

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 SELLWOOD-MORELAND IMPROVMENT LEAGUE,
5 LISA BROWN, ANDREA RAVEN, DENISE KELSEY,
6 GEORGE WOLTERS, PHYLLIS BOYER, CAREY SMITH,
7 DEVON CARBERRY, TODD BENSON, SHARON BENSON,
8 RENATE POWELL, ANDREA MUIR, BETH KLUENDER,
9 CASSANDRA ZIMMERMAN and MARY CHRIS MASS,
10 *Petitioners,*

11
12 vs.

13
14 CITY OF PORTLAND,
15 *Respondent,*

16
17 and

18
19 BAMA DESIGNS
20 and MORELAND STATION APARTMENTS LLC,
21 *Intervenors-Respondent.*

22
23 LUBA No. 2013-052

24
25 FINAL OPINION
26 AND ORDER
27

28 Appeal from City of Portland.

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30 Andrew H. Stamp, Lake Oswego, filed the petition for review and argued on behalf of
31 petitioners.

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33 Linly Rees, Senior Deputy City Attorney, Portland, filed a response brief and argued
34 on behalf of respondent.

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36 Christe C. White, Portland, filed a response brief and argued on behalf of intervenor-
37 respondent. With her on the brief were Steven P. Hultberg and Radler White Parks and
38 Alexander LLP.

39
40 BASSHAM, Board Member; HOLSTUN, Board Chair; RYAN, Board Member,
41 participated in the decision.

42
43 AFFIRMED

09/27/20013

44
45 You are entitled to judicial review of this Order. Judicial review is governed by the

1 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a decision by the city design commission approving design review for a 68-unit apartment building.

MOTION TO INTERVENE

Bama Designs and Moreland Station Apartments, LLC (intervenors), the applicants below, move to intervene on the side of the city. There is no opposition to the motion and it is granted.

FACTS

The subject property is 33,948-square foot tract zoned R-1, a medium density multi-family residential base zone that allows 43 dwelling units per acre, with potentially higher densities permitted pursuant to various amenity bonuses. The site is subject to a “d” overlay zone that requires design review approval. The property is located within the Johnson Creek Basin Plan District (Plan District), which is codified at Portland City Code (PCC) chapter 33.537. In 2008, the property was rezoned from R-2 to R-1. The city attached no conditions of approval to that rezone.

Based on the size of the property, the allowable multi-family density under the R-1 base zone is approximately 34 units. To achieve the proposed 68 units, intervenors proposed a “density transfer” of 34 units from an adjoining property, pursuant to PCC 33.120.205(E), part of the city code governing all multi-family zones throughout the city. In the R-1 zone, PCC 33.120.205(E) allows transfers of density between adjoining R-1 zoned sites, up to 100 percent of the density allowed on the receiving site. The owners of the transferring and receiving sites must record covenants reflecting the respective increase and decrease in allowed density.

City staff administratively approved the proposed design review, including the density transfer. On appeal, the city design commission conducted a hearing at which petitioners

1 appeared in opposition. On May 21, 2013, the design commission affirmed and adopted the
2 city staff decision, and adopted additional findings. This appeal followed.

3 **FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR**

4 Petitioners argued below that transfer of density on the site is governed not by PCC
5 33.120.205(E), but rather by the provisions of the Plan District, specifically PCC 33.537.110,
6 which allows density transfers within the District from sites within single-family zones
7 subject to an environmental protection overlay zone to any other site within the Plan District.
8 PCC 33.537.110 also requires that density transfers subject to that provision be approved
9 pursuant to code provisions regulating Planned Development.¹ Petitioners argued that the
10 Plan District density transfer provisions supersede the general multi-dwelling density transfer

¹ PCC 33.537.110 provides, in relevant part:

“Transfer of Development Rights

“A. Purpose. These transfer of development rights regulations preserve development opportunities for new housing and reduce development pressure on environmentally sensitive sites. The regulations allow development rights to be transferred from sites with the Environmental Protection Overlay Zones or sites where any portion of the site is in the special flood hazard area to areas that can accommodate the additional density without environmental conflict.

“B. Regulations. Transfer of development rights between sites in the plan district is allowed as follows. ‘Development rights’ are the number of potential dwelling units that would be allowed on the site. Bonus density is not transferable.

“1. Sending sites.

“a. Sites in single-dwelling zones where at least 50 percent of the site is within the Environmental Protection overlay zone may transfer development rights.

“b. Sites in single-dwelling zones where any portion of the site is in the special flood hazard area may transfer development rights.

“* * * * *

“4. Transfer procedure. Transfer of development rights is allowed as follows:

“a. Planned Development (PD) required. * * *”

1 provisions, and that the proposed transfer therefore did not comply with the Plan District
2 provisions because the sending site is zoned R-1, is not zoned for single-family dwellings,
3 and is not subject to an environmental protection overlay.

4 The design commission nonetheless approved the application pursuant to the multi-
5 dwelling density transfer provisions at PCC 33.120.205(E). The design commission's
6 findings, adopted from the staff decision, state:

7 "The Zoning Code for Multi-Dwelling Development in an R-1 zone also
8 allows a transfer of up to 100% more density for an additional 34 units. The
9 site to the east that is transferring available density in the form of dwelling
10 units to the project area can no longer build the transferred units as they will
11 be permanently sold and recorded on the receiving site. These types of
12 transfers allow density to happen in a controlled manner in areas such as this."
13 Record 19.

14 In the first assignment of error, petitioners argue that the design commission's
15 findings fail to address the interpretative issue raised below, namely whether the Plan
16 District's density transfer provisions at PCC 33.537.110 govern instead of the general multi-
17 dwelling density provisions at PCC 33.120.205(E). In the second assignment of error,
18 petitioners argue that to the extent the findings implicitly provide an adequate interpretation
19 of the relevant code provisions, to allow density transfer under PCC 33.120.205(E), that
20 interpretation is incorrect. Under the third assignment of error, petitioners argue that if
21 LUBA agrees with their interpretation that PCC 33.537.110 provides the exclusive means of
22 transferring density within the Plan District, the city erred in failing to require the applicant to
23 undergo the different review procedures and standards required for planned development.

24 Turning to the first assignment of error, the city and intervenors argue, and we agree,
25 that the design commission's interpretation of the relevant code provisions is adequate for
26 review. The original staff decision approving design review approved the transfer under PCC
27 33.120.205(E). Record 322. Petitioners' appeal statement argued that the PCC 33.537.110
28 density transfer provisions controlled instead. Record 341-42. On January 28, 2013, staff

1 submitted to the design commission a memorandum, attached to which was the staff decision
2 and the appeal statement. The memorandum states:

3 “Included in the appeal statement, the appellants do not agree with the staff’s
4 interpretation of the Johnson Creek Basin Plan District, section 33.537.110
5 Transfer of Development Rights. Staff interpreted the code (33.537.110.B.1
6 Transfer of Development Rights) to mean that the Plan District provision was
7 an added allowance for single-dwelling zones, because the Single-Dwelling
8 Base Zone Chapter (33.110) doesn’t allow density transfers; rather than a
9 restriction on the density transfers allowed by the Multi-Dwelling Base Zone
10 (section 33.120.205.E Multi-Dwelling Zones Density). As the Plan District
11 placed no restrictions on transfers to and from multi-dwelling zones, this
12 would allow the proposal to use the base zone density transfer provision, and
13 double the base zone density of 34 units to the 68 proposed units.” Record
14 291.

15 In other words, staff advised the design commission that the staff decision interpreted the two
16 density transfer provisions as additive, such that PCC 33.120.205(E) applied in multi-
17 dwellings zones, while PCC 33.537.110 applied in single dwelling zones under the specified
18 circumstances, and the two provisions do not conflict.

19 The design commission adopted the staff analysis, findings and conclusions, with
20 additional findings. Record 15. While the design commission findings do not expressly
21 address the interpretative issue raised in the appeal statement, the design commission
22 apparently understood the staff decision to embody the interpretation expressed in the
23 January 28, 2013 memorandum that accompanied the staff decision. As noted, that
24 interpretation takes the position that the two density transfer provisions are additive and do
25 not conflict, with PCC 33.120.205(E) governing in multi-dwelling zones, and PCC
26 33.537.110 governing in single-dwelling zones. It is reasonably clear that the design
27 commission agreed to and adopted that interpretation, and that interpretation is adequate for
28 review. The first assignment of error therefore provides no basis for remand.

29 The second assignment challenges the merits of the city’s interpretation that the two
30 density transfer provisions do not conflict and that PCC 33.120.205(E) governs. Petitioners
31 argue that the two density transfers conflict, and therefore the Plan District density transfer

1 provision supersedes the multi-dwelling density transfer provision, pursuant to PCC
2 33.700.070(E), which provides that when regulations conflict, regulations in plan district
3 supersede regulations in base zones.²

4 The two density transfer provisions conflict, petitioners argue, because they both
5 address the “same specific topic,” namely density transfers. PCC 33.500.040, entitled
6 “Relationship to Other Regulations,” is part of the code provisions governing plan districts,
7 and provides:

8 “When there is a conflict between the plan district regulations and base zone,
9 overlay zone, or other regulations of this Title, the plan district regulations
10 control. The specific regulations of the base zone, overlay zones, or other
11 regulations of this Title apply unless the plan district provides other
12 regulations for the same specific topic.”

13 Because the Plan District provides “other regulations for the same specific topic,” density
14 transfers, petitioners argue that the two provisions conflict and therefore the Plan District
15 provisions control.

² PCC 33.700.070 provides, in relevant part:

“E. Hierarchy of regulations.

1. Different levels of regulations. In general, an area with base zoning, overlay zoning, or an area in a plan district is subject to all of the regulations of each. * * * When the regulations conflict, unless specifically indicated otherwise, the following rules apply:

“a. The regulations in a plan district supersede regulations in overlay zones, base zones, and regulations in the 600s series of chapters;

“* * * * *

“2. Regulations at the same level. When regulations at the same level conflict, those that are more specific to the situation apply. An example would be the parking space requirement for houseboats in moorages, two spaces per unit, which is stated in the Floating Structures chapter. This would supersede the standard residential requirement of one space per unit stated in the Parking chapter. When the regulations are equally specific or when it is unclear which regulation to apply, the most restrictive applies. Regulations at the same level include such situations as two different standards in a base zone or regulations from separate chapters in the 200s series of chapters.”

1 According to petitioners, the strongest evidence that the two density provisions
2 conflict is found in the plain text of the Plan District density transfer provisions at PCC
3 33.537.110(B). PCC 33.537.110(B) provides that “[t]ransfer of development rights between
4 sites in the plan district is allowed as follows,” followed by transfer provisions that allow
5 transfers only from sites within single dwelling zones. *See* n 1. Petitioners note that the
6 quoted language is not limited to single dwelling zones, but applies broadly to “sites in the
7 plan district.” Petitioners contend that the quoted language plainly evinces the intent that
8 PCC 33.537.110(B) be the exclusive authority for density transfers for *all* sites within the
9 Johnson Creek Basin Plan District, which would effectively preclude transfers from a site
10 zoned multi-dwelling, as in the present case.

11 Respondents argue, and we agree, that the city correctly interpreted the relevant code
12 provisions, to the effect that the two density transfer provisions do not conflict, and PCC
13 33.120.205(E) applies to allow density transfers from sites zoned for multi-dwelling use
14 within the Plan District. Read in isolation, the phrase “transfer of development rights
15 between sites in the plan district is allowed as follows” can be read to suggest that transfers
16 are allowed *only* as follows, but that preclusive reading is not compelled by the actual text,
17 which does not include the modifier “only.” The text of PCC 33.537.110(B) does not
18 expressly state that the following provisions are the exclusive vehicle of transfers within the
19 Plan District, or that other transfer provisions that would apply by their own terms are
20 precluded.

21 The narrower or non-exclusive reading of PCC 33.537.110(B) is supported by PCC
22 33.537.110(A), a purpose statement, which explains that the density transfer provisions in
23 subsection (B) are intended to preserve development opportunities for new housing and
24 reduce development pressure on environmentally sensitive sites, by allowing development
25 rights to be transferred from sites subject to environmental restrictions. The subsection (B)
26 density provisions accomplish this by allowing density transfers from single-family zoned

1 sites subject to environmental restrictions. Petitioners' broader, exclusive interpretation of
2 PCC 33.537.110(B) would effectively reduce development opportunities throughout the Plan
3 District for sites zoned multi-dwelling that have environmental restrictions, as well as multi-
4 dwelling sites that have no environmental restrictions. The city's narrower, non-exclusive
5 reading of PCC 33.537.110(B) preserves development opportunities for such sites, which
6 seems more consistent with the purpose statement at PCC 33.537.110(A), as well as the more
7 general purpose statement for the Plan District as a whole, at PCC 33.537.010.³

8 We also agree with respondents that it is petitioners' interpretation of PCC
9 33.537.110(B) that creates the purported conflict. The city's code does not define "conflict,"
10 but provides that dictionary definitions control undefined terms. PCC 33.700.070(D)(1).
11 The most relevant dictionary definitions indicate that "conflict" means terms that are
12 incompatible or irreconcilable. *Webster's Third New Int'l Dictionary* 477 (unabridged 2002).
13 There is nothing incompatible or irreconcilable about giving effect to the density transfer
14 provisions at PCC 33.120.205(E) governing multi-dwelling zoned sites in the Plan District,
15 while giving effect to the density transfer provision at PCC 33.537.110(B) that applies
16 according to its more limited circumstances.

17 While the code does not define "conflict," we note that PCC 33.700.070(2), quoted in
18 n 2, provides an example of a circumstance where two regulations at the same level
19 "conflict." PCC 33.700.070(2) illustrates "conflict" using the example of a general one-

³ PCC 33.537.010 provides, in relevant part:

"The Johnson Creek Basin plan district provides for the safe, orderly, and efficient development of lands which are subject to a number of physical constraints, including significant natural resources, steep and hazardous slopes, flood plains, wetlands, and the lack of streets, sewers, and water services. At certain locations, the density of development is limited by applying special regulations to new land division proposals. In addition, restrictions are placed on all new land uses and activities to reduce stormwater runoff, provide groundwater recharge, reduce erosion, enhance water quality, and retain and enhance native vegetation throughout the plan district. At other locations, development is encouraged and mechanisms are included that provide relief from environmental restrictions."

1 parking space per unit provision that is superseded by a specific two-parking spaces per unit
2 provision governing houseboat moorages. That example is consistent with the dictionary
3 definitions cited above, because the contrasting requirements for one or two parking spaces
4 are simply incompatible and cannot coexist on the same site. In the present case, the two
5 density transfer provisions necessarily apply to different sites, are not incompatible, and do
6 not “conflict” as the PCC illustrates that term.

7 Similarly, while PCC 33.500.040 provides that the base zone applies unless the plan
8 district provides other regulations for the “same specific topic,” we disagree with petitioners
9 that the two density provisions govern the “same specific topic.” PCC 33.537.110(B) allows
10 density transfers from sites zoned for single-dwelling use that are subject to environmental
11 restrictions that are the special focus of the Plan District. PCC 33.120.205(E) applies by its
12 terms to all sites zoned for multi-dwelling use in the city, and allows density transfers
13 between sites without regard for environmental restrictions. The two provisions may concern
14 the same *general* topic, density transfers, but do not concern the “same specific topic.”

15 Finally, the city’s narrower, non-exclusive reading of PCC 33.537.110(B) is more
16 consistent with the context provided by other code provisions governing density transfers. As
17 respondents note, the general rule under the city’s code is that density transfers are allowed in
18 all multi-dwelling zones, but not allowed in any single-dwelling zones. The city has created
19 limited exceptions to that general rule in several plan districts, for single-dwelling sites that
20 are subject to certain environmental restrictions that would otherwise limit development
21 rights. The apparent purpose of that special treatment of some single-dwelling sites is to
22 mitigate the inequities created by those environmental restrictions. However, nothing about
23 this special treatment of some single-dwelling sites suggests an intent to occupy the field with
24 respect to all other density transfers expressly allowed for other sites under other
25 circumstances. Again, there is simply no conflict or incompatibility in giving effect to PCC
26 33.537.110(B) in the circumstances in which it governs, and giving effect to PCC

1 33.120.205(E) in the circumstances it governs. Accordingly, petitioners’ arguments under
2 the second assignment of error do not provide a basis for reversal or remand.

3 The third assignment of error is procedural, and dependent on the success of the
4 second assignment of error. Because we reject the second assignment of error, we also reject
5 the third assignment of error.

6 The first, second and third assignments of error are denied.

7 **FOURTH ASSIGNMENT OF ERROR**

8 Petitioners argue that the density transfer and provision for 45 parking spaces is
9 inconsistent with representations made by the applicant in obtaining the 2008 rezone of the
10 property from R-2 to R-1.

11 Petitioners explain that, in 2008, prior to applying to rezone the property from R-2 to
12 R-1, intervenor submitted an “Early Assistance Application,” which is a request for a pre-
13 application conference. The request described the project as a zone change to facilitate re-
14 development of the site from four single-family dwellings to a multi-dwelling apartment
15 building with “about 50 (with density bonus options) housing units.” Record 886. The
16 request also noted that parking would be provided at one space per unit, per code.
17 Subsequently, trip generation analyses submitted to support the zone change assumed that the
18 property would be re-developed at a density of approximately 50 units, the 34 units allowed
19 under the R-1 zone, plus density bonuses.⁴ The hearings officer approved the zone change
20 without discussing any particular development scenario or imposing any conditions of
21 approval.

22 As noted, intervenor’s 2012 application for design review approval requested 68
23 units, pursuant to the density transfer provisions discussed above, and proposed only 45

⁴ Intervenor argues that the 2008 trip generation analysis was not required to consider the possibility of applying density transfers from adjoining property, because such transfers do not generate new trips to the transportation system, but merely move already planned trips next door.

1 parking spaces, reduced based on several bonuses. The design review committee approved
2 the requested number of units and parking. Petitioners argue that the city erred, because
3 intervenor's representations in the 2008 zone change proceeding regarding density and
4 parking are binding on intervenor and the city in approving subsequent development.

5 We agree with respondents that petitioners have not demonstrated that representations
6 made during the 2008 zone change proceeding are binding on intervenor or the city in
7 approving the challenged multi-dwelling development. None of the cases cited by petitioners
8 support that proposition. The principal case, *Frankland v. City of Lake Oswego*, 267 Or 452,
9 517 P2d 1042 (1973), does not assist petitioners. In *Frankland*, the applicant for a planned
10 unit development submitted architectural sketches of the proposed development, as required
11 by city code, and the city approved the development plan. The applicant later started to build
12 something entirely different from that depicted in the approved sketches, and the Court held,
13 unsurprisingly, that the developer must build in accordance to the sketches "so that the City's
14 approval of the sketches acts as a device to control development." *Id.* at 465. The key to
15 *Frankland* and other cases cited by petitioners are that plans or proposals *required* by the
16 applicable land use regulations or *approved* by the local government are binding on the
17 applicant's subsequent development efforts. Nothing in *Frankland* or other cases cited to us
18 suggests that an applicant's voluntary descriptions of potential development that could be
19 constructed if a zone change is granted are thereafter binding on subsequent land use
20 approvals to construct development otherwise allowed in the zone. In the present case,
21 petitioners do not argue that the applicable zone change standards in 2008 required intervenor
22 to submit development plans or propose any particular number of units or parking spaces, and
23 the hearings officer did not consider, much less approve, any development plan or any
24 particular number of units or parking spaces.

25 As petitioners note, where an applicant's representations regarding development must
26 be made binding in order to assure compliance with applicable approval criteria, the local

1 government must impose conditions of approval to embody those representations, and failure
2 to impose such conditions is a basis for remand. *Neste Resins Corp. v. City of Eugene*, 23 Or
3 LUBA 55, 58-60 (1992); *Culligan v. Washington County*, 57 Or LUBA 395, 401-02 (2008).
4 The major exception to that principle is where the applicant's representations are embodied
5 in submitted plans that are required by local regulations or expressly relied upon by the local
6 government to approve the proposed development. In such circumstances, failure to impose
7 an express condition of approval requiring consistency with such approved or relied upon
8 plans is not necessarily a basis for remand. *NE Medford Neighborhood Coalition v. City of*
9 *Medford*, 53 Or LUBA 277, 288 (2007); *Wilson Park Neigh. Assoc. v. City of Portland*, 27
10 Or LUBA 106, 122-23 (1994); *Perry v. Yamhill County*, 26 Or LUBA 73, 83 (1993); *Friends*
11 *of the Metolius v. Jefferson County*, 25 Or LUBA 411, 421 (1993).

12 Discussing the above cases, petitioners argue that the city's failure to attach
13 conditions of approval to the 2008 rezone limiting development to 50 units and requiring 50
14 parking spaces, as represented in pre-application documents submitted by intervenor, does
15 not preclude petitioners from arguing that intervenor's representations are binding on
16 subsequent development, or constitute a collateral attack on the 2008 zone change. We agree
17 with petitioners that their arguments do not represent collateral attacks on the 2008 zone
18 change. However, as discussed above, the arguments fail because nothing cited to us in the
19 applicable zone change standards required intervenor to submit development plans or
20 proposals regarding density or parking, and the hearings officer did not consider, rely upon,
21 or approve any such plans or proposals, and therefore intervenor's pre-application
22 descriptions of potential development permitted under R-1 zoning are not binding on
23 subsequent development applications.

24 The fourth assignment of error is denied.

1 **FIFTH ASSIGNMENT OF ERROR**

2 The city’s design review standards require application of Community Design
3 Guidelines, one of which provides that:

4 **“Parking Areas and Garages.** Integrate parking in a manner that is attractive
5 and complementary to the site and its surroundings. Locate parking in a
6 manner that minimizes negative impacts on the community and its
7 pedestrians. Design parking garage exteriors to visually respect and integrate
8 with adjacent buildings and the environment.” Design Guideline D4.

9 The design review commission adopted findings concluding that the design and location of
10 proposed parking complies with Design Guideline D4. Record 22-23.

11 Petitioners repeat their arguments that the 2008 zone change was premised on
12 supplying one parking space per dwelling unit, and argues that the current proposal, to
13 provide 45 parking spaces for 68 units, is inconsistent with Design Guideline D4 because it
14 does not provide an adequate number of on-site parking spaces to minimize negative impacts
15 on the community.

16 Intervenor argues, and we agree, that Design Guideline D4 is not concerned with the
17 number of parking spaces, but the design and location of parking areas and garages. Other
18 code provisions govern the required number of parking spaces, and require only 45 spaces in
19 the present circumstances, which petitioners do not dispute or challenge. Petitioners’
20 arguments under this assignment of error do not provide a basis for reversal or remand.

21 The fifth assignment of error is denied.

22 The city’s decision is affirmed.