which in
12 relevant part requires compliance with design district guidelines and any applicable area
13 plan. The applicable design district guidelines are the city’s Community Design Guidelines
14 (Design Guidelines).

15 On November 1, 2000, the staff planner informed petitioner that the proposed sign
16 probably did not comply with certain Design Guidelines. The staff planner then proposed
17 two alternative designs that, according to the planner, could be approved. The city and
18 petitioner were unable to agree on an alternative design and, on November 14, 2000, the staff
19 planner issued a decision denying the proposed sign. This appeal followed.

20 **FIRST ASSIGNMENT OF ERROR**

21 Petitioner contends that the city erred in failing to process the application under its
22 Type II procedure, which provides for an administrative decision with a right of local appeal.

23 Petitioner argues that a Type II procedure is mandated in the present case by
24 PCC 33.825.025(A)(2), which requires that proposals within the Albina Community Plan
25 area’s design overlay zones and proposals for signs within a design overlay zone must be
26 processed through a Type II procedure.³ According to petitioner, the city’s procedural error

³PCC 33.825 “lists procedures for design review for proposals within design overlay zones.”
PCC 33.825.025(A)(2) provides in relevant part:

“The following proposals are processed through a Type II procedure:

1 prejudiced its substantial rights, because that error denied petitioner the right to appeal to the
2 Historic Landmarks Commission (Commission).⁴ Petitioner explains that, under the city’s
3 code, the Commission is composed of citizens with a broad range of historic and
4 architectural experience who are uniquely qualified to review the city staff’s conclusions
5 under the Design Guidelines. Petitioner argues that city planning staff do not necessarily
6 have training or expertise in architecture or historic design. Given the subjective standards in
7 the Design Guidelines and the potential for their arbitrary application, petitioner argues, the
8 right of Commission review afforded by PCC 33.825.025(A)(2) is a substantive right.

9 The city responds that planning staff correctly processed the application under the
10 city’s Type I procedure.⁵ According to the city, because the subject property is located
11 within a Conservation District, it is subject not to design review standards and procedures at
12 PCC 33.825 but rather to *historic* design review standards and procedures at PCC 33.445 and
13 PCC 33.846. PCC 33.445.240(C) and (F) require that “[e]xterior alteration of a primary
14 structure” or “[e]xterior signs” within an Historic or Conservation District are subject to
15 historic design review. PCC 33.846 sets forth standards and procedures for historic reviews.

“* * * * *

“(e) Proposals within the Albina Community Plan area’s design overlay zones, including
Lower Albina;

“* * * * *

“(h) Proposals for signs[.]”

⁴PCC 33.720.020 assigns review of certain quasi-judicial land use decisions to specified local review bodies. As pertinent here, the Design Commission reviews Type II or III design review decisions, except “design review of * * * structures in Historic or Conservation Districts,” which are reviewed by the Historic Landmarks Commission. PCC 33.720.020(C)(1); 33.720.020(D)(3).

⁵At oral argument, the city also argued that, even if the city erred in processing the application as a Type I procedure, petitioner failed to object to that procedural error below and thus cannot challenge it before LUBA. *See Wicks v. City of Reedsport*, 29 Or LUBA 8, 13 (1995) (“Where a party has the opportunity to object to a procedural error before the local government, but fails to do so, that error cannot be assigned as grounds for reversal or remand of a local government decision in an appeal to this Board.”). However, the city’s brief does not raise any issue regarding petitioner’s failure to object. The Board will not consider matters raised for the first time at oral argument. OAR 661-010-0040(1).

1 PCC 33.846.020(D)(4)(b)(1) provides that in commercial zones signs of less than 150 square
2 feet in area are processed through a Type I procedure.⁶ The city argues that, because the
3 proposal involves “exterior alteration of a primary structure” within a Conservation District
4 and an “exterior sign,” it is subject to historic design review. Because the pertinent historic
5 design review provisions specify a Type I procedure, the city argues, the city did not err in
6 following that procedure.

7 The PCC provisions to which the parties direct us do not resolve which procedure is
8 applicable to the proposed sign. The subject property is within a design overlay zone *and*
9 within a Conservation District. The independent and combined significance of those two
10 designations is not entirely clear under the city’s zoning scheme.⁷ We understand petitioner
11 to argue that the procedures for either design review or historic design review could apply,
12 and therefore the city is obligated to apply the *higher* procedure. *See* PCC 33.720.040(A)
13 (when requested reviews require different procedures, the application is processed using the
14 highest procedure, with Type III being the highest, followed by Type II).

15 Although the parties do not cite it, PCC 33.420.045 appears to resolve the apparent
16 conflict. PCC 33.420 governs the design overlay zone, and requires design review for any
17 exterior alterations to existing development or exterior signs larger than 32 square feet.

⁶PCC 33.846.020(D)(4) provides in relevant part:

“The following proposals are processed through a Type I procedure:

“* * * * *

“b. In C, E, I, and RX zones:

“(1) Signs less than 150 square feet in area[.]”

⁷The city’s code provides for design overlay zones (designated “d” on the zoning map) but apparently does not provide for historic design overlay zones, at least as such. Instead, there are Historic and Conservation Districts, which are designated on the zoning map by special borders. PCC 33.445.030(D). Within the Albina Community Plan area there are areas subject to design overlay zoning, areas within Historic and Conservation Districts, and other areas that are neither. In other words, it is not clear whether the subject property is within a design overlay zone because it is in the Kenton Conservation District, or whether those two designations simply overlap, coincidentally, in this particular case.

1 PCC 33.420.041(B) and (F). Nonetheless, PCC 33.420.045(A) provides that “[i]f the site is
2 * * * in a Historic or Conservation District, it is *instead* subject to the regulations for historic
3 design review as set out in [PCC] 33.445, Historic Resource Protection Overlay Zone[.]”
4 (Emphasis added.) PCC 33.445 in turn subjects proposals within a Conservation District to
5 historic design review standards and procedures at PCC 33.846. Thus, PCC 33.420.045(A)
6 requires that proposals within a design overlay zone that would otherwise be subject to
7 design review standards and procedures at PCC 33.825 are, if the property is within an
8 Historic or Conservation District, instead subject to historic design review standards and
9 procedures.⁸ That being the case, we agree with the city that it did not err in processing
10 petitioner’s application under the Type I procedure specified under the PCC chapters
11 governing historic design review.

12 The first assignment of error is denied.

13 **SECOND ASSIGNMENT OF ERROR**

14 Petitioner contends that the city violated ORS 227.173(1) in rejecting petitioner’s
15 application based on the Design Guidelines. Petitioner argues that the Design Guidelines are
16 impermissibly vague and therefore the city’s application of them in this case was arbitrary
17 and subject to staff’s unbridled discretion.⁹

18 ORS 227.173(1) requires that approval or denial of a discretionary permit application
19 be based upon standards and criteria that are set forth in the city’s development ordinance

⁸It is not clear why the staff planner applied PCC 33.825.060, which prescribes design review standards and procedures, rather than PCC 33.846.140, which prescribes historic design review standards and procedures. Record 3. However, any error in doing so in this case is harmless. Both PCC 33.825.060 and 33.846.140 require compliance with applicable design district guidelines, which in this case are the Design Guidelines. Thus, the applicable approval criteria in this case are the same, whether the application is processed under PCC 33.825 or 33.846. As pertinent here, PCC 33.825 and 33.846 differ only in their procedural requirements.

⁹Petitioner also refers to Article 1, section 20, of the Oregon Constitution, the privileges and immunities clause, under this assignment of error. However, petitioner does not explain why the Design Guidelines or the city’s application of them in this case implicates Article 1, section 20, and we consider that assertion no further.

1 and relate approval or denial to the development ordinance and comprehensive plan.¹⁰
2 Petitioner does not appear to dispute that the Design Guidelines are part of the city’s
3 development ordinance, for purposes of ORS 227.173(1). However, petitioner argues that
4 ORS 227.173(1) is intended to ensure that cities express applicable standards with sufficient
5 specificity that reasonable applicants can understand what they must do to establish
6 compliance. *BCT Partnership v. City of Portland*, 130 Or App 271, 276, 881 P2d 176
7 (1994); *Lee v. City of Portland*, 57 Or App 798, 802, 646 P2d 662 (1982). Petitioner
8 contends for several reasons that the Design Guidelines and the manner in which the city
9 applied them in this case violate ORS 227.173(1).

10 Petitioner argues, first, that it is impossible to know in advance of application which
11 of the Design Guidelines apply to a particular application. However, petitioner does not
12 explain why that is so. The Design Guidelines contain 16 design guidelines, divided into
13 three categories: Portland personality (P), pedestrian emphasis (E), and project design (D).
14 Five guidelines are applicable to proposals for signs and awnings, as specified in a chart on
15 page 20 of the Design Guidelines: P1, P2, D6, D7 and D8.¹¹ Although petitioner points out

¹⁰ORS 227.173 provides in relevant part:

“(1) Approval or denial of a discretionary permit application shall be based on standards and criteria, which shall be set forth in the development ordinance and which shall relate approval or denial of a discretionary permit application to the development ordinance and to the comprehensive plan for the area in which the development would occur and to the development ordinance and comprehensive plan for the city as a whole.

“* * * * *

“(3) Approval or denial of a permit application or expedited land division shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth.”

¹¹The challenged decision describes the applicable Design Guidelines as follows:

1 that staff initially seemed to believe that a different set of guidelines applied, the final
2 decision bases the city’s denial on the five guidelines that are expressly applicable to signs
3 and awnings. As the court explained in *BCT Partnership*:

4 “[I]f an ordinance contains provisions that can reasonably be interpreted and
5 explained as embodying the standards and criteria applicable to the particular
6 decision, it is specific enough to satisfy ORS 227.173. Further, it is specific
7 enough to impart the knowledge for which *Lee* [calls]. If ordinance
8 provisions can reasonably be interpreted as the applicable ones, the
9 proponents and opponents of the permit can reasonably be expected to discern
10 their potential significance.” 130 Or App at 276 (footnotes omitted).

11 It is clear, even without interpretation, that an application for a sign under the Design
12 Guidelines is governed by the five guidelines applied in this case.

13 Petitioner next argues that the applicable guidelines are impermissibly vague under
14 ORS 227.173(1) because a reasonable person cannot understand what evidence must be
15 submitted in order to show that a proposed sign “respond[s] to the area’s unique
16 characteristics” under P1, or “reinforce[s] the area’s historic significance” under P2. Further,
17 petitioner contends, it is not clear how a free-standing sign can incorporate “elements of
18 nearby quality buildings” such as building details, massing, proportions and materials, for

“P1, Community Plan Area Character: Enhance the sense of place and identity of community plan areas by incorporating site and building design features that respond to the area’s unique characteristics and neighborhood traditions.” Record 3.

“P2, Historic and Conservation Districts: Enhance the identity of historic and conservation districts by incorporating site and building design features that reinforce the area’s historic significance. Near historic and conservation districts, use such features to reinforce and complement the historic areas.” Record 4.

“D6, Architectural Integrity: Respect the original character of buildings when making modifications that affect the exterior. Make additions compatible in scale, color, details, material proportion, and character with the existing building.” Record 4.

“D7, Blending into the Neighborhood: Reduce the impact of new development on established neighborhoods by incorporating elements of nearby, quality buildings such as building details, massing, proportions, and materials.” Record 4.

“D8, Interest, Quality and Composition: All parts of a building should be interesting to view, of long lasting quality, and designed to form a cohesive composition.” Record 4.

1 purposes of D7. Because these standards are so vague, petitioner argues, the city's discretion
2 in approving or denying each application under these standards is unconstrained. According
3 to petitioner, the city exercised its discretion arbitrarily to deny the proposed sign based on
4 planning staff's personal design preferences rather than the applicable criteria.

5

1 The city’s decision concludes, essentially, that the proposed sign is too large, modern
2 and automobile-oriented to be consistent with what staff deemed to be the historic and
3 pedestrian character of the area.¹² Petitioner argues that nothing in the Design Guidelines
4 indicates to a reasonable applicant that proposed signs must be scaled to pedestrian
5 viewpoints, or be similar to signs from the early 1900s, in order to comply with guidelines
6 P1, P2 and D7.

7 However, the city is allowed latitude in adopting nonspecific and highly subjective
8 approval criteria, and in explaining what such criteria require in particular cases. *See BCT*
9 *Partnership*, 130 Or App at 277 (requirement that development comply with the city's

¹²The decision finds that the Kenton neighborhood was originally built as a company town, with North Denver Avenue as its main street. Record 2. The decision notes that the Kenton Hotel and masonry executive homes were built along North Denver Avenue, and that historically contributing structures exist to the north and south of the subject property along North Denver Avenue. *Id.* The decision then finds, with respect to P1, Community Plan Area Character:

“Because the propos[ed] sign is at a larger scale than typical streetcar commercial signage, the proposal fails to respect the unique historical, cultural, and geographic characteristics of the Albina Plan area. Even though the site itself is an existing use and an auto-oriented establishment, it is part of a larger fabric of development that is pedestrian-oriented and finely detailed. The sign is intended to be read solely by persons some distance away, and offers no relationship to the passing pedestrian underneath the proposed sign location. This guideline is not met.” Record 3-4.

Similarly, with respect to P2, Historic and Conservation Districts, the decision finds:

“The proposal does not reinforce the Kenton area’s historic significance because the sign is not at all similar to signs from Kenton’s era of construction (early 1900s). The size and placement of the sign, the methods of proposed illumination, the lack of small-scale detailing, and the materials of the sign are all quite modern. No sign or architectural feature in a historic or conservation district should be a ‘faux historic’ element, but new construction or a new element in an older district does have to respect the character of the area. The proposal fails to do this in any way. This guideline is not met.” Record 4.

Finally, with respect to D7, Blending into the Neighborhood, the decision finds:

“The proposed sign incorporates no elements from nearby quality buildings. The proportion of the sign is too large for the site and immediate neighborhood, the materials are not found in any other buildings or features nearby, and no details recall decorative or construction details found nearby on older buildings. The sign is not designed to enhance the pedestrian environment, though the site is within a designated pedestrian district. This guideline is not met.” Record 4.

1 undefined parking strategy does not violate ORS 227.173(1) where the city interprets its plan
2 and code to establish the elements of the parking strategy); *Lee*, 57 Or App at 803
3 (requirement that proposed development be consistent with public health, need, convenience
4 and welfare is not impermissibly vague).¹³ In the present case, while guidelines P1, P2 and
5 D7 are highly subjective, a reasonable applicant can readily discern that a proposed sign
6 must enhance the historic and other desired characteristics of the neighborhood. At several
7 points prior to its decision, as well as in the challenged decision, the city explained its view
8 of the neighborhood's character and why it believed the proposed sign was inconsistent with
9 that character. Record 12-14, 15, 17. Petitioner obviously disagrees with the city's views on
10 the latter point, but we cannot say that guidelines P1, P2 and D7 are impermissibly vague or
11 the city's application of those guidelines otherwise violates ORS 227.173(1).

12 The second assignment of error is denied.

13 **THIRD ASSIGNMENT OF ERROR**

14 Petitioner contends that the city misconstrued the applicable law in denying the
15 proposed sign based in part on guidelines D6 and D8. According to petitioner, those
16 guidelines apply only to proposals affecting buildings and thus do not apply to a proposal for
17 a free-standing sign.

18 Petitioner does not dispute that the proposed sign must comply with each applicable
19 criterion and that the city's decision must be affirmed if the city demonstrates at least one
20 adequate basis for denial. *Evenson v. Jackson County*, 36 Or LUBA 251, 253 (1999). We
21 concluded above that the city did not err in denying petitioner's application under guidelines
22 P1, P2 and D7. Therefore, even if petitioner is correct that the city misconstrued guidelines
23 D6 and D8 by applying them to the proposed sign, that error would not provide a basis for

¹³*But see Ashley Manor Care Centers v. City of Grants Pass*, 38 Or LUBA 308, 316-17 (2000) (city violates ORS 227.173(1) in interpreting its code to allow the city to deny a lot line vacation based on factors not identified or reasonably suggested in the code).

- 1 reversal or remand.
- 2 The third assignment of error is denied.
- 3 The city's decision is affirmed.