

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 CARLTON DEVELOPMENT LLC,

5 *Petitioner,*

6
7 vs.

8
9 CITY OF PORTLAND,

10 *Respondent.*

11
12 LUBA No. 2010-068

13
14 FINAL OPINION

15 AND ORDER

16
17 Appeal from Portland.

18
19 Richard H. Allan, Portland, filed the petition for review and argued on behalf of
20 petitioner. With him on the brief were Dana L. Krawczuk and Ball Janik LLP.

21
22 Kathryn S. Beaumont, Chief Deputy City Attorney, Portland, filed the response brief
23 and argued on behalf of respondent.

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

27
28 AFFIRMED

10/21/2010

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

NATURE OF THE DECISION

Petitioner appeals a hearings officer’s decision affirming a code enforcement letter regarding exterior alterations to petitioner’s building located in a historic district.

FACTS

The subject property is the Carlton Court building, a four-story apartment building constructed in 1915. The building is located within the 50-block Alphet Historic District in Northwest Portland. The Alphet Historic District as a whole is listed on the National Register of Historic Places, but the Carlton Court building is not specifically listed as an individual resource on the National Register or in the city’s inventory of historic resources. In the documents the city submitted to nominate the Alphet District to the National Register (henceforth, the Nomination), the city classified the Carlton Court building as a “secondary contributing” resource, with “minor” alterations. Record 96. In a paragraph labeled “Description,” the city described a number of building features, including that “[t]he primary window type is one-over-one, double-hung wood sash.” *Id.* In a paragraph labeled “Significance,” the city stated: “[t]his building is considered contributing within the district as a good example of a Classical style multi-family residence and is therefore significant as part of the larger grouping of residential development that occurred in the Northwest neighborhood.” *Id.*

In 2007, petitioner acquired the property and began renovations intended to convert the building from apartments to condominium units. The renovations included replacing the original wood window sashes with vinyl window sashes.

Portland City Code (PCC) 33.445.320.A.1 provides that “exterior alteration” of a structure in a historic district requires a historic design review permit, unless one of several exemptions in PCC 33.445.320.B applies. In October 2007, the city issued to petitioner a notice of enforcement penalty alleging that the window replacement required a historic

1 design review permit, which petitioner had not obtained. Petitioner requested an
2 administrative review of the enforcement order, arguing that the window replacement fell
3 within an exemption to historic design review at PCC 33.445.320.B.2, for exterior changes
4 that do not alter “the exterior material or color of a resource having exterior materials or
5 color specifically listed in the [Nomination] as an attribute that contributes to the resource’s
6 historic value.”¹ Petitioner argued to the city that the Nomination merely described the wood
7 window sashes, but did not “specifically list” that attribute as one that contributes to the
8 building’s historic value.

9 On February 5, 2010, city staff issued an administrative decision concluding that the
10 wood window sashes were specifically listed in the Nomination as an attribute that
11 contributes to the building’s historic value, and thus the exemption at PCC 33.445.320.B.2
12 did not apply. Petitioner appealed to the hearings officer, who held a hearing and on June 23,
13 2010, issued a decision affirming the staff decision. This appeal followed.

14 **FIRST ASSIGNMENT OF ERROR**

15 The sole issue in this appeal is whether the Nomination “specifically list[s]” the wood
16 sash windows of the Carlton Court Building “as an attribute that contributes to the resource’s
17 historic value” within the meaning of PCC 33.445.320.B.2. Petitioner argues that the
18 hearings officer misconstrued PCC 33.445.320.B.2 and the language of the Nomination to
19 conclude that the Nomination does specifically list wood sash windows as an attribute.

¹ PCC 33.445.320.B.2 provides for an exemption from the requirement to obtain a historic design review permit for:

“Changes that do not require a building, site, zoning, or sign permit from the City, and that will not alter the exterior material or color of a resource having exterior materials or color specifically listed in the Historic Resource Inventory, Historic Landmark nomination, or National Register nomination as an attribute that contributes to the resource’s historic value[.]”

The hearings officer concluded that a few of the exterior alterations that petitioner made to the Carlton Building (such as converting some windows to emergency exit windows) required a building permit, and petitioner does not dispute that conclusion. The only dispute in the present appeal involves those window replacements that do not require a building permit.

1 The Nomination states, in relevant part:

2 “Description: This four-story, brick frame, multi-family residence is located
3 on a corner lot. It has a rectilinear plan, a concrete foundation and a raised
4 basement. The flat roof has a molded cornice supported by decorative paired
5 brackets. The exterior surface is brick with a rusticated base. The solid
6 entrance door is recessed, with fixed side lights and a large, square transom.
7 Pairs of square classical pilasters with a denticulated frieze surround the
8 entrance. The primary window type is one-over-one, double-hung wood sash.
9 Raised panels of brick are present below some windows. Alterations include
10 construction of a fire escape on the southeast corner and the addition of
11 exhaust vents in the windows. These changes occurred at unknown dates.

12 “Significance: This building is considered to be contributing within the
13 district as a good example of a Classical style multi-family residence and is
14 therefore significant as part of the larger grouping of residential development
15 that occurred in the Northwest neighborhood.”

16 Petitioner argues that the Description paragraph of the Carlton Court Building
17 nomination merely describes exterior details of the building, including wood sash windows,
18 but is silent as to whether those windows or any other described features contribute to the
19 historic value of the building. Petitioner notes that the Description paragraph also describes
20 two alterations, including the “addition of exhaust vents” to some of the original windows. If
21 every building feature described in that paragraph were automatically deemed to contribute
22 to the historic value, petitioner argues, then the paradoxical conclusion is that the altered
23 windows with exhaust vents also contribute to the historic value, and cannot be altered
24 without a permit. According to petitioner, the logical place to list an “attribute that
25 contributes to the resource’s historic value” is the Significance paragraph of the Nomination,
26 which does not mention any windows or other exterior features. Because the Carlton Court
27 Building Nomination does not include language that specifically describes the wood sash
28 windows as attributes that contribute to the building’s historic value, petitioner argues, the
29 hearings officer erred in concluding that the exemption at PCC 33.445.320.B.2 does not
30 apply.

1 Relatedly, petitioner contends that the hearings officer misconstrued PCC
2 33.445.320.B.2 by not giving effect to the requirement that a building element be specifically
3 called out as “contribut[ing] to the resource’s historic value.” According to petitioner, that
4 language requires not only that the Nomination list an exterior building feature, but also that
5 the Nomination specifically state in some way that that particular feature “contributes to the
6 resource’s historic value.”

7 The city responds, and we agree, that petitioner has not demonstrated that the
8 hearings officer erred in construing PCC 33.445.320.B.2 or the language of the Nomination
9 to conclude that the original wood sash windows are exterior materials “specifically listed”
10 in the Nomination as an attribute that contributes to the Carlton Court Building’s historic
11 value.

12 We turn first to the hearings officer’s understanding of PCC 33.445.320.B.2. The
13 hearings officer began by noting PCC 33.445.320.B.2 operates as an exception to the “broad
14 mandate” of the general PCC 33.445.320 requirement to obtain a historic design review
15 permit for exterior alterations of historic resources, and concluded that the exceptions in PCC
16 33.445.320.B should be “interpreted narrowly” in order not to frustrate the intent of historic
17 design review code provisions. Record 22. Based in part on that premise, which petitioner
18 does not dispute, the hearings officer concluded that PCC 33.445.320.B.2 does not require
19 that the language of the Nomination track the precise language of the code.² In other words,
20 the hearings officer rejected petitioner’s argument below, which we understand petitioner to
21 renew on appeal, that the wood sash windows are “specifically listed” as “an attribute that
22 contributes to the resource’s historic value” for purposes of PCC 33.445.320.B.2 only if the

² The hearings officer stated, in relevant part:

“The Hearings Officer finds that that language in PCC does not have to be absolutely consistent with the language found in the National Register Nomination. The Hearings Officer finds it not absolutely necessary that the National Register Nomination use the phrase ‘attribute that contributes to the resource’s historic value.’ * * *” Record 23.

1 Nomination includes language to the effect that “wood sash windows contribute to the
2 historic value” of the Carlton Court Building.

3 We also reject that argument, at least in its most rigid form. PCC 33.445.320.B.2
4 does not prescribe exactly how exterior materials must be listed or described, or require any
5 particular magic words. If the text and context of the Nomination, fairly read, indicate that
6 an exterior feature, material or color is one of the elements that contribute to the resource’s
7 historic value, then the exemption from historic design review in PCC 33.445.320.B.2 does
8 not apply to proposed alteration of that feature, material or color.

9 We turn then to petitioner’s arguments regarding the wording of the Nomination. As
10 noted, petitioner suggests that the logical place to describe a building feature as “contributing
11 to the resource’s historic value” is in the Significance paragraph of the nomination. Because
12 the Significance paragraph does not identify wood sash windows (or indeed any building
13 feature) as contributing to the building’s historic value, petitioner argues, the Nomination
14 should not be read to describe the windows as contributing features. That argument proves
15 too much. The author of the Nomination clearly believed that the Carlton Court building has
16 some historic value worth protecting, presumably based on the features, or some set of them,
17 described in the Description paragraph. That intent would be undermined by reading the
18 Nomination to assign contributing significance only to features that are also mentioned in the
19 Significance paragraph, because it would mean that no Carlton Court building exterior
20 features are protected.

21 We note, in this regard, that the record includes the full text of the nomination of
22 another building in the District, the Mead building, found on the same page as the Carlton
23 Court building nomination. Record 73.³ Comparing the two nominations, it appears that the

³ The other nomination reads, in relevant part:

“Description: This building has a rectilinear plan and fronts onto NW Westover Street. It is a two and one-half story, wood frame structure with a concrete foundation and a daylight

1 author used the Significance paragraph as a general summary of significance, and that the
2 actual exterior details that contribute to that significance are listed only in the Description
3 paragraph. The Mead building is nominated as a “primary contributing” building with
4 “moderate” alterations. Like the Carlton Court building nomination, the Mead building
5 Description paragraph lists various exterior features, including a statement that “One-over-
6 one, double-hung wood sash is the most common window type.” *Id.* It then describes a
7 1932 alteration to the building. Notably, the Significance paragraph, like that of the Carlton
8 Court building, merely states in general terms that “[t]his building is considered to be
9 contributing within the district as a good example of a Stick style residence and is therefore
10 significant as part of the larger grouping of residential and commercial development that
11 occurred in the Northwest neighborhood.” *Id.* Considering the text and context of the
12 Carlton Court building nomination, it is clear that failure to mention a particular exterior
13 feature in the Significance paragraph has no particular legal significance, for purposes of
14 determining which if any exterior features are deemed to be contributing features. Indeed,
15 reading the two paragraphs together, it is clear that the exterior features that support the
16 ultimate conclusion regarding significance are listed only in the Description paragraph.

17 Petitioner next argues that if every exterior feature listed in the Description paragraph
18 is automatically considered an attribute that contributes to historical value, then the

basement. The belcast hip roof has wide overhanging eaves, modillions, brackets, and stickwork at the frieze. Stucco covers the exterior. The second story projects over the first story and is supported by consoles. There is wood trim at the belt course level. The main entrance is on the west façade, through a multi-paned wood door with five-pane side lights. The front porch has a shed roof and is supported by open metal posts. A second story porch with an iron balustrade is located on the south façade. One-over-one, double-hung wood sash is the most common window type. There is also a projecting multi-pane window with a slight shed roof and box cornice on the first story, south façade. On the south façade, there is a belcast hip dormer with modillions. There is one interior brick chimney. In 1932, a garage was added underneath the structure without significant damage to the historic integrity of the building.

“Significance: This building is considered to be contributing within the district as a good example of a Stick style residence and is therefore significant as part of the larger grouping of residential and commercial development that occurred in the Northwest neighborhood.” Record 73.

1 paradoxical conclusion is that alterations such as the windows in which exhaust vents have
2 been inserted contribute to historic value in the same manner as the original windows.
3 However, that is not necessarily the case. As evidenced by both the Carlton Court building
4 and Mead building nominations in the record, the Description paragraph not only serves to
5 identify the exterior features that contribute to the building’s historic value, but also serves to
6 identify alterations that have occurred to the original building since it was constructed.
7 Unless such alterations have independent historical or architectural significance, which
8 seems unlikely in most cases, such alterations would tend to detract from the historic value of
9 the property, or at best be neutral. In other words, the Description paragraph appears to be
10 structured first to list those exterior features that contribute to the building’s historic value,
11 and second to list subsequent alterations that may detract from that historic value. The
12 ultimate conclusion regarding significance and whether the building is deemed contributing
13 or non-contributing to the historic district is presumably based on a weighing of those two
14 considerations. *See* Record 73 (a portion of the nomination of a 1908 Colonial Revival
15 building with “Major” alterations that is deemed to be compatible with, but noncontributing
16 to, the district).

17 In sum, reading the text and context of the Carlton Court building nomination, it is
18 reasonably clear that the original exterior features listed in the Description paragraph are the
19 features that led the author to conclude, in the Significance paragraph, that the building is
20 “contributing within the district as a good example of a Classical style multi-family
21 residence[.]” Those contributing features do not necessarily include the two “minor”
22 alterations described in the last two sentences of the Description, but do include the original
23 “one-over-one, double-hung wood sash” windows and other original exterior features listed
24 in that paragraph. For the above reasons, the hearings officer did not err in concluding that
25 the original wood sash windows are exterior materials specifically listed in the Nomination
26 as an attribute that contributes to the Carlton Court building’s historic value.

1 The first assignment of error is denied.

2 **SECOND ASSIGNMENT OF ERROR**

3 Petitioner argues that the hearings officer’s conclusion that the Nomination
4 specifically lists wood sash windows as an attribute contributing to the Carlton Court
5 building’s historic value is not supported by substantial evidence, because the Nomination is
6 the only source of evidence on that point, and the Nomination is silent as to the significance
7 of the windows and does not include language that can support a conclusion that the
8 windows contribute to the building’s historic value. Because no purpose would be served by
9 remanding the decision for further review of the evidentiary record, petitioner argues, the
10 hearings officer’s decision should be reversed rather than remanded.

11 The second assignment of error appears to be a derivative of the first assignment of
12 error, and provides no independent basis for reversal or remand. Because we denied the first
13 assignment of error, we also deny the second assignment of error.

14 The city’s decision is affirmed.