

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 PEARL DISTRICT NEIGHBORHOOD
5 ASSOCIATION and PATRICIA GARDNER,
6 *Petitioners,*

7
8 vs.

9
10 CITY OF PORTLAND,
11 *Respondent,*

12
13 and

14
15 FOWLER & FLANIGAN,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2001-047

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from City of Portland.

24
25 Daniel Kearns, Portland, filed the petition for review and argued on behalf of
26 petitioners. With him on the brief was Reeve Kearns.

27
28 Kathryn S. Beaumont, Senior Deputy City Attorney, Portland, filed a response brief
29 and argued on behalf of respondent.

30
31 Renee M. France, Portland, filed a response brief and argued on behalf of
32 intervenors-respondent. With her on the brief was Ball Janik.

33
34 BASSHAM, Board Member; BRIGGS, Board Chair, participated in the decision
35 HOLSTUN, Board Member, did not participate in the decision.

36
37 AFFIRMED

10/08/2001

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

NATURE OF THE DECISION

Petitioners appeal a city council decision approving historic design review of modifications to a building designated as a historic landmark.

MOTION TO INTERVENE

Fowler & Flanigan (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject property is a 72,000 square foot site containing a former Meier & Frank warehouse and an adjacent vacant area. The building is a designated historic landmark, but is not located within a historic district. It is located within two special design districts: the Central City Design District and the River District.¹

Intervenor applied to the city for historic design review approval for a number of exterior alterations to the building and the adjacent vacant area. Intervenor proposed using the vacant area as a utility yard to site electrical generation equipment. Because the building is a historic landmark, the city landmarks commission reviewed the application. The staff report recommended approval, based on the historic design review criteria at Portland City Code (PCC) 33.846.140. The landmarks commission conducted public hearings on November 27, 2000, and December 18, 2000. At the December 18, 2000 hearing, petitioners argued that, because the site is within the two design districts, it is subject to design criteria applicable to those districts, in addition to historic design review criteria in PCC 33.846.140. On December 18, 2000, the landmarks commission approved the application under PCC 33.846.140, with conditions.

¹The River District is apparently a sub-district of the Central City Design District.

1 Intervenor and petitioner Pearl District Neighborhood Association (PDNA) separately
2 appealed the landmarks commission's decision to the city council. Intervenor subsequently
3 withdrew its appeal. PDNA's notice of appeal argued that the landmarks commission's
4 decision violated four of the historic design review criteria at PCC 33.846.140. Record 129-
5 30. Attached to the fee waiver request that accompanied the notice of appeal was a copy of
6 PDNA's January 9, 2001 minutes, which indicate that PDNA also wished to raise as an issue
7 whether the vacant area adjacent to the building is part of the landmark designation, and thus
8 whether the proposed utility yard is subject to the landmarks commission's review under the
9 historic design review criteria. Record 132.

10 The city council conducted a public hearing February 8, 2001. At the hearing,
11 petitioners submitted a memorandum and oral testimony arguing that the landmarks
12 commission erred in failing to apply Central City Fundamental Design Guidelines (Central
13 City guidelines) and the River District Design Guidelines (River District guidelines) to the
14 proposed alterations to the building. At the conclusion of a second hearing on February 22,
15 2001, the council adopted a tentative vote to deny PDNA's appeal, with the exception of the
16 issue of whether the proposed utility yard is subject to historic design review under the
17 landmarks commission.

18 The city council issued a final written decision February 22, 2001. The decision
19 grants PDNA's appeal with respect to the issue of whether the proposed utility yard is
20 subject to historic design review, denies the remainder of PDNA's appeal, and otherwise
21 upholds the landmarks commission's decision. With respect to the issue of whether the
22 Central City and River District guidelines apply to the building alterations, the decision
23 determines that PDNA's notice of appeal did not raise that issue, and thus the city council is
24 not required to address it under the city's code. Notwithstanding, the city council's decision
25 considers the issue, and rejects petitioners' argument that the proposed building alterations
26 are subject to design criteria applicable in the Central City and River District design districts,

1 in addition to the historic design review criteria at PCC 33.846.140.

2 This appeal followed.

3 **REQUESTS TO TAKE JUDICIAL NOTICE**

4 At oral argument on September 6, 2001, petitioners offered the Board 13 pages of
5 material that were apparently downloaded from the city’s web page. Petitioners represented
6 that the material is part of a revised version of the Central City guidelines and is thus a city
7 “enactment” subject to judicial notice under Oregon Evidence Code (OEC) 202(7).²
8 *Downtown Community Assoc. v. City of Portland*, 31 Or LUBA 574 (1996) (pursuant to OEC
9 202(7), LUBA may take judicial notice of planning documents enacted by the local
10 government). The city and intervenor objected, in part because petitioners did not
11 demonstrate that the 13 pages had been adopted by ordinance or were otherwise an
12 enactment subject to notice under OEC 202(7).

13 After discussion with the parties, the Board allowed each party to submit, within
14 seven days, written argument regarding whether the Board may take judicial notice of the 13
15 pages of material. On September 13, 2001, petitioners submitted a “request to take official
16 notice of legislative materials,” attached to which is Ordinance 175340, enacted by the city in
17 April 2001.³ Petitioners argue that Ordinance 175340 adopts amendments to the Central
18 City guidelines, including the 13 pages submitted at oral argument. Attached to Ordinance
19 175340 are the revised Central City guidelines adopted by the ordinance. Petitioners’
20 request also quotes two findings contained within Ordinance 175340, in support of the same
21 proposition for which petitioners offered the 13 pages of material. We understand petitioners

²OEC 202(7), codified at ORS 40.090(7), defines law that is subject to judicial notice to include:

“An ordinance, comprehensive plan or enactment of any county or incorporated city in this state, or a right derived therefrom. As used in this subsection, ‘comprehensive plan’ has the meaning given that term by ORS 197.015.”

³Petitioners apparently served the city and intervenor with copies of the request on September 12, 2001.

1 to request that the Board take judicial notice of Ordinance 175340 *and* the revised Central
2 City guidelines, and consider the ordinance and revised guidelines in resolving the issues
3 raised in the petition for review.

4 The city and intervenor object to the request on several grounds. Both respondents
5 object, first, to the timing of petitioners' request, arguing that submitting materials for
6 judicial notice at oral argument and after oral argument does not give adequate opportunity
7 for other parties to respond, within the confines of LUBA's expedited process. Second, the
8 city and intervenor argue that petitioners exceeded the Board's ruling at oral argument by
9 submitting *additional* material for judicial notice—Ordinance 175340 itself. Third, the city
10 and intervenor argue that, considered in isolation, the 13 pages of material submitted at oral
11 argument are not subject to notice under OEC 202(7) because there is no indication on the
12 face of that material that it was adopted by ordinance or is otherwise part of an enactment
13 that is subject to judicial notice. Finally, the city and intervenor dispute the relevance and
14 applicability of Ordinance 175340 and the revised Central City guidelines to any issue in this
15 case.

16 In our view, petitioners did not exceed our ruling in citing to Ordinance 175340 to
17 demonstrate that the 13 pages of material were part of an "enactment" for purposes of OEC
18 202(7) and thus subject to judicial notice. It is difficult to see how petitioners could have
19 responded to respondents' objections at oral argument without citing to Ordinance 175340.
20 Ordinance 175340 adequately demonstrates that the 13 pages of material are subject to
21 judicial notice.⁴ Petitioners' second request—to take notice of Ordinance 175340 itself—
22 presents a more difficult timing issue. That request was first submitted one week after oral

⁴Although no party makes an issue of it, we note that the pertinent portions of the revised guidelines downloaded from the city's web page and submitted at oral argument are worded differently than the corresponding portions of the revised guidelines attached to Ordinance 175340 that petitioners attach to their September 13, 2001 request. No party offers to explain the difference, and we do not see that the different wording plays any role in this case. We quote and discuss below the revised guidelines attached to Ordinance 175340, not the web page version submitted at oral argument.

1 argument, which gave scant time for the city and intervenor to respond. Nonetheless, the city
2 and intervenor did file responses to the request to take notice of Ordinance 175340, and
3 neither party has requested additional time to respond.⁵ While the late timing of petitioners’
4 requests was potentially prejudicial to other parties’ substantial rights and the Board’s ability
5 to resolve this case within the statutorily mandated deadlines, we find that no such prejudice
6 has in fact occurred.⁶ Accordingly, we have no basis to reject petitioners’ requests as
7 untimely. *See* OAR 661-010-0005.⁷

8 As to the relevance of Ordinance 175340 and the revised Central City guidelines, we
9 cannot say that the proposition they allegedly support and for which they are cited is entirely
10 irrelevant to the issues in this case. The requests to take official notice of Ordinance 175340
11 and the revised Central City guidelines are allowed.

12 **THRESHOLD ISSUE**

13 Intervenor argues that LUBA has no basis to review the only assignment of error in
14 this appeal—petitioners’ contention that the city erred in failing to apply Central City and
15 River District design guidelines in approving alterations to the building—because the city

⁵Intervenor does argue that Ordinance 175340 is part of a larger, complex planning process and that intervenor felt constrained by LUBA’s ruling at oral argument from raising issues relating to the context of the ordinance. However, intervenor does not identify those issues or request additional time to submit a response in order to explore such issues.

⁶We do not intend the foregoing to encourage parties to submit such requests at oral argument or after oral argument, where it is possible to submit them earlier. Petitioners offer no reason why their requests could not have been submitted in the petition for review or at some point prior to oral argument, which would have given other parties a more adequate opportunity to respond. Nonetheless, absent a showing of prejudice to other parties’ substantial rights or the Board’s consideration, we conclude that the late timing of the requests does not allow us to reject those requests.

⁷OAR 661-010-0005 provides:

“These rules are intended to promote the speediest practicable review of land use decisions and limited land use decisions, in accordance with ORS 197.805-197.855, while affording all interested persons reasonable notice and opportunity to intervene, reasonable time to prepare and submit their cases, and a full and fair hearing. The rules shall be interpreted to carry out these objectives and to promote justice. Technical violations not affecting the substantial rights of parties shall not interfere with the review of a land use decision or limited land use decision. * * *”

1 council found that issue to be precluded under PCC 33.730.030(H)(1) by the failure to
2 identify that issue in the local notice of appeal.⁸ According to intervenor, the city held that
3 the issue was not properly before it, and only discussed the merits of the issue in the
4 alternative.⁹ Therefore, intervenor contends, LUBA should address as a threshold issue
5 whether the city correctly applied PCC 33.730.030(H)(1) and, if the answer is affirmative,
6 LUBA should deny petitioners' assignment of error without further analysis.

⁸PCC 33.730.030(H)(1) provides, in relevant part:

“The appeal must be submitted on forms provided by the [city]. All information requested on the form must be submitted in order for the appeal form to be accepted. The appeal request must include:

“* * * * *

“A statement of which approval criteria the decision violates[.]”

⁹The city's decision states, in relevant part:

“Opponents raised the argument that the Central City Fundamental Design Guidelines and River District Design Guidelines apply to historic design review in addition to the Historic Design Review criteria at [PCC] 33.846.140(C). The Council notes that pursuant to [PCC] 33.730.030(H)(1) the Council was not required to consider the argument regarding the applicability of the Central City and River District Design Guidelines because it was not listed as an approval criteria which the Landmarks Commission decision violated in the opponents' appeal form. [PCC] 33.730.030(H)(1) dictates the contents of an appeal of a Type III procedure, and requires that the appeal form include ‘a statement of which approval criteria the decision violates.’ In violation of that requirement, opponents raised the issue of design criteria applicable to the building for the first time in their written Hearing Memorandum of the [PDNA] and in their testimony before the Council. While the memorandum ties the argument to Historic Review Guideline No. 10, which was an issue specified in the application form, Guideline No. 10 does not have anything to do with the design guidelines which are applicable. * * * Consequently, the Central City Guidelines and River District Guidelines are not related to Historic Review Guidelines No. 10 and the opponents failed to demonstrate that the issue was raised in the appeal form or at any time prior to the City Council Hearing. *Therefore, the Council was not required to consider the appellant's claim that the Central City Fundamental Design Guidelines and River District Design Guidelines applied to the Applicant's Historic Review Application.*

“Notwithstanding the above, the Council allowed the testimony and considered appellant's argument that the Landmarks Commission erred in not applying the Central City Fundamental Design Guidelines and River District Guidelines. However, the Council finds that there is no support for that contention in the current text of the code. * * *” Record 19 (emphasis added).

1 The petition for review anticipates intervenor’s argument, and contends for a number
2 of reasons that the merits of the issue raised in the assignment of error are properly before the
3 Board. Petitioners first argue, and intervenor does not dispute, that the issue of whether the
4 Central City and River District guidelines apply was raised before the city council, and thus
5 ORS 197.763(1) and 197.835(3) are no impediment to the Board’s review of that issue.¹⁰
6 With respect to PCC 33.730.030(H)(1), petitioners argue that that provision simply requires a
7 statement of which approval criteria are allegedly violated, and does not preclude either the
8 city council or LUBA from addressing issues or criteria not specified in the notice of appeal.
9 Next, petitioners argue that a reference to one of the historic review guidelines in the notice
10 of appeal necessarily implicated the issue of whether the Central City and River District
11 guidelines applied. Finally, petitioners argue that, assuming petitioner PDNA violated
12 PCC 33.730.030(H)(1), the city council did not in fact assign preclusive effect to that
13 violation, because the city council went on to address the merits of the issue.

14 Petitioners are incorrect that a code provision such as PCC 33.730.030(H)(1) that
15 requires a specification of issues in a local notice of appeal cannot be construed to limit
16 subsequent city council review to the issues raised in the notice. *Johns v. City of Lincoln*
17 *City*, 146 Or App 594, 602, 933 P2d 978 (1997). At issue in *Johns* was a code provision that
18 required a local notice of appeal to “indicate the interpretation that is being appealed and the
19 basis for the appeal.” *Id.* at 596. The court found that the code provision had a limiting
20 effect on subsequent review even though it simply required that issues be specified and did
21 not expressly limit review to the issues specified in the notice. The court commented that “it
22 is not readily apparent why such a specification [of issues] would be required if it carried no

¹⁰The parties do dispute whether the issue raised in the assignment of error was raised before the landmarks commission in a manner that satisfies the requirements of ORS 197.763(1) and 197.835(3). We need not resolve that dispute.

1 limitation with it.” *Id.* at 602. Petitioners offer no reason why the city could not reach a
2 similar conclusion regarding the similar provisions of PCC 33.730.030(H)(1).

3 With respect to whether the notice of appeal was sufficient to implicate the issue
4 raised in the first assignment of error, petitioners do not challenge the city’s findings to the
5 contrary or, to the extent they do, we agree with the city’s conclusion on that point. *See*
6 *Johns*, 146 Or App at 603 (under the court’s interpretation of the local provision, the city
7 council’s review is limited to issues that are reasonably discernible from the notice itself).

8 Whether the city council in fact assigned preclusive effect to the violation of
9 PCC 33.730.030(H)(1) is a more difficult question. Petitioners cite to *Cornell Park Assoc. v.*
10 *Washington County*, 16 Or LUBA 897, 903 (1988), for the proposition that a local issue-
11 specification provision such as PCC 33.730.030(H)(1) does not limit review of an issue
12 raised in violation of the provision unless the local government rejects the proponent’s effort
13 to raise that issue.¹¹ Here, petitioners argue, the council did not reject petitioners’ effort to
14 raise the issue of the design district guidelines, the council made no finding that it would not
15 consider the issue, and in fact the council’s decision considered it on the merits.

16 Intervenor responds that the city council allowed testimony regarding the design
17 district guidelines only as a courtesy, and it considered petitioners’ claims on that issue only
18 as an *alternative* holding to its primary conclusion that the issue was not properly before the
19 council. Intervenor’s position finds support in *Hausam v. City of Salem*, 39 Or LUBA 51,

¹¹In *Cornell Park Assoc.*, we stated:

“[Washington County Community Development Code] 209-3.4 and 209-5.2 might have provided a basis for refusing to allow petitioner to raise the ‘local street issue’ before the local governing body if petitioner had not identified this issue as grounds for appeal in its petitions for review below. However, respondent admits that the ‘local street issue’ *was* raised before the governing body, and does not argue that the governing body rejected this testimony because the issue was not raised in the petitions for review. Respondent does not identify any statutory or code provisions which have the effect of limiting our review to issues raised in a petition for review to a local governing body under these circumstances. * * *.” 16 Or LUBA at 903 (emphasis in original).

1 53-56 (2000), *appeal pending*. In that case, the petitioner raised an issue on local appeal that
2 was not raised in the local notice of appeal, as required under a provision similar to
3 PCC 33.730.030(H)(1). The city concluded, first, that the petitioner had violated the local
4 issue-specification provision and therefore the issue was not properly before it. In the
5 alternative, the city’s decision went on to reject the issue on its merits. We agreed with the
6 respondent that the city did not “waive” its primary legal conclusion by adopting an
7 alternative finding. *Id.* at 55. We thereafter affirmed the city’s primary conclusion, and
8 denied the assignment of error that raised the disputed issue before LUBA.

9 Read together, *Cornell Park Assoc.* and *Hausam* suggest that issue-specification
10 provisions such as PCC 33.730.030(H)(1) have preclusive effect on subsequent review only
11 where the local government recognizes and imposes that effect.¹² In the present case, it is
12 less clear than in *Hausam* that the city council recognized and imposed a preclusive
13 consequence to PDNA’s violation of PCC 33.730.030(H)(1). The city’s findings conclude
14 that the council is *not required* to consider the issue of the design district guidelines, but that,
15 notwithstanding petitioner’s violation of PCC 33.730.030(H)(1), the council will consider the
16 issue. *See* n 9. Contrary to intervenor’s understanding, that determination is not framed as
17 an initial finding of preclusion followed by an alternative disposition. Rather, the findings
18 appear to reflect the council’s view that PDNA’s violation of PCC 33.730.030(H)(1) means
19 that the council is not *obligated* to address the issue, although the council *may* consider it,

¹²We do not understand *Johns* to conclude that such issue-specification provisions *must* be construed to preclude review of issues not specified in the notice of appeal. In other words, absent an express limitation to issues specified in the notice of appeal, the local governing body retains the discretion under ORS 197.829(1) to interpret an issue-specification provision such as that in *Johns*, *Hausam* and here to allow, but not require, the governing body to consider issues not raised in the notice of appeal. Admittedly, there is language in a subsequent case in the *Johns* lineage, *Johns v. City of Lincoln City*, 161 Or App 224, 984 P2d 864 (1999) (*Johns III*), that suggests the contrary. In the seminal *Johns* opinion, the court interpreted the issue-specification provision to limit issues to those reasonably discernible in the notice of appeal. On remand, the city council adopted, for the first time, an interpretation that allowed the council to raise issues not specified in the notice. In *Johns III*, the court rejected application of that interpretation *in that case*, because doing so changed the “goal posts” on remand in a manner that was contrary to the court’s instructions in *Johns*. 161 Or App at 229. We understand that language to be based on *res judicata* concerns, and not on a broader view that such issue-specification provisions must be interpreted to have preclusive effect.

1 and ultimately does. Absent a stronger indication that the city council interprets
2 PCC 33.730.030(H)(1) to require preclusion, or has imposed such preclusion in this case, we
3 cannot agree with intervenor that the issue raised in petitioners' assignment of error is not
4 properly before the Board.

5 **ASSIGNMENT OF ERROR**

6

1 Petitioners argue that the city erred in failing to apply the Central City and River
2 District design guidelines to the proposed building alterations.

3 Petitioners do not dispute that the landmarks commission properly applied the
4 historic design review criteria at PCC 33.846.140(C), or challenge the findings or evidence
5 directed at those criteria. Rather, petitioners contend that the landmarks commission should
6 have applied the Central City and River District design guidelines *in addition* to the criteria
7 at PCC 33.846.140(C). The source of that obligation, petitioners argue, is found not in the
8 city’s code but in the terms of the ordinance that adopted the Central City guidelines, and in
9 the terms of the River District guidelines.

10 **A. Interpretation of the City’s Code**

11 The city council rejected petitioners’ arguments, interpreting the city’s code to
12 indicate that *only* historic design review criteria at PCC 33.846.140 apply to review of the
13 proposed building alterations.

14 “The site is zoned with the design overlay zone ‘d.’ Generally properties
15 within the Design Overlay Zone must go through design review in which
16 Community Design Guidelines or guidelines specific to a design district are
17 applied pursuant to [PCC] 33.825. However, the site also includes a
18 designated Historic Landmark. Therefore, rather than go through design
19 review for the proposed exterior alterations this applicant had to go through
20 Historic Design Review before the Landmarks Commission. The grounds for
21 the alternative review process and alternative criteria are found in [PCC]
22 33.420.045. [PCC] 33.420.045(A) provides that if a site is a Historic
23 Landmark it is exempt from design review and is instead subject to the
24 regulations for historic design review as set out in [PCC] 33.445, Historic
25 Resource Protection Overlay Zone. [PCC] 33.445.210 details the types of
26 historic reviews and provides that alterations to designated landmarks require
27 historic design review, as opposed to design review. Historic Reviews are
28 administered pursuant to [PCC] 33.846. The purpose statement at [PCC]
29 33.846.010 indicates that ‘this chapter provides procedures and establishes the
30 approval criteria for all historic reviews.’ [PCC] 33.846.140 provides that the
31 approval criteria for Historic Landmarks are the design guidelines established
32 at [PCC] 33.846.140(C). These are the only guidelines referenced in [PCC]
33 33.846 for Historic Landmarks and, therefore, the only approval criteria
34 applicable to this application for Historic Design Review.” Record 18-19.

1 Petitioners recognize that the city council has considerable discretion under
2 ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), to interpret
3 the city’s legislation. Further, petitioners acknowledge that a local governing body’s
4 interpretation of its legislation to determine which of two or more arguably applicable
5 approval criteria applies to a particular use can seldom be reversible under ORS 197.829(1)
6 and *Clark. deBardelaben v. Tillamook County*, 142 Or App 319, 325, 922 P2d 683 (1996)
7 (*quoting Langford v. City of Eugene*, 126 Or App 52, 57, 867 P2d 535 (1994)). Nonetheless,
8 petitioners argue that the city misinterpreted its code to limit the applicable criteria to the
9 historic design review criteria at PCC 33.846.140(C). According to petitioners, the pertinent
10 code requirements are *silent* with respect to whether specific design district guidelines, such
11 as the Central City and River District guidelines, apply to review of a historic landmark.
12 That being the case, petitioners argue, the controlling authority is the plain language in the
13 ordinance adopting the Central City guidelines, and in the River District guidelines,
14 discussed below, that, according to petitioners, require application of those guidelines to
15 review of historic landmarks.

16 The city and intervenor respond, and we agree, that the city’s code interpretation is
17 not inconsistent with the express language of the pertinent code provisions.
18 ORS 197.829(1)(a). Contrary to petitioners’ view, the relevant code provisions are not silent
19 with respect to the applicability of specific design district guidelines under the present
20 circumstances. PCC 33.420 and 33.825 set forth provisions governing the city’s design
21 overlay zones. Under PCC 33.420.051, design review applies guidelines that are specific to
22 a design district. An accompanying map indicates districts where such guidelines have been
23 adopted, and the map depicts the Central City Design District and the River District. Map
24 420-1. Thus, PCC chapter 33.420 expressly requires application of specific design district
25 guidelines to design review. *See also* PCC 33.825.065(B) (same). Importantly,
26 PCC 33.420.045 then provides, in relevant part:

1 “The following items are exempt from design review:

2 “A. If the site is a Historic or Conservation Landmark, or in a Historic or
3 Conservation District, it is *instead* subject to the regulations for
4 historic design review as set out in Chapter 33.445, Historic Resource
5 Protection Overlay Zone[.]” (Emphasis added.)

6 PCC chapter 33.445 then directs the city to provisions that require the city to apply the
7 historic review criteria at PCC 33.846.140. Petitioners identify nothing in the code that
8 suggests specific design district guidelines are applicable to historic design review, and
9 PCC 33.420.045(A) is anything but silent on that topic. Indeed, PCC 33.420.045(A) is
10 directly contrary to petitioners’ view. The city’s interpretation to that effect is well within its
11 discretion under ORS 197.829(1) and *Clark*.

12 **B. Central City and River District Guidelines**

13 Petitioners’ remaining argument is that terms of the ordinance adopting the Central
14 City guidelines, and the terms of the River District guidelines, require that those guidelines
15 apply to historic design review under the present circumstances.¹³

16 Ordinance 163325, enacted in 1990, adopted the Central City guidelines. In relevant
17 part, Ordinance 163325 directs that:

18 “* * * The Fundamental Central City Design Guidelines attached as Exhibit
19 ‘A’ are hereby approved and adopted for use in the Central City.

20 “* * * The Design Commission, the Historical Landmarks Commission, in
21 case of design review in historic districts *or of historical landmarks*, and the
22 City Council on appeal, *shall conduct design review in design zones in the*
23 *Central City using the Fundamental Central City Design Guidelines.*”
24 Petition for Review App 22-23 (emphasis added).

25 In February 1996, the city enacted Ordinance 169822, which adopted the River District
26 guidelines. The River District guidelines state in relevant part:

¹³At several points in the petition for review, petitioners assert that the Central City and River District guidelines and the ordinances adopting them are part of the city’s comprehensive plan. The city disputes this assertion, and petitioners offer no support for it. Our analysis presumes that the guidelines and ordinances are not part of the city’s comprehensive plan.

1 “Generally design review is conducted by the Design Commission or the
2 design review staff. Projects located in Historic Districts, Historic
3 Conservation Districts or that affect a City designated landmark are reviewed
4 by the City’s Historic Landmarks Commission or the design review staff.
5 * * * *The Landmarks Commission uses these guidelines as their approval*
6 *criteria when they have responsibility for design review of a project located*
7 *within the River District. * * **” Petition for Review App 35 (emphasis
8 added).

9 Petitioners contend that the above-quoted language clearly requires that review of
10 historic landmarks in design districts shall apply the specific guidelines developed for that
11 design district. The city council rejected that argument:

12 “[T]he Council * * * considered appellant’s argument that the Landmarks
13 Commission erred in not applying the Central City Fundamental Design
14 Guidelines and River District Guidelines. However, the Council finds that
15 there is no support for that contention in the current text of the code. As
16 explained in detail above, the Council’s interpretation of the [PCC] is that
17 only the Historic Design Review criteria of [PCC] 33.846.140 apply to this
18 application.

19 “The Central City Fundamental Design Guidelines and River District Design
20 Guidelines only apply to new development or modifications to existing
21 development within that district and subdistrict that must go through design
22 review pursuant to [PCC] 33.825, setting out the procedure and criteria for
23 design review. The design guidelines specific to a district or subdistrict are
24 specifically referenced in [PCC] 33.825.065(B). However, as previously
25 established, the application in this case is for exterior alterations to a Historic
26 Landmark and is consequently exempt from design review.

27 “[Petitioners’ citations to the ordinances adopting the Central City guidelines
28 and the River District guidelines are] unpersuasive because subsequent
29 ordinances and code amendments have created an alternative process and set
30 of guidelines for ‘historic design review’ that is separate substantively and
31 procedurally from ‘design review.’ The City Council adopted the Historic
32 Resource Protection Amendments to [the PCC] on August 1, 1996 through
33 Ordinance No. 169987. The amendments created a new Chapter 33.445,
34 Historic Resource Protection Zone, and a new Chapter 33.846, Historic
35 Reviews. Through those chapters, the amendments produced a new set of
36 regulations and historic design review criteria that are distinct from traditional
37 design review.

38 “Pursuant to the Council’s interpretation of the current [PCC], the subject
39 historic landmark is exempt from traditional Design Review and subject to
40 Historic Design Review. Consequently, the Landmarks Commission acted

1 properly in only applying the Historic Design Review criteria of [PCC]
2 33.846.140(C) to the proposed exterior alterations of the Landmark.” Record
3 19-20.

4 If we understand the city’s position correctly, the language that petitioners rely upon
5 is an echo of superseded code language that, prior to August 1996, subjected design review
6 of historic landmarks to design review criteria, including design district guidelines such as
7 the Central City guidelines and River District guidelines. As the challenged decision
8 explains, in August 1996 the city adopted a set of code amendments that significantly altered
9 the criteria and standards applicable to historic design review. The city’s response brief
10 notes that the 1996 amendments eliminated language in PCC 33.825.020(A), governing
11 design review, stating that “[d]esign review is required for all [Historic] Landmarks.”
12 Response Brief App 151. The eliminated language was replaced with language stating that
13 “[d]esign review of historic resources is governed by the provisions of [PCC] Chapter
14 33.846, Historic Reviews.” *Id.* The same amendment eliminated language in the purpose
15 statement of PCC 33.825, stating that “[d]esign review is used to review modifications to
16 historic landmarks to ensure that the characteristics which led to it becoming a historic
17 landmark are conserved.” *Id.* The city cites to several other similar contemporaneous
18 amendments that eliminate or amend code provisions affecting historic design review. The
19 combined effect of these amendments, the city argues, was to implement a new scheme that,
20 in relevant part, clarified that historic resources are not subject to design review criteria other
21 than historic design review criteria. The city asserts that, under the new scheme, only new
22 construction or modifications to existing, non-historic structures in design zones are subject
23 to design review guidelines.

24 Petitioners’ response to the city’s citation of legislative history is, we understand, to
25 point to Ordinance 175340 and the revised Central City guidelines, discussed above with

1 respect to petitioners’ request to take judicial notice.¹⁴ Petitioners cite to portions of
2 Ordinance 175340 and the revised Central City guidelines to support their argument that,
3 consistent with the 1990 and 1996 ordinances and guidelines, and notwithstanding
4 PCC 33.420.045, the other code language, and the legislative history discussed above, the
5 city *continues* to believe that modifications to historic landmarks in the Central City district
6 are subject to the Central City guidelines and any subdistrict guidelines, *in addition* to
7 historic review criteria.¹⁵

¹⁴Ordinance 175340 was apparently adopted February 14, 2001, effective April 1, 2001. Petitioners do not argue that Ordinance 175340 or the amended Central City guidelines apply to the present application as approval criteria. We understand petitioners to cite these materials to support their view that, notwithstanding the city’s interpretation of the 1996 code amendments in this case, the city continues to believe that the Central City guidelines adopted in 1990 and the River District guidelines apply to review of proposed alterations to a historic landmark.

¹⁵Petitioners cite to the following findings supporting Ordinance 175340:

- “14. The [Central City guidelines] will continue to be the mandatory approval criteria for design review and historic design review cases within the Central City. In most areas of the Central City they are supplemented by either special district design guidelines or historic district design guidelines. Where historic districts have their own special design guidelines, design review is conducted using the historic district’s guidelines and the [Central City guidelines].” Ordinance 175340, p. 3.
- “46. **Policy 3.4 – Historic Preservation**, calls for preserving and retaining historic structures and areas throughout the city. The proposed revisions to the [Central City guidelines] are supportive of this policy. The revised guidelines clarify issues of compatibility and context (**C3 – Respect Architectural Integrity, C4 – Complement the Context of Existing Buildings, and C5 – Design for Coherence**). These are important guiding principles for areas that are rich in historic resources yet may be outside of a recognized Historic District. The revised guidelines also place a special emphasis on the adaptive re-use, rehabilitation and restoration of historic resources (**A6 – Reuse/Rehabilitate/Restore Buildings**). In addition, the revisions clarify the applicability of design guideline documents as well as specific design guidelines to both historic landmarks and projects within historic districts. * * *” *Id.* at 11.

Petitioners then cite to the following conclusion to Ordinance 175340:

“NOW, THEREFORE, the Council:

“* * * * *

“* * * Directs that the revised [Central City guidelines] be used by the Design and Landmarks Commissions as mandatory approval criteria for design and historic design review cases

1 We are frankly puzzled why the city council would adopt the code interpretation it
2 has in this case and contemporaneously adopt an ordinance and amendments to the Central
3 City guidelines that appear to be directly contrary to the city’s code, as interpreted.
4 Nonetheless, the city’s apparent inconsistency on this point has no dispositive bearing on this
5 appeal. Petitioners have established, at most, that the city’s code as interpreted conflicts in
6 one respect with the 1990 ordinance adopting the Central City guidelines, the 1996 River
7 District guidelines, and the 2001 amendments to the Central City Guidelines. The city’s
8 code interpretation must be affirmed under ORS 197.829(1) and *Clark*, as discussed above.
9 What petitioners have not established is why the apparent conflict between the city’s code, as
10 interpreted, and the uncodified 1990 and 1996 ordinances and guidelines is a basis to reverse
11 that code interpretation. The city’s decision resolves the apparent conflict between the
12 current code and the 1990 and 1996 ordinances and guidelines. Petitioners have not
13 demonstrated that the city’s resolution of that apparent conflict exceeds the city’s
14 interpretational discretion. To the extent the 2001 ordinance and amendments have any
15 bearing or weight on that issue, we do not see that the 2001 legislation compels a different
16 conclusion in this case.

17 The assignment of error is denied.

18 The city’s decision is affirmed.

subject to design review within the Central City, including historic design review of proposals related to Historic Districts and Historic Landmarks within the Central City.” *Id.* at 23.

Finally, petitioners cite to a passage in the revised Central City guidelines, that states:

“**Central City sites that are Historic Landmarks or Conservation Landmarks** must meet the [Central City guidelines], subdistrict design guidelines, and the approval criteria for historic resources found in Section 33.846.140(C) of the [PCC]. The zoning code criteria take precedence over conflicting subdistrict design guidelines or [Central City guidelines].” Central City Fundamental Design Guidelines, p. 5.