

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 BEAUMONT-WILSHIRE NEIGHBORS FOR  
5 RESPONSIBLE GROWTH, RONI RICHEY,  
6 MARSH GLEASON, JOHN GOLDEN  
7 and MARGARET DAVIS,  
8 *Petitioners,*

9  
10 vs.

11  
12 CITY OF PORTLAND,  
13 *Respondent,*

14 and

15  
16  
17 VWR DEVELOPMENT LLC,  
18 *Intervenor-Respondent.*

19  
20 LUBA No. 2013-031

21  
22 FINAL OPINION  
23 AND ORDER

24  
25 Appeal from City of Portland.

26  
27 Ty K. Wyman, Portland, filed the petition for review and argued on behalf of  
28 petitioners. With him on the brief was Dunn Carney Allen Higgins & Tongue LLP.

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

32  
33 Seth J. King, Portland, filed a joint response brief and argued on behalf of intervenor-  
34 respondent. With him on the brief was Michael C. Robinson and Perkins Coie LLP.

35  
36 HOLSTUN, Board Chair; BASSHAM, Board Member; RYAN, Board Member,  
37 participated in the decision.

38  
39 REMANDED

12/04/2013

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

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**NATURE OF THE DECISION**

Petitioners appeal a building permit for a four-story, 50 unit apartment building with spaces for commercial uses on the ground floor.

**MOTION TO INTERVENE**

VWR Development LLC, the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is granted.

**FACTS**

The subject property is zoned Storefront Commercial (CS) and includes approximately 0.3 acres. The property is located north of the intersection of NE 43<sup>rd</sup> Avenue and NE Fremont Street. The proposed commercial uses in the building would occupy the ground floor along NE Fremont. The proposed building adjoins residentially zoned and developed land to the north. A chronology of key events in this appeal is set out below:

- Sept. 10, 2012            Application for building permit submitted.
- March 22, 2013        Building Permit first issued.
- April 10, 2013        Petitioners appeal first building permit to LUBA.
- April 30, 2013        City withdraws first building permit decision for reconsideration.
- May 3, 2013            City files reconsidered building permit decision with LUBA.
- May 24, 2013        Petitioners appeal the reconsidered building permit decision.
- June 12, 2013        City withdraws its reconsidered building permit decision for further reconsideration.
- July 30, 2013        City files second reconsidered building permit decision with LUBA.
- August 14, 2013     Petitioners appeal the second reconsidered building permit decision to LUBA.

1 **FIRST ASSIGNMENT OF ERROR**

2 The proposed apartment building provides no off-street parking. Portland City Code  
3 (PCC) 33.266.110 requires off-street parking for apartments with more than 30 units. PCC  
4 33.266.110 took effect in its current form on May 10, 2013—well after the application was  
5 submitted on September 10, 2012, but before the city rendered its second reconsidered  
6 decision. Petitioners contend it was error for the city not to apply PCC 33.266.110 to require  
7 off-street parking.

8 For statutory permits issued pursuant to ORS 227.160 through 227.186, the local  
9 “standards and criteria” that applied “at the time the application was first submitted” apply to  
10 a decision on that application, provided the application was complete or was made complete  
11 within the deadline specified in the statute. ORS 227.181 (the fixed goal post statute).  
12 Petitioners contend the building permit does not qualify as a statutory permit and there is no  
13 *statutory* fixed goal post rule for building permits.

14 Petitioners acknowledge that the PCC includes a *city* fixed goal post rule at PCC  
15 33.700.080(A)(2):

16 “Application for building or development permit. Applications for building or  
17 development permits will be processed based on regulations in effect on the  
18 date a complete application is filed with the City. *For the purposes of this*  
19 *section, a complete building or development permit application contains the*  
20 *information necessary for BDS to determine that the proposal conforms with*  
21 *all applicable use regulations and development standards.” (Emphasis*  
22 *added.)*

23 Petitioners contend PCC 33.700.080(A)(2) does not apply in this case, because the record  
24 includes information that was submitted on June 18, 2013, over a month after the PCC  
25 33.266.110 off-street parking requirement for apartment buildings with over 30 units took  
26 effect on May 10, 2013. Petitioners contend that information was “necessary for BDS to  
27 determine that the proposal conforms with all applicable use regulations and development  
28 standards,” so under the last sentence of PCC 33.700.080(A)(2) emphasized above, the  
29 building permit did not become complete until June 18, 2013.

1 PCC 33.700.080(B) appears immediately after PCC 22.700.080(A) and specifically  
2 addresses revisions to building permits:

3 **“Revisions to building or development permit applications. Revisions will**  
4 **be processed based on the regulations in effect when the original complete**  
5 **application was received if:**

6 “1. The use remains within the same use category as in the original  
7 application;

8 “2. The revision does not increase the total square footage of the proposed  
9 use;

10 “3. The original application has not expired; and

11 “4. The revised development meets all applicable development standards.”

12 Petitioners did not address the potential significance of PCC 33.700.080(B) in the  
13 petition for review. At oral argument, petitioners expressly stated that they were not  
14 disputing that the four criteria that must be met to take advantage of PCC 33.700.080(B) are  
15 satisfied here, if the documents submitted on June 18 are accurately viewed as a “revision” of  
16 the building permit application. Petitioners clarified that their position in this appeal is that  
17 there was not a “complete building permit \* \* \* application” in this case, within the meaning  
18 of PCC 33.700.080(A)(2), until all “the information necessary for BDS to determine that the  
19 proposal conforms with all applicable use regulations and development standards.”  
20 Petitioners contend that for purposes of the city fixed goal post rule at PCC 33.700.080(A)(2)  
21 the building permit application was not complete until June 18, 2013, when the documents  
22 that appear at Record 3-73 were submitted. We understand petitioners to contend that PCC  
23 33.700.080(B) simply does not apply to those documents, since they were documents needed  
24 for the building permit application to be a “complete building permit application” in the first  
25 place, not “revisions” to the building permit application.

26 The primary difficulty with petitioners’ argument is that it ignores the fact that the  
27 city in fact approved the building permit for the first time on March 22, 2013 and for a  
28 second time on May 3, 2013. On both of those dates, the city presumably determined it had

1 all the “information necessary for BDS to determine that the proposal conforms with all  
2 applicable use regulations and development standards,” because it approved the building  
3 permit on those dates. We agree with the city that the building permit application in this case  
4 was complete no later than March 22, 2013, when the city first approved the building permit.  
5 The documents that were submitted after that date that led to the third and final decision on  
6 the building permit application were both submitted as a “Permit Revision Application.”  
7 Record 5, 77. While the fact that the Application form that accompanied those revisions are  
8 labeled “Permit Revision Application” is not necessarily determinative, we believe it is an  
9 accurate description of what those documents were. To the extent it is possible to argue that  
10 the building permit application did not become complete until June 18, 2013,  
11 notwithstanding that it had been approved by the city twice before that date, we reject the  
12 argument.

13 The first assignment of error is denied.

14 **SECOND ASSIGNMENT OF ERROR**

15 The disputed proposal includes a dry well. The city has adopted a Stormwater  
16 Management Manual (SWMM). SWMM Section 2.3.3 provides:

17 “[A] drywell must be 10 feet on center from all foundations and 5 feet from  
18 property lines. The top of the drywell shall be located downgrade from  
19 foundations and at a lower elevation than local basements.”

20 Petitioners first argue “[a]s shown at R. 16 and 17 the drywell is placed less than 10 feet on  
21 center from the foundation of the proposed development and is partly in the 5-foot setback  
22 for the north-side property line.” Petition for Review 10.

23 The drywell is a stormwater management facility, and PCC 17.38.040(D)(1) requires  
24 an operation and maintenance plan for stormwater management facilities.<sup>1</sup> Petitioners also

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<sup>1</sup> PCC 17.38.040(D)(1) provides:

“All applicants for new development, redevelopment, plats, site plans, building permits or public works projects, as a condition of approval, shall be required to submit an operation and

1 argue: “The plan submitted by Intervenor (R. 263-66) shows a drainage system, including  
2 locations for the sedimentation and drywell facilities that appear not to match the approved  
3 plans at R. 16 and 17.” *Id.*

4 **A. The Drywell Setbacks**

5 Petitioners may have failed to appreciate that the ten-foot and five-foot setbacks  
6 required by SWMM Section 2.3.3 are measured on-center. And because the plans at Record  
7 16 and 17 are 8 ½” by 11” versions of much larger plans it is not possible to determine with  
8 any certainty from those plans whether the drywell violates those setbacks. However,  
9 respondents concede that the dry well is 9 feet from the foundation and 6 feet from the  
10 northern property line. And if the distances are measured on the full size plan C3.00, which  
11 was provided to LUBA at oral argument, that appears to be the case. In this location the plan  
12 shows the foundation is located 15 feet from the north property line, which provides exactly  
13 enough space to site the drywell if the center is located 10 feet from the foundation and 5 feet  
14 south of the north property line. Accordingly, the drywell needs to be moved one foot to the  
15 north to comply with SWMM Section 2.3.3. If we were not required to remand this decision  
16 for other reasons based on our resolution of the fourth assignment of error, we would be hard  
17 pressed to remand the decision based solely on such a minor error. However the city’s  
18 decision must be remanded for other reasons, and we therefore sustain this subassignment of  
19 error.

20 The city will need to require that the drywell be relocated to comply with the SWMM  
21 Section 2.3.3 foundation and property line setbacks.

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maintenance plan and the required plan cover sheet for the required stormwater management facilities for review and approval by the Director, unless otherwise exempted in the Stormwater Management Manual. \* \* \*

1           **B.     Failure of the Operation and Maintenance Plan to Match the Approved**  
2           **Utility Plan**

3           The Utility Plan that appears at Record 17 and the Operation and Maintenance Plan  
4 that appears at Record 266 both show the drywell and a sedimentation manhole as similarly  
5 sized circular facilities with diameters of approximately five feet, located in the northeast  
6 corner of the property. The Utility Plan at Record 17 shows the drywell located about 10 feet  
7 *east* of the sedimentation manhole, measuring center to center. The Operation and  
8 Maintenance Plan at Record 266 shows the drywell and sedimentation manhole in opposite  
9 locations, with the drywell located *west* of the sedimentation manhole. Petitioners’ entire  
10 argument is that the sedimentation manhole and drywell locations shown on the operation  
11 and maintenance plan “appears not to match the approved plans at R. 16 and 17.” What  
12 petitioners do not do is make any attempt to explain how what appears to be an inadvertent  
13 labeling error in the operation and maintenance plan is a basis for remand. Petitioners’  
14 argument concerning the difference between the two plans is not sufficiently developed for  
15 review, and this subassignment of error is denied for that reason. *Deschutes Development v.*  
16 *Deschutes Cty*, 5 Or LUBA 218, 220 (1982).

17           **C.     Respondents’ Arguments**

18           Respondents offer two arguments that they contend warrant denial of the second  
19 assignment of error. We address each separately below.

20                   **1.     PCC 17.38.040**

21           PCC 17.38.040 requires that building permits include a condition of approval that  
22 stormwater management facilities be installed in a manner that complies with the SWMM.<sup>2</sup>

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<sup>2</sup> PCC 17.38.040 provides, in part:

“No plat, site plan, building permit or public works project shall be approved unless the conditions of the plat, permit or plan approval requires installation of permanent stormwater management facilities designed according to standards or guidelines established by the Director and as specified in the Stormwater Management Manual.”

1 PCC 17.38.040(D)(1) similarly provides that building permits will include a condition of  
2 approval to require submittal of an operation and maintenance plan. Respondents contend  
3 that all PCC 17.38.040 requires is that a condition of approval be included in building  
4 permits, and respondents point out that petitioners do not claim the challenged building  
5 permit fails to include the conditions of approval required by PCC 17.38.040. However at  
6 oral argument respondents conceded the building permit does not include the conditions of  
7 approval required by PCC 17.38.040. For all we know, the applicant’s decision to submit the  
8 disputed plans for approval is the reason why that condition of approval was not included.  
9 And as we have already determined, one of the plans shows a drywell that intrudes slightly  
10 into the SWMM Section 2.3.3 setback. Respondents’ technical argument is not a basis for  
11 denying the second assignment of error.

12 **2. The SWMM is not a Land Use Regulation**

13 As defined by ORS 197.015(11) a “land use regulation” is an ordinance that  
14 establishes standards for implementing a comprehensive plan.<sup>3</sup> Relying primarily on *Angius*  
15 *v. Clean Water Services of Washington County*, 50 Or LUBA 154 (2005), respondents  
16 contend the SWMM is not a land use regulation and for that reason LUBA should “determine  
17 that it lacks jurisdiction over this assignment of error,” because the SWMM is not a land use  
18 regulation. Response Brief 10.

19 *Angius* is certainly not controlling here and is not even particularly relevant. The  
20 issue in *Angius* was whether LUBA had jurisdiction to hear the appeal. In dismissing the  
21 appeal in *Angius* we concluded that petitioner failed to establish that Washington County’s  
22 Clean Water Services District’s Design and Construction Standards qualified as land use

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<sup>3</sup> 197.015(11) provides:

“‘Land use regulation’ means any local government zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance establishing standards for implementing a comprehensive plan.”

1 regulations. The issue in *Angius* was whether LUBA had jurisdiction at all. The issue raised  
2 by respondents in this appeal is whether LUBA’s *scope of review* includes petitioners’  
3 allegations regarding the SWMM. Those are different questions.

4 Our jurisdiction to review the appealed land use decision is determined largely by the  
5 ORS 197.015(10) definition of land use decision. There is no dispute in this appeal that the  
6 challenged building permit is a land use decision, and under ORS 197.825(1) LUBA has  
7 jurisdiction to review the decision.<sup>4</sup> LUBA’s scope of review is set out at ORS 197.835 and  
8 ORS 197.835(9)(a)(D) expressly authorizes LUBA to reverse or remand a decision where the  
9 local government “[i]mproperly construed the applicable law.” Applicable law is not limited  
10 to land use regulations.

11 As respondents correctly note, the general issue of whether LUBA should consider  
12 some kinds of non-land use matters that are included in a land use decision that is appealed to  
13 LUBA, if they can be severed and left unresolved, is somewhat unsettled. *Friends of Linn*  
14 *County v. City of Lebanon*, 45 Or LUBA 408, 416 n 5 (2003). However as petitioners  
15 correctly point out, LUBA has considered challenges to the adequacy of a city’s findings to  
16 demonstrate a proposal complied with stormwater drainage standards. *Soares v. City of*  
17 *Corvallis*, 56 Or LUBA 551, 564-67 (2008). LUBA has even been presented with challenges  
18 under the SWMM. In *Von Clemm v. City of Portland*, \_\_\_ Or LUBA \_\_\_ (LUBA No. 2012-  
19 045/046, November 9, 2012), LUBA concluded that the SWMM standards did not apply to  
20 the environmental review decision that was before LUBA in that appeal, but in doing so  
21 LUBA accepted the city’s argument that the SWMM standards apply at the time of building  
22 permit review, rather than as part of environmental review. *Von Clemm*, slip op at 13. The

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<sup>4</sup> ORS 197.825(1) provides in part:

“[T]he Land Use Board of Appeals shall have exclusive jurisdiction to review any land use  
decision \* \* \* of a local government \* \* \* in the manner provided in ORS 197.830 to  
197.845.”

1 SWMM standards are “applicable law” in this appeal of the city’s building permit decision,  
2 over which we have jurisdiction. Under ORS 197.835(9)(a)(D), petitioners’ SWMM  
3 challenges are within our scope of review.

4 **D. Conclusion**

5 For the reasons explained in section A of our discussion of the second assignment of  
6 error, the second assignment of error is sustained in part.

7 **THIRD ASSIGNMENT OF ERROR**

8 In a Zoning Plan Examination Checksheet dated October 10, 2012, a planner for the  
9 city made the following request:

10 “The legal descriptions of the parcels that make up the site do not appear to  
11 conform to a platted subdivision or partition. Development [i]n the City of  
12 Portland is allowed on legally created lots and parcels, as well as “**Lots of**  
13 **Record,**” which are plots of land created by a recorded deed prior to July 26,  
14 1979. **Please provide a deed recorded prior to July 26, 1979 that**  
15 **describes each plot of land in this site as it exists today, so I can verify**  
16 **that the site was legally created.**” Record 339 (bold type in original).

17 In a Zoning Plan Examination Checksheet Response dated December 5, 2012, the city  
18 appears to take the position that a deed dated September 3, 1970 that was submitted by the  
19 applicant and appears at Record 282 satisfies the above request. Record 280.

20 From the above, petitioners engage in a number of speculations. We address  
21 petitioners’ speculations individually below.

22 **A. Development Cannot Straddle Lot Lines**

23 Petitioners first speculate that the deed at Record 280 does not describe the entire  
24 development site and that the development site is therefore made up of more than one lot.<sup>5</sup>

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<sup>5</sup> Petitioners also cite copies of two computer screen shots in the record that appear to show the property is made up of more than one tax lot. As defined by PCC 33.910 a lot “is a legally defined piece of land other than a tract that is the result of a land division” PCC 33.910 includes the following definition of “lot of record:”

“**Lot of Record.** A lot of record is a plot of land:

- “• Which was not created through an approved subdivision or partition;

1 Petitioners then speculate that the definition of “multi-dwelling structure” at PCC 33.910  
2 “excludes a structure that straddles a lot line.”<sup>6</sup> Petition for Review 12.

3 Petitioners’ argument is not sufficient to establish that the development site is made  
4 up of more than one lot. Even if petitioners had established that the development site is made  
5 up of more than one lot, the *definition* of “multi-dwelling structure” does not prohibit  
6 structures that straddle lot lines. If the city had intended to preclude approval of multi-  
7 dwelling structures that straddle lot lines, it would not have done so in a definition. The cited  
8 language in the definition of “multi-dwelling structure” is simply distinguishing multi-  
9 dwelling structures, where units need not be located on their own lot, from other types of  
10 residential structure types, such as “Attached House,” which is defined as “[a] dwelling unit,  
11 **located on its own lot**, that shares one or more common or abutting walls with one or more  
12 dwelling units. PCC 33.910 (bold lettering in original). The language in the PCC 33.910  
13 definition of “multi-dwelling structure” that petitioners rely on merely makes it clear that the  
14 units in a multi-dwelling structure need not be located on their own lot, as would be the case  
15 with some other dwelling types.

16 **B. PCC 21.12.070**

17 Petitioners next set out a portion PCC 21.12.070, and argue that PCC 21.12.070  
18 would require separate water service for each lot on the development cite.<sup>7</sup> Petitioners do not

- 
- “• Which was created and recorded before July 26, 1979; and
  - “• For which the deed, or other instrument dividing the land, is recorded with the appropriate county recorder.”

Tax lots are created by the assessor’s office and the fact that the subject property is made up of more than one tax lot, if that is a fact, does not necessarily mean the property is made up of more than one lot or lot of record.

<sup>6</sup> The PCC 33.910 definition of multi-dwelling structure is set out below:

“**Multi-Dwelling Structure.** A structure that contains three or more dwelling units that share common walls or floor/ceilings with one or more units. The land underneath the structure is not divided into separate lots. Multi-dwelling includes structures commonly called garden apartments, apartments, and condominiums.”

1 acknowledge the underlined language and rely exclusively on the italicized language. *See n*  
2 7. Respondents cite the underlined language, and argue “although this provision requires  
3 separate water service for each parcel of land, it provides that a parcel is ‘separate’ only when  
4 ‘partitioned by a different ownership, street, or public way.’” Joint Response Brief 16.

5 We reject petitioners’ PCC 21.12.070 argument for three reasons. First, although the  
6 code language the parties cite is not easy reading, respondent’s reading of the language  
7 petitioners rely on, in context with the underlined language, supports a conclusion that the  
8 italicized language does not have the preclusive effect petitioners argue. The property is not  
9 partitioned by a “different ownership, street, or public way,” and the record shows the entire  
10 property is in the same ownership. Second, even if the focus is exclusively on the italicized  
11 language of PCC 21.12.070, the prohibition against a single service connection being used to  
12 supply “a separate parcel of the same owner” only applies if “proper application for [such]  
13 service has not been made.” Petitioners neither acknowledge that language nor show that  
14 application for service of both lots has not been made. Finally, PCC 21.12.070 is, to put it  
15 charitably, a challenge to understand. The second sentence in the second paragraph of PCC  
16 21.12.070 that neither petitioners nor respondents cite expressly provides “A single service  
17 may be provided for multiple units under single ownership.” That sentence would seem to  
18 apply in the proposal on review. Given the complexity of the prohibitions in PCC 21.12.070,

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<sup>7</sup> PCC 21.12.070 provides, in part:

“Unless otherwise provided in this section, a separate service shall be required to supply water to each separate parcel of land and to each house or building under separate ownership upon the same parcel. A parcel is considered separate when partitioned by a different ownership, street, or public way.

“\* \* \* \* \*

*The service connection to a parcel of land shall not be used to supply an adjoining parcel of a different owner, or to supply a separate parcel of the same owner for which proper application for service has not been made. When property provided with a service is subdivided, the service connection shall be considered as supplying the parcel of land which it directly enters. See Section 21.12.010 ‘Service to Property Adjacent to Water Main’ for allowed location of water service.” (Underlining and italics added.)*

1 and the presence of exceptions to most of the PCC 21.12.070 prohibitions, petitioners have  
2 failed to demonstrate PCC 21.12.070 would preclude a single service for the disputed  
3 project.<sup>8</sup>

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<sup>8</sup> To dispel any doubt that it is exceedingly difficult to determine what PCC 21.12.070 permits and prohibits, we set out the complete text below:

“Unless otherwise provided in this section, a separate service shall be required to supply water to each separate parcel of land and to each house or building under separate ownership upon the same parcel. A parcel is considered separate when partitioned by a different ownership, street, or public way.

“Unless otherwise provided hereunder, a separate service shall be required for each house or building even if under one ownership and on the same lot or parcel of land. A single service may be provided for multiple units under single ownership. A single service may be approved by the Chief Engineer for multiple units which are individually owned when there is a contract with the Portland Water Bureau specifying who shall be responsible for all water bills and charges. Otherwise, multiple units which are individually owned must have a separate service to each unit.

“The Bureau may limit the number of houses or buildings or the area of land under one ownership to be supplied by one service connection or meter.

“Two or more houses or buildings under one ownership and on the same lot or parcel of land may be supplied through a single service meter, if approved by the Administrator or Chief Engineer. If the property on which the houses or buildings are located is divided by sale, a separate water service shall be obtained for each ownership prior to the sale.

“Notwithstanding terms to the contrary in this section, a property owner may request, and the Chief Engineer may authorize, continuation of water service, through existing lines, to the owners of property divided by sale, if the divided parcels will continue to share use of existing water lines and mains, as they did prior to the sale and which were in compliance with the provisions of Title 21 at the time of the sale. Authorization will not be granted if there is a change in size or location of any of the existing water services.

“In addition, the party requesting exemption from the standard requirement, described above, must provide the Administrator with a document that has been recorded, the purpose of which is to authorize all users of the common lines and mains to access those lines as necessary, for installation, maintenance and repair of the common system, said rights to run with the land.

“The service connection to a parcel of land shall not be used to supply an adjoining parcel of a different owner, or to supply a separate parcel of the same owner for which proper application for service has not been made. When property provided with a service is subdivided, the service connection shall be considered as supplying the parcel of land which it directly enters. See Section 21.12.010 ‘Service to Property Adjacent to Water Main’ for allowed location of water service.”

1           **C.     PCC 33.130**

2           Petitioners’ final argument under this assignment of error is that “[r]espondent would  
3 have to find compliance with the many development standards set forth in PCC Chap. 33.130  
4 for each lot individually.” That argument is not sufficiently developed to state a cognizable  
5 basis for remand. *Deschutes Development. v. Deschutes Cty.*

6           **FOURTH ASSIGNMENT OF ERROR**

7           Computing minimum setbacks in the CS zone is complicated, with rules, exceptions  
8 to rules and exceptions to the exceptions. “[M]inimum building setback standards apply to  
9 all buildings and structures \* \* \*.” PCC 33.130.215(B).<sup>9</sup> However, minimum building  
10 setbacks generally do not apply in the CS zone. PCC 33.130.215(B)(1). One exception to  
11 that general rule is that building setbacks do apply to properties in CS zones that abut  
12 residentially zoned property. PCC 33.130.215(B)(2)(a).<sup>10</sup> The proposed building is to be 45  
13 feet tall, and with some exceptions, the minimum building setback from the adjoining  
14 residentially zoned property to the north is eleven feet. PCC Table 130-4. Certain building  
15 features are allowed to extend into the required eleven-foot setback from the adjoining  
16 residential zone to the north. PCC 33.130.215(B)(3). We set out the relevant text of PCC  
17 33.130.215(B)(3) later in this opinion. Petitioners contend that several features of the

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<sup>9</sup> PCC 33.910 includes the following definitions:

“**Building.** A structure that has a roof and is enclosed on at least 50 percent of the area of its sides.”

“**Structure.** Any object constructed in or on the ground. Structure includes buildings, decks, fences, towers, flag poles, signs, and other similar objects. Structure does not include paved areas or vegetative landscaping materials.”

<sup>10</sup> PCC 33.130.215(B)(2)(a) provides, in part:

“Lot line abutting [residentially] zoned lot[s], except RX. The required minimum building setbacks along a lot line abutting a [residentially] zoned lot, except RX, are stated in Table 130-4.”

Table 130-4 requires an eleven-foot setback for buildings between 31 and 45 feet tall.

1 proposed development intrude into the eleven-foot setback or violate certain exceptions to  
2 that eleven-foot setback. We address those features separately below.

3 **A. Built-in Gas Barbeque**

4 The proposal includes a large built-in gas barbeque that is located five feet from the  
5 north property line, or six feet within the required eleven-foot setback. Record 18; Oversize  
6 Plan L1.01. The plans for the barbeque show that the grill is to be housed in a five-foot by  
7 three-foot concrete base that would be over three feet tall and include a granite countertop.  
8 Record 143; Oversized Plan L4.01. Petitioners contend the gas barbeque qualifies as a  
9 “structure.” See n 9. Petitioners contend it was error for the city to approve the gas barbeque  
10 structure within the eleven-foot setback.

11 Respondents contend that the eleven-foot setback does not apply to the gas barbeque.  
12 Respondents argue the examples given in the definition of “structure” (“buildings, decks,  
13 fences, towers, flag poles, signs, and other similar objects”) all serve “a structural, decorative,  
14 or identification purpose” and are part and parcel of the fundamental infrastructure of a  
15 development. Joint Response Brief 18. Respondents contend the gas barbecue does not  
16 serve any of those purposes and should be viewed as “a patio implement similar to the nearby  
17 table and chair shown on the plan.” *Id.*

18 Respondents also point to the purpose of the eleven-foot setback from the adjoining  
19 residential zone:

20 “\* \* \*The setback requirements for areas that abut residential zones promote  
21 commercial development that will maintain light, air, and the potential for  
22 privacy for adjacent residential zones. \* \* \*” PCC 33.130.215(A).

23 Since the purpose of the eleven-foot setback is to protect residential areas from the impacts of  
24 commercial development, respondents argue, that purpose is not furthered here because the  
25 gas barbeque is part of the residential development, not part of the commercial portion of the  
26 building along Fremont Street. To emphasize this final point, respondents contend PCC

1 33.130.215(B)(4) “applies an entirely different set of setbacks if the use is entirely residential  
2 in nature.” Joint Response Brief 18.

3 Turning first to respondents’ contentions based on the purpose of the eleven-foot  
4 setback, we agree that given the applicable text in the purpose statement, it would be  
5 consistent with that text for the city to exempt buildings that are entirely residential or  
6 exempt the residential portion of mixed residential/commercial uses such as the proposed use  
7 from the setback requirement. However, PCC 33.130.215 simply does not do so.  
8 Respondents appear to be correct that PCC 33.130.215(B)(4) applies different setbacks to  
9 “accessory structures,” if the CS zoned property is “entirely in residential use.” PCC  
10 33.130.215(B)(4) actually undercuts respondents “purpose of the set back” argument, since  
11 the city easily could have extended the different setbacks for accessory structures on sites that  
12 are developed entirely residentially, to accessory structures on sites that are in mixed  
13 commercial/residential use, but did not.

14 Turning to respondents’ contentions based on the definition of “structure,” *see* n 9, we  
15 agree that the barbeque grill serves a somewhat different purpose than the listed examples.  
16 But that list does not purport to be exclusive or limiting in any way; and the first part of the  
17 definition, “[a]ny object constructed in or on the ground,” is clearly broad enough to  
18 encompass the nearly four-foot high, five-foot wide concrete, granite and mechanical  
19 structure proposed here. We would almost certainly agree with respondents that the gas  
20 barbeque is more like the adjoining tables and chairs if the gas barbeque were a smaller,  
21 mobile gas barbeque on wheels. But there is simply no way we can conclude the proposed  
22 concrete, granite and mechanical structure is anything other than a “structure,” as PCC  
23 33.910 defines that term.

24 This subassignment of error is sustained.

1           **B. Synthetic Turf**

2           The proposal includes a synthetic turf area, approximately 14 feet by 9 feet, located in  
3 the northeast corner of the property. That synthetic turf area is partially within the eleven-  
4 foot setback from the residentially zoned property to the north. Petitioners contend that  
5 synthetic turf is also a “structure,” as PCC 33.910 defines that term, and therefore the  
6 synthetic turf violates the setback.

7           The first sentence of the definition of structure, “[a]ny object constructed in or on the  
8 ground,” is potentially broad enough to include the synthetic turf that will be installed over a  
9 compacted subgrade and 8 1/2 inches of base aggregate. Record 143; Oversize Plan L4.01.  
10 But we decline to read that sentence so broadly. We agree with respondents that the synthetic  
11 turf is very similar to “paved areas [and] vegetative landscaping materials,” which are  
12 expressly exempted from the definition of “structure.” *See* n 9.

13           **C. Trellis, Wheelchair Ramp and Balconies**

14           As noted earlier, the PCC 33.130.215(B)(2)(a) eleven-foot setback requirement is an  
15 exception to the PCC 33.130.215(B)(1) general rule that setbacks generally do not apply in  
16 the CS zone. PCC 33.130.215(B)(3) provides a partial exception to that exception to allow  
17 certain features to extend as much as 2.2 feet (20% of eleven feet) into the eleven-foot  
18 setback.<sup>11</sup>

19           A single wheelchair ramp is proposed at the rear entrance of the building, between the  
20 building and the residential property to the north. Record 22; Oversize Plan A1.10. There is

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<sup>11</sup> PCC 33.130.215(B)(3) provides, in part:

“Minor projections of features attached to buildings.

“a. Minor projections allowed. Minor features of a building, such as eaves, chimneys, fire escapes, water collection cisterns and planters, bay windows, uncovered stairways, wheelchair ramps, and uncovered decks or balconies, may extend into a required building setback up to 20 percent of the depth of the setback. However, they may not be within 3 feet of a lot line.”

1 also a trellis in the vicinity of and partially covering the wheelchair ramp. *Id.*; Record 147;  
2 Oversize Plan A1.50. Petitioners contend these features extend into the eleven-foot setback  
3 more than the 2.2 feet authorized by PCC 33.130.215(B)(3)(a). Finally, petitioners contend  
4 the balconies proposed on the north side of the building extend into the eleven-foot setback  
5 more than 2.2 feet, in violation of the first sentence of PCC 33.130.215(B)(3)(a), or extend  
6 within three feet of the east and west lot lines, in violation of the last sentence of PCC  
7 33.130.215(B)(3)(a). *See* n 11.

8 Turning first to the trellis and wheelchair ramp, the drawing that most clearly shows  
9 the relationship of those features with the north property line is at Record 22; Oversize Plan  
10 A1.10. The full sized plan is drawn at a scale of 1/8" = 1 foot. On the plan the wheelchair  
11 ramp is located either 1 1/4 inches or 1 5/8 inches from the rear property line, depending on  
12 the northernmost reach of the wheelchair ramp, which is not clear. If the former, it extends  
13 into the eleven-foot setback by one-foot, which is authorized by PCC 33.130.215(B)(3)(a). If  
14 it is the latter, the wheelchair ramp does not extend into the eleven-foot setback at all. We  
15 reject petitioners' arguments concerning the wheelchair ramp.<sup>12</sup> On the plan, at its closest  
16 point, the trellis is either one inch or 1 1/8 inch from the rear property line. If it is the former,  
17 the trellis intrudes into the eleven-foot setback by three feet, which is 8/10 of a foot more  
18 than is authorized by PCC 33.130.215(B)(3)(a). If it is the latter, the trellis extends into the  
19 eleven-foot setback by two feet, which is authorized by PCC 33.130.215(B)(3)(a).

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<sup>12</sup> In their brief, respondents argue the wheelchair ramp is allowed to extend fully into the eleven-foot setback by PCC 33.130.215(B)(3)(b)(3), which provides another exception to the eleven-foot setback requirement. PCC 33.130.215(B)(3)(b)(3) allows "[u]ncovered decks and stairways that are no more than 2-1/2 feet above the ground [to] fully extend into a required building setback[.]" Respondents contend the wheelchair ramp is similar to decks and stairways and should be treated the same. But the section that precedes PCC 33.130.215(B)(3)(b)(3), PCC 33.130.215(B)(3)(b)(2), specifically addresses wheelchair ramps and demonstrates that the city does not view uncovered decks and stairways and wheelchair ramps as the same thing. While we therefore reject the argument respondents make in their brief under PCC 33.130.215(B)(3)(b)(3), we have just concluded that the wheelchair ramp in fact complies with the eleven-foot setback.

1           Since this decision must be remanded in any event, we will sustain this subassignment  
2 of error, in part. On remand the city will need to determine whether the trellis extends into  
3 the eleven-foot setback more than 2.2 feet and, if it does, require that the proposal be  
4 modified or impose a condition that requires the trellis to be modified to extend no farther  
5 than 2.2 feet into the setback.

6           Turning to the balconies, there is a jog in the northern property line so that the  
7 western two thirds of the proposed building is located 20 feet from the rear property line and  
8 the eastern one third is located 15 feet from the rear property line. The balconies extend  
9 north toward the north property line less than five feet. Record 43; Oversized Plan A11.30.  
10 Therefore the balconies extending north from the western two-thirds of the building comply  
11 with the eleven-foot setback and some of the balconies on the east side of the building extend  
12 north less than one foot into the eleven-foot setback, which is permitted by PCC  
13 33.130.215(B)(3)(a).

14           Finally, petitioners challenge the balconies located on the second, third and fourth  
15 floors at the northeast, northwest, southwest and southeast corners of the building, a total of  
16 12 balconies. Those balconies extend north or south; there are no balconies on the east and  
17 west sides of the building. Petitioners contend all of those balconies are closer than three feet  
18 from the building's east and west property lines.

19           The PCC 33.130.215(B)(2)(a) eleven-foot setback, *see* n 10, and the PCC  
20 33.130.215(B)(3) exception to that eleven-foot setback, *see* n 11, only apply where the  
21 property's lot line abuts residentially zoned property. The east and west property lines do not  
22 abut residentially zoned property. Therefore the eleven-foot setback does not apply to the  
23 east and west property lines, and the conditional exemption for that eleven-foot setback at  
24 PCC 33.130.215(B)(3), including the condition that extensions not be closer than three feet  
25 from a lot line with an adjoining residentially zoned property do not apply.

26           This subassignment of error is sustained in part.

1 The fourth assignment of error is sustained in part.

2 **CONCLUSION**

3 Citing our decision in *Richmond Neighbors v. City of Portland*, \_\_\_ Or LUBA \_\_\_  
4 (LUBA No. 2012-061, February 20, 2013), petitioners argue the city’s decision should be  
5 reversed rather than remanded. OAR 661-010-0071.<sup>13</sup> In *Richmond Neighbors* we  
6 concluded that complying with the underlying land use regulation was likely to require “more  
7 than insignificant changes to the existing application.” *Slip op* at 17. We also noted that no  
8 party opposed the petitioner’s request that the decision be reversed in the event the  
9 assignments of error were sustained.<sup>14</sup> Neither of those factors is present here. The changes

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<sup>13</sup> OAR 661-010-0071 provides:

“(1) The Board shall reverse a land use decision when:

- “(a) The governing body exceeded its jurisdiction;
- “(b) The decision is unconstitutional; or
- “(c) The decision violates a provision of applicable law and is prohibited as a matter of law.

“(2) The Board shall remand a land use decision for further proceedings when:

- “(a) The findings are insufficient to support the decision, except as provided in ORS 197.835(11)(b);
- “(b) The decision is not supported by substantial evidence in the whole record;
- “(c) The decision is flawed by procedural errors that prejudice the substantial rights of the petitioner(s); or
- “(d) The decision improperly construes the applicable law, but is not prohibited as a matter of law.”

<sup>14</sup> We explained:

“As noted, respondents do not address whether remand or reversal is the appropriate remedy, if the first assignment of error is sustained. It might be possible that compliance with the PCC 33.460.310(A) main entrance requirement could be demonstrated on remand, without significant changes to the proposed development. However, as far as we can tell, it is more likely that compliance with the PCC 33.460.310(A) main entrance requirement will require, at a minimum, more than insignificant changes to the existing application, if not a new

1 that will be required on remand are trivial, and respondents oppose the request for reversal.  
2 In each case the needed changes are the kinds of minor changes that are routinely made via  
3 modifications of a submitted application or via conditions of approval. Reversal is not  
4 appropriate in these circumstances.

5 On remand the city will need to require that the drywell be relocated one foot north to  
6 comply with the required setbacks. The city will also need to require that the gas barbeque be  
7 relocated to comply with the applicable setback, or eliminated altogether. Finally, the city  
8 may need to require that the trellis be modified slightly, depending on whether the trellis is  
9 located .8 feet too far into the applicable setback.

10 The city's decision is remanded.

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application. Absent some assistance from respondents on this point, we agree with petitioners  
that reversal is the appropriate disposition.” *Richmond Neighbors*, slip op at 17.