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AFFIRMED

10/14/2015

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

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NATURE OF THE DECISION

Petitioner appeals a city council decision that grants design review approval for a full-block, mixed-use development located in the Central City Plan District’s River Sub-District.¹

MOTION TO INTERVENE

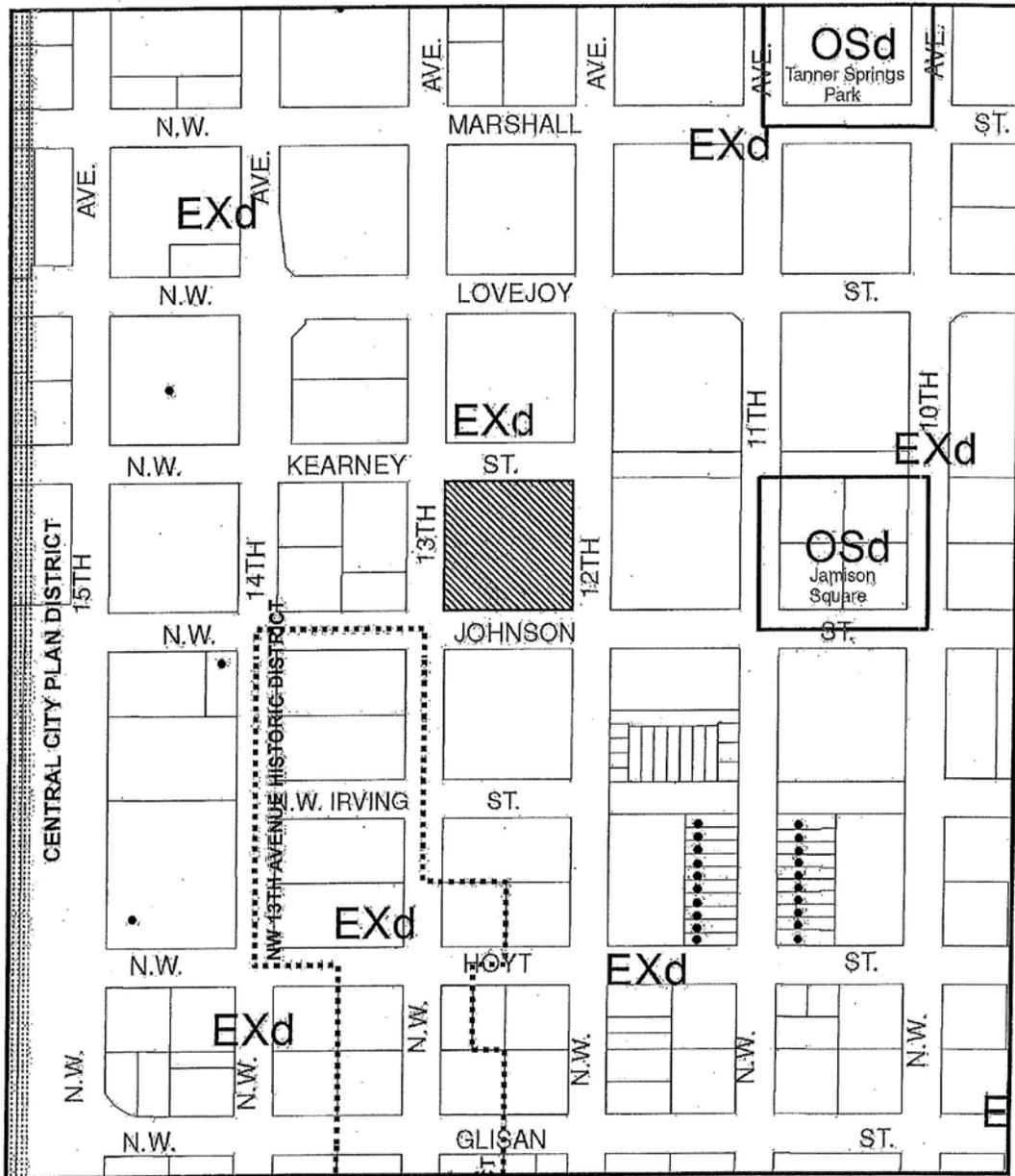
Security Properties, Inc., and SP Pearl, LLC move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

Graphics from the record are included on the following pages to help describe the relevant facts. The subject city block is located in Portland’s Central City Plan District, north of NW Johnson, south of NW Kearney, and between NW 13th and NW 12th. The property is located two blocks east of the western edge of the River Sub-District, which runs along I-405. The Alphabet Historic District lies across I-405 to the west. The NW 13th Avenue Historic District lies to the southwest of the property.² The property is approximately 12 blocks west of the Willamette River.

¹ Plan Districts are Portland Zoning Code regulations that are tailored to specific areas of the city. The Central City Plan District is one of 31 Plan Districts. The Central City Plan District includes a number of Sub-Districts.

² The NW 13th Avenue Historic District is the dotted outlined area to the southwest of the subject property, which is shown with crosshatch in the middle of the first graphic.



ZONING

 Site
 Historic Landmark


 NORTH

This site lies within the:
**CENTRAL CITY PLAN DISTRICT
 RIVER SUBDISTRICT**

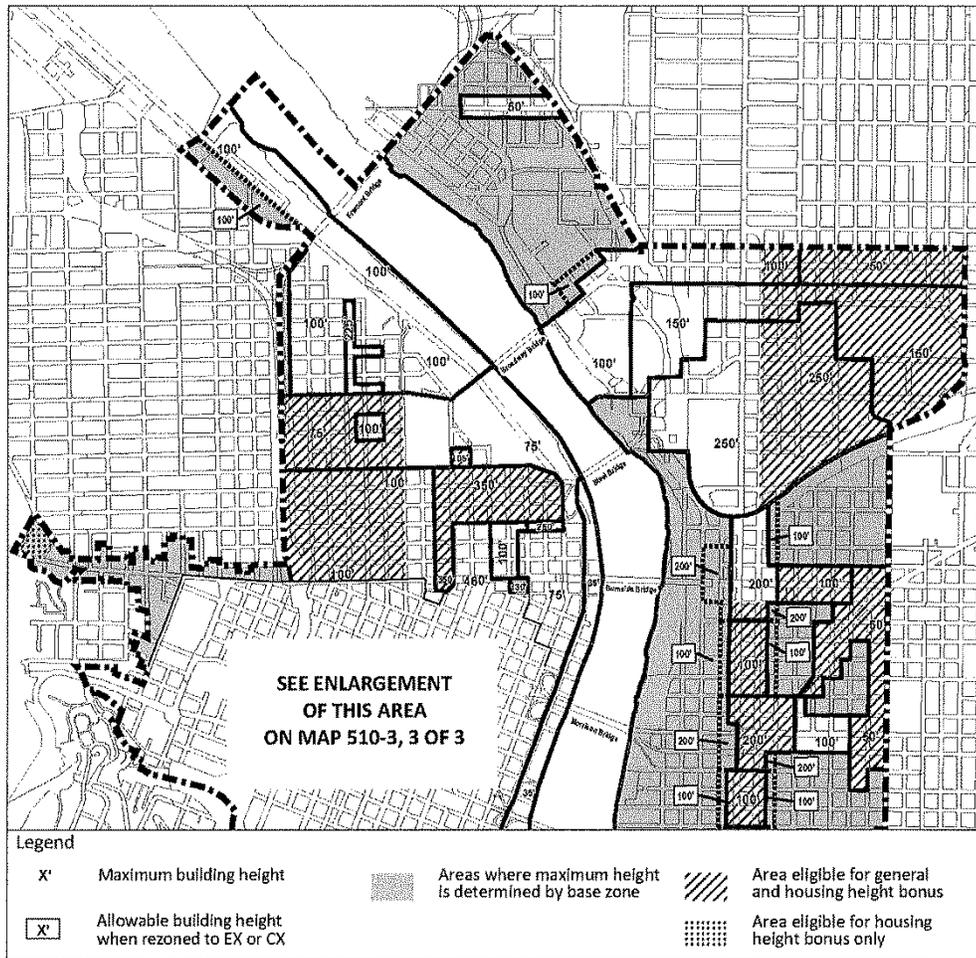
File No. LU 14-230014 DZM, AD
 1/4 Section 2928
 Scale 1 inch = 200 feet
 State Id 1N1E33AD 1600
 Exhibit B (Oct 24, 2014)

Maximum Heights

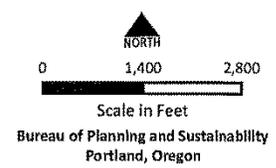
Map 510-3

Map 1 of 3

Map Revised July 24, 2015



- [Dashed Line] Central City Plan District boundary
- [Solid Line] Maximum heights area boundary
- [Dotted Line] Boundary of area when building heights are tied to rezoning to EX or CX



1 Under the applicable base zoning, the maximum building height on the
2 subject property is 75 feet. The second graphic shows the base zoning
3 maximum height limits and the cross-hatched area of the River Sub-District
4 that is eligible for height bonuses. The subject property is located between the
5 faint number 75 and the outlined number 100 in the northern part of the cross-
6 hatched area shown on the second graphic, west of the Willamette River.
7 Within the area eligible for height bonus, a general height bonus of 45 feet is
8 allowable under subsection D of Portland City Code (PCC) 33.510.210. Under
9 subsection E of PCC 33.510.210, an additional height bonus of 30 feet is
10 allowable to encourage development of housing.

11 The proposal is to develop two buildings with a public courtyard
12 between the two buildings. The long dimensions of the two north/south
13 oriented buildings are along NW 12th and NW 13th. The building on the east
14 side of the block, along NW 12th, was granted both a general 45-foot bonus and
15 a housing 30-foot bonus and would be almost 150 feet tall. The building to the
16 west, along NW 13th would be 76 feet tall. Petitioner assigns error to the
17 housing bonus for the building along NW 12th.

18 **STANDARD OF REVIEW**

19 The requested height bonus was first approved by the Design
20 Commission, but the Design Commission's decision was affirmed on appeal by
21 the City Council. Accordingly, the challenged decision is subject to deferential

1 review on appeal, under ORS 197.829(1) and *Siporen v. City of Medford*, 349
2 Or 247, 259, 243 P3d 776 (2010).³

3 **ASSIGNMENT OF ERROR**

4 **A. The Applicable Law**

5 The approval criteria for housing bonuses in the Central City Plan
6 District are set out at PCC 33.510.210.E.4, which is set out in full in the
7 margin.⁴ The city found that the proposal complies with all six of the PCC

³ ORS 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.”

⁴ PCC 33.510.210.E.4 provides:

- “4. Approval Criteria. The approval of the bonus height is made as part of the design review of the project. The bonus height may be approved if the review body finds that the applicant has shown that *all of the following criteria* have been met:

1 33.510.210.E.4 criteria. Record 70-78. Petitioner assigns error to the city’s
2 findings regarding one of the PCC 33.510.210.E.4 criteria, PCC
3 33.510.210.E.4.f, which requires the city to find that “[a]pproval of the
4 increased height is consistent with the purposes stated in [PCC] 33.510.205.A.”
5 PCC 33.510.205.A sets out five purposes. We set out below the text of PCC
6 33.510.205.A, followed by a listing of each of the purposes stated in PCC
7 33.510.205.A:

-
- “a. The increased height will not violate an established view corridor;
 - “b. If the site is within 500 feet of an R zone, the proposed building will not cast shadows that have significant negative impacts on dwelling units in R zoned lands;
 - “c. If the site is shown on Map 510-3 as eligible for the Open Space (OS) performance standard, the project must meet the performance standards of Subsection 33.510.205.E.;
 - “d. If the site is on a block adjacent to the Yamhill or Skidmore Fountain/Old Town Historic Districts, the project must meet the performance standards of Subsection 33.510.205.D.;
 - “e. The increased height will result in a project that better meets the applicable design guidelines; and
 - “f. Approval of the increased height is *consistent with the purposes stated in Subsection 33.510.205.A.*” (Emphases added.)

1 **“A. Purpose.** The maximum building heights are intended to
2 accomplish several purposes of the Central City Plan. These
3 include protecting views, creating a step-down of building
4 heights to the Willamette River, limiting shadows on public
5 open spaces, ensuring building height compatibility and step
6 downs to historical districts, and limiting shadows from new
7 development on residential neighborhoods in and at the
8 edges of the Central City.”

- 9 1. Protecting Views,
- 10 2. Creating a step-down of building heights to the Willamette
11 River,
- 12 3. Limiting shadows on public open spaces,
- 13 4. Ensuring building height compatibility and step downs to
14 historical districts,
- 15 5. Limiting shadows from new development on residential
16 neighborhoods in and at the edges of the Central City.

17 The city found that the proposal is consistent with all five of the PCC
18 33.510.205.A purposes. Petitioner’s challenge is limited to the city’s findings
19 concerning the second of the purposes stated in PCC 33.510.205.A, “[c]reating
20 a step-down of building heights to the Willamette River.”

21 **B. The City’s Findings**

22 The city adopted alternative interpretations of the PCC 33.510.210.E.4.f
23 criterion that “[a]pproval of the increased height is consistent with the purposes
24 stated in [PCC] 33.510.205.A.” We discuss those alternative interpretations
25 separately below.

1 **1. The Proposal Must be Harmonious as a Whole or on**
2 **Balance With the Purposes**

3 In its first interpretation of PCC 33.510.210.E.4.f, the city concluded that
4 PCC 33.510.210.E.4.f does not render each of the five PCC 33.510.205.A
5 purposes “a separate mandatory approval criterion.” Record 74. Rather, the city
6 interpreted PCC 33.510.210.E.4.f to be met if the proposal is “harmonious ‘as a
7 whole,’ or ‘on balance’ with the general purposes stated in [PCC]
8 33.510.205.A.” Record 73. The city’s findings are set out below:

9 **“Findings:** As an initial matter, the City Council finds that it is not
10 clear on its face how 33.510.210.E.4.f should be applied to this
11 project and the request for 30 feet of additional height. * * * The
12 City Council finds that in order to assess whether the request for
13 an additional 30 feet in building height meets 33.510.210.E.4.f it
14 must interpret the phrase ‘consistent with’ and how that phrase
15 should be applied in this context to the multiple and varied
16 purposes listed in 33.510.205.A.

17 “The City Council finds that ‘consistent with’ is not defined in the
18 [Portland Zoning Code (PZC)]. Because it is not defined, the City
19 Council looks to a dictionary definition. ‘Consistent’ means
20 ‘*marked by harmony, regularity or steady continuity throughout*’
21 and ‘*marked by agreement and concord.*’ Webster’s Third
22 International Dictionary, 2002. In light of this definition, the City
23 Council interprets 33.510.210.E.4.f to require that, where a height
24 bonus is allowed, the additional height is harmonious ‘as a whole,’
25 or ‘on balance’ with the general purposes stated in 33.510.205.A.

26 “Where, as here, consistency must be shown with multiple, not
27 always compatible items, the consistency must focus on the
28 totality of the situation, not on the individual items. The City
29 Council believes that this interpretation is a reasonable
30 interpretation of the PZC for several reasons.

1 “First, 33.510.210.E.4.f does not require that approval of the
2 increased height ‘comply’ with each of the individual purposes
3 stated in 33.510.205.A, nor does it use any synonym of ‘comply.’
4 Where the PZC intends that one of the purposes covered by
5 33.510.205.A be met, it specifically provides for that, as it does
6 with regard to view corridors in 33.510.210.E.4.a. Second, since
7 33.510.210.E.4.f does not use the term ‘comply’ or ‘compliance’
8 or a synonym of such, it must intend something other than
9 compliance with the purposes of 33.510.205.A, individually or
10 collectively.

11 “Third, consistency with the purpose statement as a whole does
12 not require compliance with each individual purpose of
13 33.510.205.A because some of the 205.A purposes are in conflict.
14 For example, it would be impossible for a project to
15 simultaneously ‘*ensure . . . step downs to historical districts*’ and,
16 at the same time, achieve a ‘*step down of building heights to the*
17 *Willamette River.*’ Where, as here, the project is located between a
18 historical district and the Willamette River, it must step down in
19 one direction or the other, it cannot step down in both directions.

20 “In light of these reasons, the City Council finds that the
21 consistency required by 33.510.210.E.4.f is established when the
22 additional height achieves an appropriate balance that is
23 harmonious with the purposes stated in 33.510.205.A, and that
24 such balance does not require that each separate element of the
25 33.510.205.A purpose statement be individually met. The City
26 Council further interprets that this subsection “f.” requirement
27 does not transform each individual element of the 33.510.205.A
28 purpose statement into a separate mandatory approval criterion.

29 “Based upon this interpretation, The City Council finds that the
30 increased height of the residential building is consistent, on
31 balance, with the purposes of 33.510.205.A because the additional
32 height, overall, respects and embraces the 13th Avenue Historic
33 District by stepping down to the district; by providing site and
34 building designs (including the character and design details of the
35 13th Avenue Building, with its streetside loading dock) that are
36 coherent with and complement the overall urban design of the
37 Pearl District; and by providing a new high-amenity public

1 courtyard, creating active building corners, enhancing the
2 streetscape with active uses and engaging design on all four block
3 faces; and for the reasons discussed under each of the elements of
4 33.510.205.A below.” Record 73-74 (boldface, italics and
5 underlining in original).

6 Petitioner contends that PCC 33.510.210.E.f requires that proposed
7 height increase must be “consistent with the purposes stated in [PCC]
8 33510.205.A.” By interpreting PCC 33.510.210.E.f to be satisfied if the
9 proposed height increase is merely “harmonious ‘as a whole,’ or ‘on balance’
10 with the general purposes stated in PCC 33.510.205.A,” petitioner contends the
11 city council interpreted PCC 33.510.210.E.f in a manner that is “inconsistent
12 with [its] express language,” and for that reason is not entitled to deference
13 under ORS 197.829(1)(a). *See* n 4. Petitioner also contends the city has
14 impermissibly violated the statutory admonition “not to insert what has been
15 omitted” when interpreting ambiguous laws. ORS 174.010; *Friends of the*
16 *Hood River Waterfront v. City of Hood River*, 263 Or App 80, 90, 326 P3d
17 1229 (2014).⁵ We understand petitioner to contend that the city is required to
18 find that the proposed height increase is consistent with all of the PCC

⁵ ORS 174.010 provides:

“In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.”

1 33.510.205.A purposes, including the second purpose, which requires that
2 building heights step down to the Willamette River. In this case the buildings
3 step down *away* from the Willamette River, which is twelve blocks to the east.

4 When trying to determine the intended meaning of an ambiguous land
5 use regulation, on some level the interpreter can almost always be accused of
6 inserting what has been omitted. If the land use regulation is clear on its face,
7 there is no reason to try to explain what it means. PCC 33.510.210.E.f is
8 ambiguous. PCC 33.510.210.E.f does not expressly require that the increased
9 height must be consistent with **all** the purposes stated in PCC 33510.205.A.
10 Neither does PCC 33.510.210.E.f expressly require that all of the purposes
11 must be applied individually as approval criteria. Petitioner’s contentions that
12 they must be understood and applied in that matter can also be accused of
13 inserting what has been omitted.

14 In *Waker Associates, Inc. v. Clackamas County*, 111 Or App 189, 826
15 P2d 20 (1992), the Court of Appeals endorsed an interpretive approach quite
16 similar to the one the city adopted here, when faced with similar land use
17 regulation text. In *Waker* applicable statutes and county land use regulations
18 required that EFU zone conditional uses “not conflict with the plan’s
19 agricultural goals.” 111 Or App at 191. The proposed golf course in that case
20 appeared to conflict with a number of those agricultural goals.⁶ LUBA had

⁶ The agricultural goals included the following:
Page 13

1 rejected a balancing approach to determine whether the proposed golf course
2 conflicted with the plan’s agricultural goals. *Waker v. Clackamas County*, 22
3 Or LUBA 233, 240-41 (1991). The Court of Appeals disagreed with LUBA
4 and concluded that a balancing approach is often a necessity:

5 “We do not understand the parties to argue or LUBA to have
6 concluded either that compatibility with all seven of the goals is
7 necessary for a proposed use to be allowed or, at the other
8 extreme, that compatibility with any one of the seven must
9 necessarily result in the approval of a proposed use. It follows that
10 county decision-makers will often be confronted with situations,
11 like this one, where a use is compatible with some of the goals and
12 incompatible with others. It is not possible to approve or
13 disapprove a use in those situations without engaging in a
14 balancing exercise. Although the effect on and consistency of a

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- “A. To preserve agricultural lands;
 - “B. To protect agricultural lands from conflicting uses, high taxation and the cost of public facilities unnecessary for agriculture;
 - “C. To maintain the economic base of Clackamas County and increase its share of the market;
 - “D. To increase agriculture income and employment by creating conditions which further the growth and expansion of agriculture and which attract agriculturally related industries;
 - “E. To maintain and improve the quality of air, water and land resources;
 - “F. To conserve scenic and open space; and
 - “G. To protect wildlife habitats.” 111 Or App at 191.

1 proposed use with each of the goals must be considered, the
2 weight to be given a goal and the magnitude of the effects that
3 particular proposed uses will have on the values that the different
4 goals protect will inevitably vary from case to case. * * * .” 111
5 Or App at 194.

6 *Waker* is not directly on point, because petitioner in this case does argue
7 that the proposal must be consistent with all five of the PCC 33.510.205.A
8 purposes. But as we have already noted, PCC 33.510.210.E.f does not
9 expressly require consistency with all five of the PCC 33510.205.A purposes or
10 that each of those purposes must be treated as separate approval criteria.

11 The city also explained that because the site lies between a historic
12 district and the Willamette River it is impossible to step down toward the
13 Willamette River, consistent with the second purpose, *and* step down toward
14 the 13th Street Historic District to the southwest, as required by the fourth PCC
15 33510.205.A purpose. Most of the River District is similarly situated, with the
16 Willamette River to the east and historic districts to the south and west. The
17 city found that its balancing interpretation had the effect of potentially allowing
18 housing bonuses in the area of the River District that is specifically designated
19 as potentially eligible for such bonuses, whereas petitioner’s interpretation of
20 PCC 33.510.210.E.f would mean that development in most of the area
21 designated for housing height bonuses in the River District could never qualify
22 for a housing height bonus. The city and intervenors argue the city’s
23 interpretation avoids rendering the city’s designation of that area as potentially
24 eligible for the housing bonus a nullity, which is consistent with the ORS

1 174.010 command to give effect to all provisions if possible. *See* n 5; *Friends*
2 *of Hood River Waterfront*, 263 Or App at 90.

3 As contextual support for its interpretation, the city points out that PCC
4 33.510.210.E.4.f is not written as a “standard” or “criterion” that must be
5 complied with, whereas PCC 33.510.210.E.4.a is written as a “standard” that
6 must not be “violate[d].” *See* n 4. The city could have made the same
7 comparison between PCC 33.510.210.E.4.f and PCC 33.510.210.E.4.c and .d.
8 *See* n 4. Perhaps more significant is the wording and structure of PCC
9 33.510.210.E.4 itself, which clearly requires that all six of the PCC
10 33.510.210.E.4 “criteria” must be “met” (including PCC 33.510.210.E.4.f) but
11 PCC 33.510.210.E.4.f does not similarly make it clear that all five of the
12 purposes in PCC 33.510.205.A must separately be met or complied with. Under
13 the dictionary definition of “consistent,” the “consistent with the purposes”
14 language of PCC 33.510.210.E.4 perhaps could be interpreted to require
15 compliance with all five purposes of PCC 33.5190.205.A. But the dictionary
16 definition of “consistent” is not at odds with the city’s balancing interpretation,
17 and for the textual and contextual reasons set out in the city’s decision we
18 conclude that there is nothing in the express text of PCC 33.510.210.E.4.f that
19 requires that it be interpreted in the manner petitioner argues.

20 The city’s interpretation gives effect to the city’s decision to designate a
21 large area of the River District as eligible for a housing height bonus, thereby
22 avoiding a conflict that would render that designation a nullity. In doing so, the

1 city’s interpretation gives effect to both the second and fourth purposes of PCC
2 33.510.205.A.

3 “[W]hen a local government plausibly interprets its own land use
4 regulations by considering and then choosing between or
5 harmonizing conflicting provisions, that interpretation must be
6 affirmed * * * unless the interpretation is inconsistent with *all* the
7 ‘express language’ that is relevant to the interpretation, or
8 inconsistent with the purposes or policies underpinning the
9 regulations.” *Siporen*, 349 Or at 259 (emphasis in original).

10 The city’s interpretation is not inconsistent with all the express language that is
11 relevant. The city council’s interpretation “engaged in a ‘considered
12 determination,’” “plausibly harmonize[d] conflicting provisions” and
13 “comports with at least some of the express language of the relevant
14 provisions.” *Siegert v. Crook County*, 246 Or App 500, 506-07, 266 P3d 170
15 (2011). Neither is the city’s interpretation inconsistent with the purposes or
16 policies underpinning the regulations. The city’s findings concerning the
17 purposes and policies that underlie the Willamette River building height step-
18 down requirement are discussed below and are not specifically challenged by
19 petitioner.

20 The city council’s interpretation that under PCC 33.510.210.E.4.f the
21 five PCC 33.510.205.A purposes are not “separate mandatory approval
22 criteri[a],” and instead that a proposed height bonus is consistent with those
23 purposes if the proposal is “harmonious ‘as a whole,’ or ‘on balance’ with the
24 general purposes stated in [PCC] 33.510.205.A,” is not reversible under ORS
25 197.829(1) and *Siporen*.

1 **2. The Proposal is Consistent With All the Purposes**

2 In its second interpretation, the city concluded that even if PCC
3 33.510.210.E.4.f requires that the housing bonus comply with each of the five
4 PCC 33.510.205.A purposes, the proposal complies with all five purposes,
5 including the Willamette River building height step-down requirement. The
6 relevant city findings are set out below:

7 “Even if [PCC] 33.510.210.E.4.f were interpreted to require the
8 increased height to comply with the each of the purposes in [PCC]
9 33.510.205.A, the City Council finds that such compliance is
10 achieved, as follows:

11 “■ * * * * *

12 “■ 33.510.205.A Purpose Statement Element 2: Creating a
13 step-down of building heights to the Willamette River. The
14 City Council finds that this element of the purpose
15 statement seeks to ensure that development within the
16 Central City Zone achieves an overall step-down to the
17 Willamette River. The City Council finds that this purpose
18 is achieved through the heights allowed through the PZC,
19 including height bonuses in eligible areas. Consistency with
20 this purpose is context driven, and is determined on an area
21 basis by looking to the allowable zoning heights on Map
22 510-3 and to potential development that would be consistent
23 with the adopted PZC, not to whatever happens to be the
24 then-existing individual building heights.

25 “The City Council finds that this purpose does not require
26 that every building on each block step down to the next and
27 the next and the next as development moves towards the
28 river. Rather, the intent of the purpose is to ensure that,
29 overall, the Central City achieves a step down to the river by
30 construction of projects consistent with allowed zoning
31 heights.

1 “Map 510-3 shows that the Pearl District has several
2 different zoning height ‘transects’ from west to east. South
3 of Hoyt, allowed heights step up from 100 feet west of 8th
4 Avenue to 350 feet east of 8th Avenue and then down to 75
5 feet right next to the Willamette River. North of Lovejoy,
6 the allowed zoning height is uniform at 100 feet, except for
7 the 225 feet allowed on portions of 12th Avenue, Lovejoy,
8 and Northrup. In the project location, zoning heights are
9 uniformly 75 feet from NW 14th Avenue to the river, with
10 bonus height (general and housing bonus heights of up to
11 150 feet) allowed on properties west of NW 9th Avenue.

12 “The project satisfies this purpose by building to the
13 allowable height in the west side of the Pearl District, while
14 allowable building heights on the east side of the District,
15 nearer the river, are at 75 feet and not eligible for bonus
16 height.

17 “■ * * * * *. Record 75.

18 In the omitted findings, the city council found that the proposed height bonus is
19 consistent with the first, third, fourth and fifth purposes of PCC 33.510.205.A.
20 Petitioner does not assign error to those findings. The above-quoted findings
21 were adopted by the city, in the alternative, to explain that the city does not
22 interpret the building height step-down to the Willamette River purpose in the
23 same way petitioner does. The city explains that it interprets the purpose to be a
24 more general one that is implemented or achieved by the allowable heights
25 under the applicable zoning. And in particular the city takes the position that
26 the purpose is not correctly understood to be driven by the heights of existing
27 buildings or to require that every building step down block by block to the
28 Willamette River. Petitioner neither acknowledges this alternative

1 interpretation, nor attempts to explain why it is erroneous. Because petitioner
2 does not challenge the second interpretation, it provides a second reason why
3 the city's decision must be affirmed.

4 The city's decision is affirmed.