

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

3
4 LOIS WAKELIN and GARY MARSHEL,
5 *Petitioners,*

6
7 vs.

8
9 CITY OF PORTLAND,
10 *Respondent.*

11 LUBA No. 2000-204

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13
14 FINAL OPINION
15 AND ORDER

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17 Appeal from City of Portland.

18
19 Daniel Kearns, Portland, filed the petition for review and argued on behalf of
20 petitioners. With him on the brief was Reeve Kearns.

21
22 Ruth M. Spetter, Senior Deputy City Attorney, Portland, filed the response brief and
23 argued on behalf of respondent.

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25 BASSHAM, Board Member; BRIGGS, Board Chair; HOLSTUN, Board Member,
26 participated in the decision.

27
28 AFFIRMED

09/21/2001

29
30 You are entitled to judicial review of this Order. Judicial review is governed by the
31 provisions of ORS 197.850.
32

NATURE OF THE DECISION

Petitioners challenge a city decision rezoning three tax lots from Residential 5,000-square foot minimum lot size (R-5) to Neighborhood Commercial (CN-2), to allow development of a 45-unit apartment building.

FACTS

The subject property consists of three vacant adjoining tax lots totaling 30,693 square feet. The three lots are zoned R-5 and designated on the city’s comprehensive plan as Neighborhood Commercial. Under the city’s zoning scheme, two zoning districts implement the Neighborhood Commercial designation: CN-1 and CN-2. The primary difference between the two districts is that CN-1 does not require on-site parking, while CN-2 requires one on-site parking space per residential unit. Multi-family housing is a permitted use in both zones.

The subject property is located on the east side of S.E. 39th Avenue, approximately 250 feet south of S.E. Hawthorne Street. Surrounding uses include a mix of commercial and residential development. S.E. 39th Avenue is improved with four vehicular lanes, curbs and sidewalks, but does not provide any street parking. S.E. 39th Avenue is designated in the city’s comprehensive plan as a Major City Traffic Street and a Major City Transit Street. Both S.E. 39th Avenue and S.E. Hawthorne Street provide significant transit services.

The city council previously denied an application to rezone the subject property to CN-2, to allow a drive-through restaurant, based in part on concerns regarding the impacts of commercial use traffic on nearby streets.¹ In December 1999, the applicant filed the instant application for rezoning to CN-2. The application was expressly predicated on limiting the final use to a multi-family residential development with a maximum of 45 units. The

¹See *Angel v. City of Portland*, 22 Or LUBA 649, *aff’d* 113 Or App 169, 831 P2d 77 (1992).

1 applicant and the city thereafter assumed that the subject property would be developed with a
2 45-unit apartment building, for purposes of applying the city’s rezoning criteria. The
3 applicant submitted, and the city transportation bureau approved, a traffic impact analysis
4 that concluded that intersections affected by the proposal would continue to operate at
5 acceptable levels of service. With respect to parking, the decision assumes 37 off-street
6 parking spaces and 40 bicycle spaces will serve the 45 residential units, under a code
7 provision that allows bicycle parking to substitute for up to 25 percent of required parking.
8 The off-street parking and bicycle spaces will be provided on-site.

9 A public hearing was held before a hearings officer on June 6, 2000, after which the
10 hearings officer approved the zone change to CN-2, conditioned on limiting use of the site to
11 a multi-family residential development with a maximum of 45 units.

12 Petitioners appealed the hearings officer’s decision to the city council, arguing that
13 the proposed rezoning is inconsistent with code provisions and comprehensive plan policies
14 regarding the provision of on-street and off-street parking. After several public hearings, the
15 city council denied petitioners’ appeal, approving the proposed zone change. This appeal
16 followed.

17 **ASSIGNMENT OF ERROR**

18 Petitioners argue that the city misconstrued and misapplied Portland City Code (PCC)
19 33.855.050(B)² and Portland Comprehensive Plan (PCP) Transportation Policies 6.14, 6.15

²PCC 33.855.050 provides, in relevant part:

“An amendment to the base zone designation on the Official Zoning Maps will be approved (either quasi-judicial or legislative) if the review body finds that the applicant has shown that all of the following approval criteria are met:

“* * * * *

“**B. Adequate public services.** Public services for water supply, transportation system structure and capacity, and police and fire protection are capable of supporting the uses allowed by the zone or will be capable by the time development is complete,

1 and 6.16, in approving a zone change without evaluating the actual on-street and off-street
2 parking demands of the development allowed by the zone change.³

3 According to petitioners, the code provision and transportation policies allow
4 property to be rezoned only if the city evaluates the *actual* parking demands of development

and proposed sanitary waste disposal and stormwater disposal systems are or will be made acceptable to the Bureau of Environmental Services.

“1. Adequacy of services applies only to the specific zone change site.

“2. Adequacy of services is based on the projected service demands of the site and the ability of the public services to accommodate those demands. Service demands may be determined based on a specific use or development proposal, if submitted. If a specific proposal is not submitted, determination is based on City service bureau demand projections for that zone or area which are then applied to the size of the site. Adequacy of services is determined by the service bureaus, who apply the demand numbers to the actual and proposed services to the site and surrounding area.”

³The cited comprehensive plan policies are as follows:

Transportation Policy 6.14 (Parking Management):

“To achieve environmental and transportation policy objectives, the parking supply shall be managed to take into account both transportation capacity and parking demand. Implement measures to achieve Portland’s share of the mandated 10 percent reduction (per the Transportation Rule) in parking spaces per capita within the metropolitan area over the next 20 years. Through the land use process, these measures should include restrictions on the development of new spaces and the redevelopment of existing parking spaces for other uses.”

Transportation Policy 6.15 (On-Street Parking Management):

“Manage the supply, operations and demand for parking in the public right-of-way to encourage economic vitality, traffic safety, and livability of residential neighborhoods. Parking in the right-of-way, in general, should serve land uses in the immediate area. Maintain existing on-street parking in older neighborhoods where off-street parking is inadequate. Parking for individuals, or at specific locations, is not guaranteed by this policy. However, the City should act to protect parking first for residents and second for customers and visitors.”

Transportation Policy 6.16 (Off-Street Parking):

“Off-street parking will be the primary source of parking supply. The zoning code shall require private development of adequate, but not excessive, off-street parking for all land uses. The CM, CS, CN-1, EX, RX, or CX zones are placed near existing or future transit service. The City will not require the private development of off-street parking in these zones because growth in access is expected to be met primarily by transit, bicycles, and pedestrians.”

1 allowed by the zone change, and determines that there are adequate public services to
2 accommodate those parking demands. Petitioners contend that the record contains no studies
3 or quantifications of the actual parking demands of the proposed development or the actual
4 supply of on-street and off-street parking in the area, and the city’s decision makes no
5 attempt to evaluate either demand or supply of such parking. Instead, petitioners argue, the
6 city’s decision finds compliance with PCC 33.855.050(B) and the transportation policies
7 based primarily on a finding that the proposed development can satisfy the off-street parking
8 requirements of the CN-2 zone.

9 The city council rejected petitioners’ view that PCC 33.855.050(B) requires study
10 and an attempt to quantify the future, actual on-street and off-street parking demands of the
11 proposed development. The council interpreted PCC 33.855.050(B) to require the city to
12 determine that the transportation system, as a whole, is adequate. However, the council
13 found that PCC 33.855.050(B) does not in all cases require separate quantitative analysis of
14 each component of that system, such as parking. The council indicated that such separate
15 quantitative analyses may be warranted under certain circumstances, but were not warranted
16 in the present case.⁴

⁴The city council’s decision states in relevant part:

“At the November 1, 2000 hearing before the City Council, [an opponent argued] that the applicant has not demonstrated that adequate off-site parking is available to serve the demands of the site. He states that [PCC] 33.855.050(B) and (B)(2) require an objective numerical analysis of how many parking spaces will be needed by the new development. He argues that the code requires that the availability of actual existing on-street parking spaces be quantified, and that the availability of proposed new off-street parking be quantified.

“The council does not agree with [this] interpretation of [PCC] 33.855.050(B) as applied to the facts of this case. The Council finds that [PCC] 33.855.050(B) does not require a separate quantitative analysis for each component of the transportation system for every zone change proposal. Rather, this section requires the applicable service bureau to determine that the transportation system, as a whole, has adequate capacity, based on projected service demands. Portland [Department of] Transportation has made this determination based on a Traffic Impact Study prepared by a traffic engineer.

“Portland [Department of] Transportation and the Council reserve the discretion regarding the level of analysis required to determine whether transportation services are ‘adequate.’ The

Council notes that the transportation *system* includes public streets, on- and off-site bicycle and vehicle parking and circulation, pedestrian facilities, bicycle facilities and transit service—all of which are available to, or required for development of, this site. In this case, the site’s location along a major transit street with regular bus service *combined with* the parking standards of the CN-2 zone, render potential parking impacts on neighborhood streets negligible. Moreover, the limited need for on-site parking in transit-oriented areas such as SE Hawthorne Street and SE 39th Avenue is recognized by Policy 6.16, which states that ‘growth in access is expected to be met primarily by transit, bicycles, and pedestrians. * * *

“For these reasons, neither Portland [Department of] Transportation nor the Council determined it necessary to conduct a separate quantitative study of off-street parking impacts for the CN-2 zone change proposal. As noted above, any future developer of the site must comply with the on-site parking requirements of the CN-2 (not CN-1) zone. The Council notes that [PCC] 33.266.110 (Required Parking Spaces) describes its purpose as follows:

“Purpose. The purpose of required parking spaces is to provide enough on-site parking to accommodate the majority of traffic generated by the range of uses which might locate at the site over time. Transit-supportive plazas and bicycle parking may be substituted for some required parking on a site to encourage transit use and bicycling by employees and visitors to the site.’

“Because future developers of the site must meet the parking requirements of the underlying CN-2 zone, the Council finds that ‘enough’ on-site parking will be provided to accommodate the proposed 45-unit residential use. Generally, the code requires one parking space per unit and in certain circumstances offers an opportunity to reduce the number of vehicle parking spaces by 25 percent by providing extra bicycle facilities. The Council finds that parking lots are not intended to accommodate worst case parking scenarios, especially along major transit streets. In this case, the Council finds that meeting the on-site parking requirements of the CN-2 zone meets the ‘adequacy’ standard in [PCC] 33.855[.050](B).

“[With respect to off-site parking, other opponents argued] that the applicant must analyze the supply and demand for off-street parking. * * * The Council finds that a separate numerical analysis of off-site demand and supply is unnecessary in this case, because enough (*i.e.*, ‘adequate’) on-site parking is required by the CN-2 zone and parking demand is further reduced because of the site’s location along SE 39th Avenue, a major transit street.” Record 21-22 (emphasis in original; footnotes omitted).

Transportation Policy 6.16, quoted in n 3 above, addresses off-street parking. The city’s findings addressing this policy explain:

“The record shows that the site is located in an area that is transit- and pedestrian-oriented and where bicycle use is common. The record also shows that CS and CN1 zoning is located on Hawthorne Street and immediately south of Hawthorne Street on SE 39th Avenue. Therefore, the Council concludes that the subject site is located ‘near existing or planned future transit service,’ and therefore could have qualified for CN1 zoning, consistent with this policy. Because of the site’s location and transportation amenities, the Council believes that growth in access in the SE Hawthorne Street and SE 39th Avenue area will be met largely, if not primarily, by transit, bicycles, and pedestrians, as stated in this policy.

“However, the Council recognizes that CN1 zoning would have restricted the number of on-site parking to a maximum of 13 spaces. And the Council is cognizant of the concerns of immediate neighbors. To minimize potential (if unsubstantiated) adverse impacts on nearby local streets, the Council agrees with the applicants and the Hearings Officer that CN2 zoning

1 Petitioners challenge that interpretation, arguing that the plain terms of
2 PCC 33.855.050(B) require that the city’s determination regarding the adequacy of services
3 be “based on the projected service demands of the site.” Further, petitioners argue,
4 PCC 33.855.050(B)(2) requires that the city determine adequacy of services by applying the
5 projected service demands “to the actual and proposed services to the site and surrounding
6 area.” According to petitioners, the city’s interpretation essentially reads these requirements
7 out of the code, and is thus not sustainable under ORS 197.829(1) and *Clark v. Jackson*
8 *County*, 313 Or 508, 836 P2d 710 (1992).⁵

9 LUBA must affirm the city council’s interpretation of PCC 33.855.050(B) unless we
10 can say that no person could reasonably interpret the provision in the manner the city has.
11 *Huntzicker v. Washington County*, 141 Or App 257, 261, 917 P2d 1051 (1996). As the city’s
12 findings that are quoted at some length at n 4 make clear, there is some internal tension in
13 PCC 33.855.050(B) and city comprehensive plan provisions that encourage both (1)
14 adequate parking for automobiles and (2) increased use of non-automobile modes of

is more appropriate for this site. The principal reason why the Council believes that the CN2 zone is preferable for this site is because the CN2 zone is the only zone that could be applied to the Neighborhood Commercial site that requires on-site parking.” Record 26-27.

⁵ORS 197.829(1) provides:

“The Land Use Board of Appeals shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

- “(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
- “(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
- “(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
- “(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.”

1 transportation. We believe there are three key aspects of the city’s interpretation and
2 application of PCC 33.855.050(B) in this case.

3 First, petitioners are correct that PCC 33.855.050(B) appears to require a projection
4 of transportation service demand and some comparison of that demand against the existing or
5 future supply, in order to determine the adequacy of the “transportation system structure.”
6 However, the city is also correct that PCC 33.855.050(B) does not specify *how* that
7 projection or comparison must be accomplished or the level of detail that is required in the
8 evidence and analysis. Moreover, as the city points out, PCC 33.855.050(B) does not
9 explicitly require separate study of each discrete component of the transportation system
10 structure (such as off-street parking).⁶

11 Second, the city interprets PCC 33.855.050(B) to allow the city discretion to require a
12 quantified analysis of actual impacts, such as it did for traffic impacts on intersections, or to
13 conduct a less formal analysis. In the present case, the council and the applicable city bureau
14 determined that a quantified analysis of on-street and off-street parking was not necessary.

15 Finally, in reaching the conclusion that a quantified analysis of on-street and off-
16 street parking is not necessary, the city council reasoned that it could rely on the on-site
17 parking that is required in any event by the PCC to supply on-site auto and bicycle parking.⁷
18 The decision explains that this parking will satisfy some of the overall parking demand that
19 will be generated by the site. The city council also reasoned that any additional demand for

⁶The city’s response brief emphasizes that PCC 33.855.050 is concerned with the adequacy of *public* services. The city may intend to suggest that PCC 33.855.050 is not concerned with the adequacy of *private* off-street parking, except insofar as such parking may impact the adequacy of parking on public streets. If that is the city’s point, it seems to diverge from the view of PCC 33.855.050 taken in the city council’s decision, which describes the scope of the “transportation system” at issue under that provision to include off-street parking. *See* n 4.

⁷To the extent petitioners argue that PCC 33.855.050(B) mandates an individual study of the subject property to determine on-site parking needs and precludes the city from relying on the legislatively established standards in the CN-2 zone to supply needed on-site parking, we do not agree. In any event, as explained later, the city further relied on the site’s ready access to transit, bicycle and pedestrian travel options in assessing overall parking needs.

1 parking that might exceed on-site parking supply, which might result in on-street parking,
2 would be “negligible.” Record 21. The city explained this reasoning by pointing out that the
3 site is located on a major transit street and in an area where future transportation needs are
4 “expected to be met primarily by transit, bicycles, and pedestrians.” Record 22, 26.
5 Petitioners do not dispute that the site is located in an area where transit, bicycle and
6 pedestrian transportation opportunities are present.

7 A reasonable person could conclude, as the city council did, that PCC 33.855.050(B)
8 does not require a separate quantified analysis of the actual impacts of the proposed
9 development with respect to parking. The code provision requires some comparison of
10 supply and demand, but is largely silent as to how that comparison is conducted, and what
11 kind of evidence is sufficient to determine supply and demand or the ultimate question of
12 adequacy. We cannot say that the city’s interpretation—to allow different types and levels of
13 analysis with respect to different components of the transportation system—is inconsistent
14 with the express language of PCC 33.855.050(B). Nor can we say that the approach the city
15 took in this case, to rely on previously established standards for on-site parking and the ready
16 availability of transit, bicycle and pedestrian transportation options to address parking
17 demands, is otherwise impermissible under PCC 33.855.050(B), as the city council interprets
18 that provision.

19 Petitioners’ arguments under PCP Transportation Policies 6.14, 6.15 and 6.16 do not
20 alter that conclusion. *See* n 3. The city adopted findings of compliance with these policies,
21 and petitioners do not challenge those findings. If we understand petitioners correctly, they
22 cite to selected portions of these policies to support their view that PCC 33.855.050(B)
23 requires empirical analysis of actual parking impacts. However, nothing in the cited
24 language of these policies bears on the type or level of analysis required under
25 PCC 33.855.050(B), or otherwise demonstrates that the city’s interpretation of that provision
26 is reversible under ORS 197.829(1) and *Clark*.

1 Petitioners' evidentiary arguments are predicated on petitioners' view that
2 PCC 33.855.050(B) requires analysis of actual parking impacts. Because we affirm the
3 city's contrary conclusion in our discussion above, petitioners' evidentiary arguments
4 provide no independent basis for reversal or remand.

5 The assignment of error is denied.

6 The city's decision is affirmed.