

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

3
4 JAY HOLTZ and KATHERINE HOLTZ,
5 *Petitioners,*

6
7 vs.

8
9 CITY OF PORTLAND,
10 *Respondent,*

11 and

12
13
14 RUSSELL T. CAMPBELL
15 and DAWN CAMPBELL,
16 *Intervenors-Respondent.*

17
18 LUBA No. 2003-017

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from City of Portland.

24
25 Steven W. Abel and Ellen P. Hawes, Portland, filed the petition for review. With
26 them on the brief was Stoel Rives, LLP. Steven W. Abel argued on behalf of petitioners.

27
28 Frank Hudson, Assistant City Attorney, Portland, filed the response brief and argued
29 on behalf of respondent.

30
31 Michael G. Magnus, Beaverton, filed a response brief, and argued on behalf of
32 intervenors-respondent.

33
34 BASSHAM, Board Chair; BRIGGS, Board Member; HOLSTUN, Board Member,
35 participated in the decision.

36
37 AFFIRMED

06/02/2003

38
39 You are entitled to judicial review of this Order. Judicial review is governed by the
40 provisions of ORS 197.850.

1

2 **NATURE OF THE DECISION**

3 Petitioners appeal city site review approval for a single-family dwelling in a
4 residential zone.

5 **MOTION TO INTERVENE**

6 Russell T. Campbell and Dawn Campbell (intervenors), the applicants below, move
7 to intervene on the side of the city. There is no opposition to the motion, and it is allowed.

8 **FACTS**

9 The subject property is a steeply sloping residential lot zoned R5. The eastern lower
10 edge of the property borders SW Davenport Street, while the western upper edge of the
11 property borders SW 17th Avenue. Slopes on the property exceed 20 percent.

12 The R5 zone imposes a 30-foot maximum height limitation on single-family
13 dwellings. Portland City Code (PCC) 33.110.215(B), Table 110-3. Under the city’s code,
14 the generally applicable method for determining the “base point” for measuring structure
15 height is set forth in PCC 33.930.050. PCC 33.930.050 provides that the base point may be
16 determined in either of two ways, depending on the steepness of the slope between the
17 highest elevation within five feet of the structure and the elevation of the lowest grade.¹

¹ PCC 33.930.050 provides, in relevant part:

“* * * The height of buildings is the vertical distance above the base point described in Paragraphs 1. or 2. below. The base point used is the method that yields the greater height of building. * * *

“* * * * *

- “1. Base point 1. Base point 1 is the elevation of the highest adjoining sidewalk or ground surface within a 5 foot horizontal distance of the exterior wall of the building when such sidewalk or ground surface is not more than 10 feet above lowest grade. See Figure 930-6.
- “2. Base point 2. Base point 2 is the elevation that is 10 feet higher than the lowest grade when the sidewalk or ground surface described in Paragraph 1. above, is more than 10 feet above lowest grade. See Figure 930-7.”

1 However, PCC 33.110.215(D) provides for “[a]lternative height limits for steeply sloping
2 lots.” Under PCC 33.110.215(D)(1), the height limit for lots that slope steeply “downhill
3 from the street” is the higher of either 23 feet above the average grade of the street, or the
4 normal height limit calculated under PCC 33.930.050.²

5 Intervenor applied to the city for site review and approval of a 5,939-square foot
6 single-family dwelling on the subject property. The proposed site plan oriented the garage
7 and front façade of the house toward SW 17th Avenue, the higher elevation street bordering
8 the property. To demonstrate that the proposed dwelling complied with applicable height
9 standards, intervenors relied on the alternative height limit in PCC 33.110.215(D)(1), and
10 proposed a dwelling that was 23 feet above the average grade of SW 17th Avenue.

11 The city processed the site review application under its “Type I” procedure, which
12 allows for written comments and a final decision by the Director of the Bureau of
13 Development Services (Director), but provides no public hearing or local appeal. Petitioners
14 submitted written comments, arguing that the city must process the application under its
15 “Type III” procedure, which requires a hearing and opportunity for local appeal. In addition,
16 petitioners argued that because the subject property fronts upon and slopes uphill from SW
17 Davenport Street, the alternative 23-foot height limitation at PCC 33.110.215(D)(1) does not
18 apply.

² PCC 33.110.215(D) provides, in relevant part:

“Alternative height limits for steeply sloping lots.

- “1. Downhill slope from street. On lots that slope downhill from the street with an average slope of 20 percent or greater, the height limit is the higher of either 23 feet above the average grade of the street, or the normal height limit calculated as stated in Chapter 33.930, Measurements. In addition, the alternative height and setback standards of Subsection 33.110.220.D apply.
- “2. Uphill slope from the street. On lots that slope uphill from the street with an average slope of 20 percent or greater the alternative height and setback standards of Subsection 33.110.220.D apply.”

1 On January 7, 2003, the Director issued a final decision rejecting both of petitioners’
2 arguments, and approving the requested site review. In relevant part, the Director concluded
3 that it was appropriate to review the application under Type I procedures, and that under the
4 city’s code intervenors can elect to apply the alternative 23-foot height limitation at
5 PCC 33.110.215(D)(1). This appeal followed.

6 **FIRST ASSIGNMENT OF ERROR**

7 Petitioners assign error to the Director’s refusal to process the site review application
8 under Type III procedures. According to petitioners, the city’s decision interpreted and
9 resolved one or more ambiguities in the city’s code. Therefore, petitioners argue, the city
10 was required to either “issue a statement of clarification processed through a Type III
11 procedure,” or initiate an amendment to the city’s code, pursuant to PCC 33.700.070(B).³

12 The city and intervenors respond that petitioners misunderstand PCC 33.700.070(B).
13 The city and intervenors emphasize that PCC 33.700.070(B) states that the Director “may”
14 issue a statement of clarification processed through a Type III procedure, or initiate a code
15 amendment, not that the Director “shall” or must do so. Under PCC 33.700.070(D)(2),
16 intervenors point out, the term “may” is defined as “permissive.”

17 We agree with the city and intervenors that petitioners misread PCC 33.700.070(B).
18 However that code provision is properly understood, it does not *require* that the Director

³ PCC 33.700.070 provides, in relevant part:

“The rules of this section apply to this Title and any conditions of a land use approval granted under this Title.

“A. **Reading and applying the code.** Literal readings of the code language will be used. Regulations are no more or less strict than as stated. Applications of the regulations that are consistent with the rules of this section are nondiscretionary actions of the [Director] to implement the code. The action of the [Director] is final.

“B. **Ambiguous or unclear language.** Where the language is ambiguous or unclear, the [Director] may issue a statement of clarification processed through a Type III procedure, or initiate an amendment to Title 33 as stated in Chapter 33.835, Goal, Policy, and Regulation Amendments.”

1 elevate a Type I land use review to a Type III review or initiate a code amendment if the
2 review happens to involve ambiguous or unclear code provisions that require interpretation.⁴

3 The first assignment of error is denied.

4 **SECOND ASSIGNMENT OF ERROR**

5 Petitioners argue that the city misconstrued the applicable law in determining that the
6 alternative 23-foot height limit in PCC 33.110.215(D)(1) applies to the proposed dwelling.

7 The Director’s interpretation to that effect is based on a contextual analysis of
8 PCC 33.110.215(D)(1). The Director noted that both PCC 33.110.215(D)(1) and (2) make
9 the standards at PCC 33.110.220(D) applicable to lots that slope uphill or downhill 20
10 percent or more. PCC 33.110.220(D)(4) allows *front building setbacks* on lots that slope up
11 or down from the street with a 20 percent slope or more to be reduced, *provided*
12 corresponding *height reductions* are made.⁵ The Director noted that PCC 33.110.220(D)(4)

⁴ PCC 33.700.070(B) can also be read in a different manner than the city and intervenor propose. Arguably, PCC 33.700.070(B) does not concern the Director’s options in addressing interpretational issues that arise in the course of reviewing a particular land use application. Rather, it can be read to delegate to the Director a quasi-legislative authority to clarify ambiguities in the city’s code by issuing a statement of clarification, processed through a Type III procedure, outside the context of any particular development application. However, because we disagree with petitioners’ interpretation of PCC 33.700.070(B) we need not and do not decide whether this different view of PCC 33.700.070(B) is correct.

⁵ PCC 33.110.220(D) provides, in relevant part:

“D. Exceptions to the required setbacks.

“* * * * *

“4. Steeply sloping lots. This provision applies to lots which slope up or down from the street with an average slope of 20 percent or greater. See Chapter 33.930, Measurements, for more information on how to measure average slope.

“a. In the RF, R20, R10, and R7 zones, the front building setback for the dwelling may be reduced to 10 feet. However, the height limitations of subparagraph c. below apply. * * *

“b. In all single-dwelling residential zones, the front building setback for the garage wall and/or the garage entrance setback may be reduced to five feet. However, the height limitations of c. below apply. * * *

1 and its accompanying diagrams refer to the “front building setback” in terms that suggest that
2 the front building setback relates to the side of the dwelling that faces the street. Based on
3 that observation, the Director reasoned that:

4 “* * * Read together, [PCC 33.110.220(D)(4) and its diagrams] indicate that
5 the term ‘street,’ as used in [PCC 33.110.215(D) and 33.110.220(D)], is a
6 reference to the ‘street’ on which the dwelling fronts. Stated differently, to
7 determine whether a lot slopes ‘downhill from the street’ or slopes ‘uphill
8 from the street,’ one must first determine on which street the front of the
9 house faces. If the front of the house faces a street and the lot slopes down
10 from that street, then [PCC 33.110.215(D)(1)] ‘Downhill Slope from the
11 Street,’ applies * * *. Conversely, if the front of the house faces a street and
12 the lot slopes uphill from that street, then [PCC 33.110.215(D)(2)] ‘Uphill
13 Slope from the Street,’ applies * * *.” Record 12.

14 Based on that interpretation, the Director found:

15 “In the case at hand, the site plan is unambiguous: the building site plan
16 indicates the front of the dwelling and the garage entrance will be on SW
17 17th. County and City records, moreover, indicate the legal address of the
18 dwelling is on SW 17th Street. * * * The City accordingly finds the front of
19 the house is on SW 17th Street. Because the front of the proposed dwelling
20 will face a street that is on the uphill side of the lot (*i.e.*, the lot slopes
21 downhill from SW 17th), [PCC 33.110.215(D)(1)], ‘Downhill Slope from the
22 Street,’ applies to this proposal. * * *.” *Id.*

23 Petitioners dispute the city’s contextual analysis, and its conclusion that the term
24 “street” as used in PCC 33.110.215(D) and 33.110.220(D)(4) refers to the street that the
25 proposed dwelling fronts or faces. Petitioners note that the city code defines “street” without
26 any reference to building fronts or frontage.⁶ Further, petitioners note that
27 PCC 33.110.220(D)(4) also refers to “garage entrance setbacks,” which has no necessary
28 correlation to front building or lot lines, as a garage entrance can be accessed from the side of

“c. Height limitation. The height limit in the area of the reduced setback is lowered one foot for every foot of reduced setback. * * *”

⁶ PCC 33.910.030 defines “street” as

“[a] right-of-way that is primarily intended for motor vehicle travel or for motor vehicle access to abutting property. Streets are also intended for pedestrian or bicycle travel, or access to abutting property. * * *”

1 a lot. Petitioners argue that this context undercuts the inference drawn by the Director.
2 Given the mixed contextual analysis and the lack of support for the Director’s interpretation
3 of “street” in the code definition of that term, petitioners argue that the Director’s
4 interpretation is inconsistent with the text and context of the code. If so, petitioners argue,
5 then the subject property is both uphill and downhill from a “street” and therefore both
6 PCC 33.110.215(D)(1) and (2) apply. As discussed below, petitioners assert that if both
7 provisions potentially apply, then the city must apply the most restrictive height limitation.

8 Alternatively, petitioners argue that even if the meaning of “street” as used
9 PCC 33.110.215(D) and 33.110.220(D)(4) is related to the front or frontage of the lot, then
10 the city nonetheless erred in applying the 23-foot height limitation at PCC 33.110.215(D)(1),
11 because as a matter of law the subject property fronts or has frontage on *two* streets.
12 Petitioners argue that the subject property meets the code description of a “through lot,”
13 which is a lot that has “frontage on two parallel or approximately parallel streets.”
14 PCC 33.910.030 (definition of “lot”); *see also* the PCC 33.910.030 definition of “front lot
15 line” (“a through lot has two front lot lines * * *”). Because the subject property fronts or
16 has frontage on both SW Davenport Street and SW 17th Avenue, petitioners argue, the
17 property slopes both downhill and uphill from a “street.” Therefore, petitioners argue, both
18 PCC 33.110.215(D)(1) and (2) apply.

19 If both PCC 33.110.215(D)(1) and (2) apply, petitioners contend, then the city must
20 apply the more restrictive regulation, as required by PCC 33.700.070(E)(2).⁷ According to

⁷ PCC 33.700.070(E) provides, in relevant part:

“E. Hierarchy of regulations.

“* * * * *

- “2. Regulations at the same level. When regulations at the same level conflict, those that are more specific to the situation apply. An example would be the parking space requirement for houseboats in moorages, two spaces per unit, which is stated in the Floating Structures chapter. This would supersede the standard residential

1 petitioners, applying the 23-foot height limitation at PCC 33.110.215(D)(1) in the present
2 case would allow a dwelling with a 70-foot tall façade, if measured from the downhill side of
3 the house, higher than could be allowed under PCC 33.110.215(D)(2). In sum, petitioners
4 argue that whether or not the Director’s interpretation of “street” is error, the city erred in
5 applying the less restrictive height limitation at PCC 33.110.215(D)(1) to the subject
6 property.

7 As an initial point, it is not clear to us that PCC 33.110.215(D)(2) supplies a height
8 limitation on lots that slope uphill from a street, as petitioners appear to presume.
9 PCC 33.110.215(D)(2) simply states that the “alternative height and setback provisions” of
10 PCC 33.110.220(D) apply to such lots. However, PCC 33.110.220(D) does not itself supply
11 any height limitations. In relevant part, it simply allows a reduced front building *setback* on
12 steeply sloping lots if there are corresponding height reductions. The present case does not
13 involve reduced front building setbacks. For that reason, we have some difficulty
14 understanding petitioners’ argument that *both* PCC 33.110.215(D)(1) and (2) impose height
15 limitations in the present case. To the extent PCC 33.110.215(D)(2) applies at all, it is not
16 the source of any height limitation.

17 Petitioners’ point may be that where PCC 33.110.215(D)(2) applies, *i.e.*, where a lot
18 slopes uphill from a street, then the generally applicable 30-foot height limitation in Table
19 110-3 controls the height of the proposed dwelling. We understand petitioners to contend
20 that application of the 30-foot height limitation in Table 110-3 in the present case, measured
21 from the “base point” determined under the second method described at PCC 33.930.050(2),
22 would probably result in a dwelling with a roofline at a lower elevation than would be the
23 case if the alternative 23-foot height limitation at PCC 33.110.215(D)(1) applied. If so, we

requirement of one space per unit stated in the Parking chapter. When the regulations are equally specific or when it is unclear which regulation to apply, the most restrictive applies. Regulations at the same level include such situations as two different standards in a base zone or regulations from separate chapters in the 200s series of chapters.”

1 understand petitioners to argue, the city is required by PCC 33.700.070(E)(2) to apply the
2 “most restrictive” standard.

3 The problem with that argument is that it is not clear that the 30-foot height limitation
4 in Table 110-3 and the alternative 23-foot height limitation in PCC 33.110.215(D)(1) are “at
5 the same level” and or that they “conflict” within the meaning of PCC 33.700.070(E)(2).
6 The 23-foot height limitation in PCC 33.110.215(D)(1) is expressly framed as an *alternative*
7 to the generally applicable height limitations in Table 110-3. Even if viewed as being “at the
8 same level” and in “conflict,” it would appear that the 23-foot height limitation, which is
9 directed at lots that slope downhill from a street, is more “specific” than the general 30-foot
10 height limitation applicable to all R-5 zoned lots. In such circumstances,
11 PCC 33.700.070(E)(2) directs that the more specific standard applies.

12 In short, we disagree with petitioners that PCC 33.700.070(E)(2) prohibits the city
13 from applying the 23-foot height limitation at PCC 33.110.215(D)(1). To the extent both
14 PCC 33.110.215(D)(1) and (2) apply to the proposed dwelling, only one supplies a height
15 limitation in this case, and therefore those provisions do not “conflict” within the meaning of
16 PCC 33.700.070(E)(2). As explained, the alternative height limitation at
17 PCC 33.110.215(D)(1) and the general height limitation at Table 110-3 do not conflict or, if
18 they do, the former controls.

19 Our conclusion in this respect eliminates the sole asserted basis for reversing or
20 remanding the challenged decision under this assignment of error. Accordingly, we see no
21 purpose in resolving petitioners’ challenge to the Director’s interpretation of the term
22 “street” in PCC 33.110.215(D), or petitioners’ arguments that the subject property is a
23 “through lot.” Even if petitioners are correct on these points, petitioners do not dispute that
24 the alternative height limitation at PCC 33.110.215(D)(1) is facially applicable to the
25 proposed dwelling. Petitioners’ argument for reversing or remanding the Director’s
26 determination that PCC 33.110.215(D)(1) supplies the applicable height limitation rests on

1 petitioners' view that application of that height limitation is trumped in this case by operation
2 of PCC 33.700.070(E)(2). As explained, we disagree that PCC 33.700.070(E)(2) plays any
3 role in determining which height limitation applies to the proposed dwelling. Given our
4 ruling on that point, petitioners' remaining arguments under this assignment of error provide
5 no basis for reversal or remand.

6 The second assignment of error is denied.

7 The city's decision is affirmed.