

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

3
4 DAVID L'HEUREUX,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF PORTLAND,
10 *Respondent.*

11
12 LUBA No. 2013-015

13
14 FINAL OPINION
15 AND ORDER

16
17 Appeal from City of Portland.

18
19 Dean N. Alterman, Portland, filed the petition for review and argued on behalf of
20 petitioner. With him on the brief was Folawn Alterman & Richardson LLP.

21
22 Eric Shaffner, Deputy City Attorney, Portland, filed the response brief and argued on
23 behalf of respondent.

24
25 HOLSTUN, Board Chair; BASSHAM, Board Member; RYAN, Board Member,
26 participated in the decision.

27
28 REMANDED

07/25/2013

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

1

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city decision that grants a height adjustment to allow construction
4 of a dwelling that will be taller than would be permitted without the adjustment.

5 **FACTS**

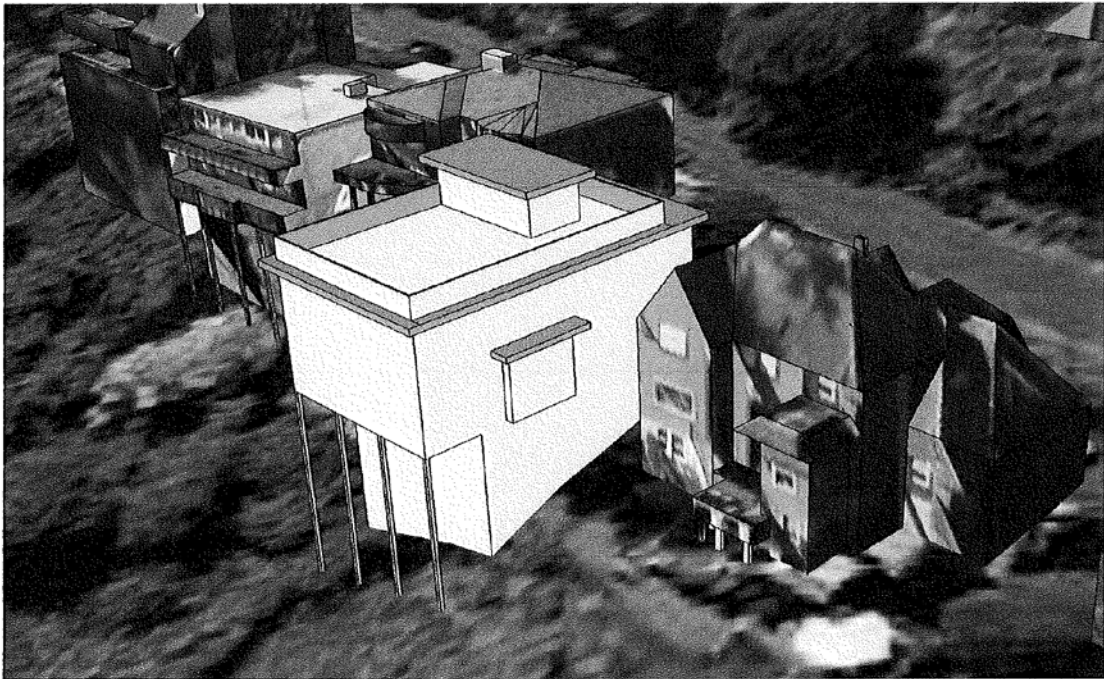
6 This case is one where a picture is easily worth a thousand words. We set out two
7 diagrams below to assist in describing the relevant facts. First, we set forth below an
8 admittedly poor map from the record to help us describe the subject property, the proposal
9 and the factors that play a role in determining if the adjustment was properly approved.

10



11

1 The second diagram was prepared by opponents of the adjustment to show the
2 relationship of the proposed dwelling to adjacent and nearby dwellings and is set out below.
3 The overhead perspective in that drawing is looking north to south across NW Marlborough
4 Avenue from north of the subject property, just west of the north arrow on the first diagram.



5
6 Referring first to the first diagram, the vacant subject property is located on the east
7 side of NW Marlborough Avenue (Marlborough), a short distance south of that street's
8 intersection with NW Melinda Avenue (Melinda) and south of NW Westover Road
9 (Westover). The subject property is the only vacant property on the north side of
10 Marlborough. The three existing dwellings north of the vacant subject property along
11 Marlborough are located on lots that, like the subject property, are not as steeply sloping
12 away from Marlborough as most of the other lots farther south on Marlborough. The existing
13 dwellings are set back farther on those three lots, as compared to the existing dwellings on

1 the lots located to the south of the subject property. The dwellings south of the subject
2 property are developed very close to Marlborough. Petitioner’s dwelling is located on the lot
3 immediately to the south of the subject property.

4 The proposed dwelling is to be located 42 feet back from Marlborough, so that the
5 front façade of the proposed dwelling will align roughly with the front façade of the dwelling
6 to the north and the rear façade of petitioner’s dwelling to the south.¹

7 Under Portland City Code (PCC) 33.110.215(B), the maximum building height in the
8 R7 zone where the proposed dwelling would be located is 30 feet. But under PCC
9 33.930.050(A)(2), that 30 foot height limit must be measured from a point ten feet above the
10 lowest grade of the structure. If the PCC 33.110.215(B) 30-foot height limit is measured in
11 the manner required by PCC 33.930.050(A)(2), the proposed dwelling is considerably taller
12 than the PCC 33.110.215(B) 30-foot height limit.

13 PCC 33.110.215(D) authorizes “[a]lternative height limits for steeply sloping lots.”
14 Under PCC 33.110.215(D), the proposed dwelling may be “23 feet above the average grade
15 of the street.” Because the average street grade is much higher than the lowest grade of the
16 structure, a taller dwelling is allowed on the subject property under the PCC 33.110.215(D)
17 23-foot height limit (measured from the average street grade) than would be permissible
18 under the PCC 33.110.215(B) 30-foot height limit (measured from 10 feet above the lowest
19 grade of the structure).

20 Referring to the second diagram, the dispute in this appeal concerns the three and one-
21 half foot tall parapet (wall) that encloses a rectangular structure that the parties and decision
22 refer to as a “penthouse” on the top of the building.² The portion of the dwelling below the

¹ The dwelling includes a “cantilevered ‘bump out’ over the garage entrance,” which is only 36 feet from Marlborough. Record 18.

² The penthouse provides a weatherproof covering for the stairway necessary to access the roof-top deck that is enclosed by the parapet.

1 parapet and penthouse is 22 and one-half feet tall and therefore complies with the applicable
2 23-foot maximum building height. The three and one-half foot tall parapet and seven-foot
3 six-inch penthouse exceed the applicable building height limit and are the reason for the
4 disputed adjustment.

5 **THE ADJUSTMENT CRITERIA**

6 “Adjustments” are the city’s version of a zoning variance, by which development that
7 does not comply with applicable approval standards may nevertheless be approved if the
8 adjustment criteria are met. The criteria for granting an adjustment are set out at PCC
9 33.805.040, and the adjustment criteria that apply in this case are set out below:

10 “[A]djustment requests will be approved if the review body finds that the
11 applicant has shown that * * * approval criteria A. through F * * * have been
12 met. * * *.

13 **A.** Granting the adjustment *will equally or better meet the purpose of the*
14 *regulation to be modified; and*

15 * * * * *

16 **E.** *Any impacts resulting from the adjustment are mitigated to the extent*
17 *practical[.]” (Emphases added.)*

18 Turning first to the PCC 33.805.040(A) “equally or better” criterion, the purposes of
19 the building height standards to be modified are identified at PCC 33.110.215(A), which are
20 set out below:

21 “● They promote a reasonable building scale and relationship of one
22 residence to another;

23 “● They promote options for privacy for neighboring properties; and

24 “● They reflect the general building scale and placement of houses in the
25 city’s neighborhoods.”

26 In his first and second assignments of error, petitioner challenges the adequacy of the
27 findings and the evidentiary support for the city’s findings concerning the first purpose set
28 out above, to “promote a reasonable building scale and relationship.” In his third and fourth

1 assignments of error, petitioner challenges the adequacy of the findings and the evidentiary
2 support for the city’s findings concerning the third purpose set out above, “reflect the general
3 building scale and placement of houses in the city neighborhoods.” In his fifth and sixth
4 assignments of error, petitioner challenges the adequacy of the findings and the evidentiary
5 support for the city’s findings concerning the PCC 33.805.040(E) requirement that “[a]ny
6 impacts resulting from the adjustment are mitigated to the extent practical.”³

7 Before turning to petitioner’s assignments of error, we note that the city decision that
8 is before us in this appeal is a decision of the city’s adjustment committee, not the city
9 council. Therefore, based on petitioner’s assignments of error, we review the decision to
10 determine whether the adjustment committee adopted inadequate findings, misconstrued
11 applicable law or adopted a decision that is not supported by substantial evidence. ORS
12 197.835(9)(a)(C) and (D); OAR 661-010-0071(2)(a), (b) and (d). The more deferential
13 standard of review of any interpretations adopted by the governing body that is required by
14 ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 255, 243 P3d 776 (2010) does
15 not apply here. *Gage v. City of Portland*, 133 Or App 346, 349-50, 891 P2d 1331 (1995).

16 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

17 We agree with the city that much of the debate below before the city’s adjustment
18 committee, and for that matter in the briefs in this appeal, seems to focus on how the
19 proposed dwelling will impact views and how the proposed larger than required front yard
20 setback, with the dwelling set back farther on the site, either mitigates or exacerbates the
21 negative impacts of the proposed dwelling on the views from various perspectives in the
22 neighborhood. We agree with the city that the proposed dwelling’s increased front setback
23 impacts on views is not a direct consideration under the city’s adjustment criteria. However,
24 the adjustment committee’s decision also frequently fails to focus on the relevant

³ Petitioner does not assign error to the findings concerning the second purpose, “promote options for privacy for neighboring properties.”

1 considerations under the adjustment criteria, and like petitioner expends a great deal of effort
2 addressing view impacts.

3 The PCC 33.805.040(A) requirement that granting an adjustment must “equally or
4 better meet the purpose of the regulation to be modified” is not an easy standard to apply or
5 comply with, and LUBA has struggled in reviewing city decisions that attempt to give effect
6 to that standard. *Cottonwood Capital v. City of Portland*, ___ Or LUBA ___ (LUBA No.
7 2011-120, June 13, 2012), slip op at 12-16; *Loprinzi’s Gym v. City of Portland*, 56 Or LUBA
8 358, 361-67 (2008); *Pearman v. City of Portland*, 56 Or LUBA 570, 575-77 (2008); *Yun v.*
9 *City of Portland*, 54 Or LUBA 564, 566-67 (2007); *O’Brien v. City of Portland*, 52 Or LUBA
10 113, 128-32 (2006); *Squires v. City of Portland*, 31 Or LUBA 335, 341-43 (1996). Under the
11 PCC 33.805.040(A) “equally or better” criterion, it does not matter if measures can be taken
12 to mitigate the impacts of the adjustment, because PCC 33.805.040(E) separately requires
13 such mitigation. And it is not enough that the adjustment will not result in significant
14 adverse impacts to adjoining properties or uses. The adjustment must “equally or better”
15 *meet the purposes* of the 23-foot height limitation, one of which is to “promote a reasonable
16 building scale and relationship of one residence to another.”

17 The PCC does not define “scale” or “building scale.” Neither the parties nor the
18 decision really make any attempt to explain what building scale means. We have been unable
19 to find a particularly useful definition of “scale” or “building scale.”⁴ For lack of a better
20 alternative, we will assume in this opinion that building scale means the size, bulk or mass of
21 a building. One of the purposes of the 23-foot height limit is to limit the size, bulk and mass

⁴ *Webster’s Third New International Dictionary* includes the following definition for “scale:”

“7 a : relative size of esp. architectural parts as compared with the whole * * * b : proper or intended size, proportion, and relationship with reference to other elements and to the whole or to the setting[.]” *Webster’s Third New Int’l Dictionary* 2023 (unabridged ed. 1981).

1 of dwellings by limiting the dwelling’s height dimension, so that dwellings will not be taller
2 than neighboring dwellings and for that reason out of scale.

3 Petitioner contends the following adjustment committee finding is inadequate to
4 demonstrate that the adjustment to allow a 30-foot tall dwelling, instead of limiting the
5 dwelling to 23 feet in height, will equally or better “promote a reasonable building scale and
6 relationship of one residence to another:”

7 “The additional deep front yard setback places the home within a reasonable
8 relationship to other residences, because the adjacent home to the north is set
9 back approximately 34 feet, which nearly matches the proposed bump-out on
10 the front façade, while the adjacent home to the south has a particularly
11 dominating front façade due to the reduced setback for the second story. As a
12 result, the perspective for a pedestrian walking along the street would view the
13 new home as generally the same height as adjacent homes due to the increased
14 setback. Additionally, even though the proposed house is set farther back, the
15 overall footprint of the home is such that it will be partially visible from the
16 oblique angles of adjacent homes, but overall will not significantly impinge on
17 views, light and open air among all of the houses.” Record 18.

18 Nothing in the record indicates that the dwelling to the north or the dwelling to the south of
19 the proposed dwelling were granted height adjustments. We therefore assume that those
20 dwellings comply with the city’s height limits.⁵ The first part of the first sentence of the
21 above-quoted findings points out the front façades of the approved dwelling and adjacent
22 dwelling to the north will roughly be aligned. But as far as we can see, this shared dwelling
23 alignment has nothing to do with whether the *height adjustment* equally or better serves the
24 purposes of the height limit. Moreover, the findings do not explain how allowing a taller 30-
25 foot dwelling immediately next to the existing dwelling to the north equally or better meets

⁵ Apparently the house immediately to the south and perhaps other houses to the south are located closer to Marlborough than the required 15-foot setback. Under the current version of PCC 33.110.220(D)(4)(c) the 15-foot setback may be reduced, but the permissible height of the dwelling is reduced by one foot for every foot the 15-foot front yard setback is reduced. Apparently some of the houses south of the proposed dwelling, while less than 23 feet tall, are taller than required by PCC 33.110.220(D)(4)(c) because they are closer than 15 feet to Marlboro and do not satisfy the reduced height limit that is required to be closer than 15 feet to Marlborough.

1 the purpose of “promot[ing] a reasonable building scale and relationship” with that shorter
2 dwelling.

3 Next, we are unsure of what the adjustment committee means in the second part of
4 that sentence by referring to the dwelling to the south as having a “particularly dominating
5 front façade due to the reduced setback for the second story.” Just as importantly, we agree
6 with petitioner that even if a pedestrian on the street might perceive the dwelling to the south
7 and the proposed dwelling as being of similar height, the findings do not explain how that
8 fact, assuming it is a fact, necessarily means allowing a 30-foot tall dwelling on the subject
9 property “equally or better” meets the purpose of “promot[ing] a reasonable building scale
10 and relationship” with the dwelling to the south, which will still be located next to the
11 proposed dwelling and has its own perspective of the 30-foot tall proposed dwelling. The
12 focus of the “reasonable building scale and relationship” language is on neighboring
13 residences, not pedestrians on the street.

14 The final sentence of the above-quoted findings states that the additional front yard
15 setback will not result in a significant impingement on “views, light, and open air among all
16 the houses.” We fail to see what that has to do with whether the *height adjustment* equally or
17 better meets the purpose of “promot[ing] a reasonable building scale and relationship.”

18 The city cites other findings in support of its contention that the adjustment
19 committee’s findings concerning the “promote a reasonable building scale and relationship”
20 purpose are adequate:

21 “The Adjustment Committee found that the proposed house will equally or
22 better meet the goal of promoting ‘a reasonable building scale and relationship
23 of one residence to another’ PCC 33.110.215 A, because, due to its front
24 setback, it will ‘provide a visual transition from relatively open front yards to
25 very closely set dominating front façades’ Also, the Committee found
26 that ‘[r]egarding height, . . . the [house] will not be more visually dominant or
27 intrusive than other nearby residences’ Of particular importance here is
28 the fact that the main bulk of the house will be below the 23-foot limit at 22
29 feet, 6 inches. Only the relatively small penthouse and the semi-transparent
30 parapet will exceed the limit. The Committee’s findings clearly constituted

1 the ‘some sort of comparison’ required by the ‘equally or better’ criterion.”
2 Respondent’s Brief 8-9 (citations omitted).

3 We do not understand the “visual transition” finding. The proposed dwelling will
4 have roughly the same front setback alignment as the three dwellings to the north, which are
5 set back farther on those lots than the dwellings to the south, which are sited closer to
6 Marlborough. That does not provide a “visual transition” with the southerly dwellings; it
7 does the opposite by joining with the three dwellings to the north to complete the two
8 contrasting front yard setback distances, without any transition. Next, even if we assume the
9 proposed dwelling “will not be more visually dominant or intrusive than other nearby
10 residences,” as the adjustment committee found, without some further explanation from the
11 adjustment committee, it does not follow that allowing a 30-foot tall dwelling, instead of a
12 23-foot tall dwelling will “equally or better” meet the purpose of “promot[ing] a reasonable
13 building scale and relationship.” Finally, the finding that “[o]nly the relatively small
14 penthouse and the semi-transparent parapet will exceed the limit” appears to misconstrue the
15 “equally or better” standard to be a “*de minimis* impact” or “no significant impact” standard.
16 If the “equally or better” criterion was a “*de minimis* impact” or “no significant impact”
17 criterion, the adjustment committee’s finding might be sufficient to justify allowing the extra
18 seven feet of height. But it is not worded as such a criterion.

19 Given the nature of the “equally or better” adjustment standard and the purpose of the
20 23-foot height limit to “promote a reasonable building scale and relationship,” it is hard for
21 us to see how the city could ever grant a height adjustment to allow a house that is seven feet
22 taller than the 23-foot standard, unless there are unusual on-site or neighborhood
23 circumstances. For example, if the existing houses to the north and south of the proposed
24 dwelling were 30 feet tall, measured from the average street grade, because they predate
25 zoning, were granted adjustments or were allowed to be 30 feet tall for some other reason,
26 then approving an adjustment to allow construction of the proposed 30-foot dwelling might
27 “equally or better” “promote a reasonable building scale and relationship,” compared to

1 requiring construction of a 23-foot tall dwelling that would be shorter than the adjoining
2 dwellings. There may well be other local circumstances that might justify an adjustment to
3 the 23-foot building height restriction. However, the adjustment committee’s findings do not
4 identify such circumstances.

5 The first and second assignments of error are sustained.

6 **REMAINING ASSIGNMENTS OF ERROR**

7 Because we sustain the first two assignments of error, remand is required. To
8 consider the remaining assignments of error would require that we assume the adjustment to
9 allow a dwelling that is seven feet taller than its neighbors equally or better meets the purpose
10 of “promot[ing] a reasonable building scale and relationship of one residence to another,”
11 when we have just concluded that the adjustment committee has not established that
12 proposition. That exercise seems sufficiently pointless that we decline to do so. We do
13 however make an attempt below to point out some problems with the findings challenged in
14 the remaining assignments of error, in the event the applicant and adjustment committee elect
15 to attempt to reapprove the requested adjustment.

16 **A. Third and Fourth Assignments of Error**

17 In his third and fourth assignments of error, petitioner challenges the adequacy of the
18 findings and the evidentiary support for the adjustment committee’s findings concerning the
19 third purpose for the 23-foot height limit, which is to “reflect the general building scale and
20 placement of houses in the city neighborhoods.” Making the required finding that the height
21 adjustment equally or better meets this purpose is initially complicated because it is difficult
22 to see what a height limit or a height adjustment could possibly have to do with a purpose of
23 reflecting “*placement* of houses in the neighborhoods.” (Emphasis added.) That problem
24 aside, the adjustment committee appears to have understood this purpose to require that the
25 adjustment committee consider the building scale in the immediate neighborhood. But after
26 quoting the three PCC 33.110.215(A) purposes, “promote a reasonable building scale and

1 relationship,” “promote options for privacy,” and “reflect the general building scale and
2 placement of houses in the city neighborhoods,” the adjustment committee proceeds to adopt
3 four single-spaced pages of findings without clearly identifying which of those three purposes
4 the findings are addressing. Record 18-21. Sometimes it is reasonably clear which of those
5 purposes the findings are addressing, and sometimes it is not.

6 The adjustment committee’s failure to identify the purpose or purposes its many
7 separate findings are addressing is particularly problematic with regard to the “reflect the
8 general building scale and placement of houses in the city neighborhoods” purpose, because
9 the only findings that clearly were adopted to address that purpose appear to be addressing
10 the requirement that the height adjustment reflect the “placement of houses” aspect of the
11 standard. Putting aside the inherent difficulty with that requirement, the adjustment
12 committee’s findings conclude that the proposed dwelling provides a visual transition
13 between the northerly dwellings that are set back farther from Marlborough and the southerly
14 dwellings that are sited closer to Marlborough.⁶ As we have already pointed out earlier in
15 this decision, the proposed dwelling will have roughly the same front yard setback as the
16 three northerly dwellings, will be taller than those dwellings and provides no *transition* that
17 we can see between those dwellings and the shorter dwellings that are located to the south
18 and much closer to Marlborough.

⁶ Those findings are as follows:

“The proposed home will reflect the general building scale and placement of houses along this street as the subject site is in a transition area between the three homes between the site and NW Westover, which are all set back from the street a significant amount [the closest being approximately 19 feet from the street lot line] while the rest of the homes along NW Marlborough are placed very close to the street. As such, the proposed home would provide a visual transition from relatively open front yards to very closely set dominating front facades of the rest of the homes along this side of NW Marlborough. As a transition from two very distinctly different development patterns, the proposal is intended to balance these characteristics without adversely impacting the appearance along the street or impacting the relatively open views the other house have to the north.” Record 19.

1 Finally, the adjustment committee’s findings do not really identify what the
2 adjustment committee believes to be “the general building scale * * * of houses in the”
3 neighborhood. Until the adjustment committee does so, it will not be in a position to take on
4 the challenging task of establishing that allowing an adjustment to permit a dwelling that is
5 taller than existing dwellings will equally or better meet the purpose of the height limit to
6 “reflect the general building scale of houses in the” neighborhood.

7 **B. Fifth and Sixth Assignments of Error**

8 If the adjustment committee can demonstrate that the proposal can comply with the
9 PCC 33.805.040(A) requirement that the adjustment “equally or better meet[s] the purpose of
10 the regulation[s] to be modified,” the PCC 33.805.040(E) requirement that “[a]ny impacts
11 resulting from the adjustment are mitigated to the extent practical” is a less challenging
12 criterion. The adjustment committee relied in part on “the orientation of the axis of the
13 penthouse so that the smaller façades face each abutting residence” and the requirement that
14 the parapet be constructed of “transparent or semi transparent [visually porous] material” to
15 address the PCC 33.805.040(E) “mitigation” requirement. Record 24. The adjustment
16 committee also may have been relying on a condition of approval that requires that
17 “[e]xterior lighting for the roof deck must be ‘sky friendly’ as well as ‘neighbor friendly.’”
18 Record 26. Those seem to be legitimate mitigation measures, although petitioner disputes
19 their significance.

20 But the adjustment committee also appears to have relied on the “generous front yard
21 setback of 42 feet to the main façade of the house” for mitigation. Record 24. Placing the
22 proposed dwelling farther back on the lot may mitigate the impacts of the height adjustment
23 by making the proposed dwelling look smaller from the street and from some parts of the
24 dwelling to the south, but by placing the taller dwelling directly beside the shorter dwelling to
25 the north, that larger setback would appear to accentuate the impacts of the height adjustment
26 on the dwelling to the north and do little to mitigate the impacts on the portions of the

1 dwelling to the south that remain close to the proposed taller dwelling. Further explanation
2 of the adjustment committee’s reliance on the front yard setback as mitigation will be
3 necessary.

4 One final point merits mention. In a number of places in its brief, the city takes the
5 position that it is powerless to require that the applicants reduce their proposed front yard
6 setback. Respondent’s Brief 4-5, 14-15. We agree with the city that it cannot require that the
7 proposed dwelling be located closer to Marlborough to reduce the impacts of the proposed
8 dwelling on neighboring properties’ views to the east, at least petitioner cites no authority by
9 which the adjustment committee could have required such mitigation solely to protect views.
10 But PCC 33.805.040(E) requires that “[a]ny impacts resulting from the adjustment are
11 mitigated to the extent practical.” If requiring that the dwelling be located closer to
12 Marlborough would (1) be practical and (2) mitigate impacts resulting from the height
13 adjustment, we see no reason why PCC 33.805.040(E) would not authorize and require that
14 the applicants do so as a condition of approving the height variance.

15 Because we sustain petitioner’s first and second assignments of error, the adjustment
16 committee’s decision is remanded.