

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

05/07/18 PM 1:04 LUBA

3
4 HARISH PATEL,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF PORTLAND,
10 *Respondent,*

11
12 and

13
14 LEE-WAY DEVELOPMENT
15 COMPANY, LLC, TIMOTHY LEE
16 and PETER FINLEY FRY, AICP,
17 *Intervenors-Respondents.*

18
19 LUBA No. 2017-111

20
21 ROBERT QUILLIN
22 and VANESSA MORGAN,
23 *Petitioners,*

24
25 vs.

26
27 CITY OF PORTLAND,
28 *Respondent.*

29
30 and

31
32 LEE-WAY DEVELOPMENT
33 COMPANY, LLC, TIMOTHY LEE
34 and PETER FINLEY FRY, AICP,
35 *Intervenors-Respondents.*

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37 LUBA No. 2017-112
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1
2
3 FINAL OPINION
4 AND ORDER
5

6 Appeal from City of Portland.
7

8 Harish Patel, Portland, filed a petition for review and argued on his own
9 behalf.
10

11 Sarah Stauffer Curtiss, Portland, filed a petition for review and argued on
12 behalf of petitioners Robert Quillan and Vanessa Morgan. With her on the brief
13 was Stoel Rives LLP.
14

15 Linly F. Rees, Chief Deputy City Attorney, Portland, filed a response
16 brief and argued on behalf of respondent.
17

18 Dean N. Alterman, Portland, filed a response brief and argued on behalf
19 of intervenors-respondents. With him on the brief was Alterman Law Group
20 PC.
21

22 HOLSTUN Board Member; RYAN, Board Chair; BASSHAM, Board
23 Member, participated in the decision.
24

25 AFFIRMED 05/07/2018
26

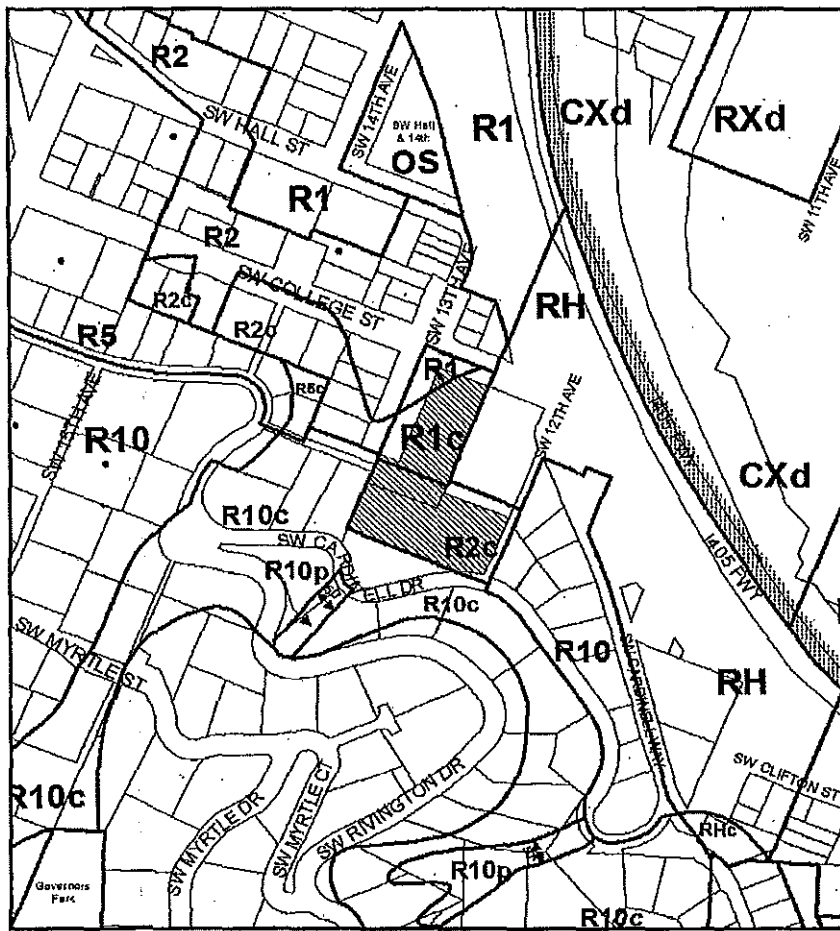
27 You are entitled to judicial review of this Order. Judicial review is
28 governed by the provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a city land use hearings officer's decision that grants environmental review and environmental modification review for a 36-unit multi-family structure.

FACTS

A map from the record showing the site and its zoning is included below.



ZONING



-  Site
-  Historic Landmark

File No.	LU 17-102096 ENM
1/4 Section	3228
Scale	1 inch = 200 feet
State Id	1S1E04DB 5600
Exhibit	B (Jan 12, 2017)

1 The subject approximately 1.4-acre property is located on the north side
2 of SW Cardinell Drive in the hills overlooking the City of Portland central
3 business district. The property is split-zoned R1 and R2.¹ The R2 zone has a
4 minimum front building setback of 10 feet and imposes a maximum building
5 height limit of 40 feet. PCC 33.120; Table 110-3; 120-3. The “c” designation
6 on the above map indicates the property is in the city’s Environmental
7 Conservation Zone, which in this case required environmental review. As
8 explained in more detail below, through environmental review, the city
9 approved a modification of the minimum front building setback from 10 feet to
10 zero feet and a modification of the 40-foot maximum building height limit to
11 75 feet. These modifications permitted construction of the proposed 36-unit
12 multi-family dwelling on a 16,549 square foot footprint located entirely on the
13 R2-zoned portion of the property while the R1-zoned portion of the property
14 would remain undeveloped.

15 A decision approving the disputed modifications was originally issued
16 by the city’s bureau of development services (BDS). That decision was
17 appealed to the city hearings officer and the hearings officer’s decision was
18 appealed to LUBA. On December 6, 2017 the city withdrew the original
19 hearings officer’s decision for reconsideration. That decision on

¹ “The R1 zone is a medium density multi-dwelling zone [that] allows approximately 43 units per acre.” Portland City Code (PCC) 33.120.030.C. “The R2 zone is a low density multi-dwelling zone [that] allows approximately 21.8 dwelling units per acre.” PCC 33.120.030.B.

1 reconsideration, dated January 5, 2018, is the decision that is before us in this
2 appeal. The city council approved a substantially identical development
3 proposal in 2006, for which some site preparation began in 2008. However,
4 that earlier approval had been abandoned and has now been replaced with the
5 approval that is before us in this appeal.

6 **(PATEL) FIRST ASSIGNMENT OF ERROR**

7 Petitioner Patel’s argument under his single assignment of error is
8 approximately half a page long. It does not identify or develop any argument
9 that goes beyond the arguments raised in the other petitioners’ four
10 assignments of error. We therefore do not separately address petitioner Patel’s
11 petition for review further because it provides no cognizable basis for reversal
12 or remand.

13 **(QUILLIN/MORGAN) FIRST AND SECOND ASSIGNMENTS OF**
14 **ERROR**

15 Petitioners Quillin and Morgan (hereafter petitioners) argue the hearings
16 officer improperly interpreted PCC 33.430.280 to allow him to grant
17 *modifications* of the R2-zone maximum building height and minimum front
18 setback requirements through environmental review. Petitioners argue that the
19 hearings officer instead should have required *adjustments* to those base zoning
20 requirements under PCC 33.805.² The different “modification” and

² Both environmental review “modifications” and “adjustments” under PCC 33.805 are city variations on the more traditional zoning “variance,” all of

1 “adjustment” procedures for allowing developments that do not comply with
2 one or more zoning standards is material, petitioners argue, because in
3 residential zones the adjustment standards require a demonstration that “the
4 proposal will not significantly detract from the livability or appearance of the
5 residential area[.]” PCC 33.805.040(B). The modification standards do not
6 impose that requirement.

7 PCC 33.430.280 authorizes modification of “lot dimension standards or
8 site-related development standards” through environmental review, but PCC
9 33.430.280 requires that “use-related development standards” be adjusted
10 through the PCC 33.805 adjustment process.³ Petitioners contend the hearings

which allow development that does not comply with one or more zoning standards, in certain specified circumstances.

³ The complete text of PCC 33.430.280 is set out below:

“PCC 33.430.280 Modifications Which Will Better Meet Environmental Review Requirements

The review body may consider modifications for lot dimension standards or site-related development standards as part of the environmental review process. These modifications are done as part of the environmental review process and are not required to go through the adjustment process. Adjustments to use-related development standards (such as floor-area ratios, intensity of use, size of the use, number of units, or concentration of uses) are subject to the adjustment process of Chapter 33.805. In order to approve these modifications, the review body must find that the development will result in greater protection of the resources and functional values identified on the site and will, on balance, be consistent with the purpose of the applicable regulations. For modifications to lot dimension standards, the review body must

1 officer's conclusion that the height and setback standards qualify as "site-
2 related development standards" (1) is incorrect, (2) is not supported by
3 adequate interpretive findings, and (3) fails to respond to interpretive issues
4 they raised to the hearings officer below.

5 PCC 33.430.280 is ambiguous. The terms "site-related development
6 standards" and "use-related development standards" are not defined in the
7 PCC. And it is certainly not obvious to us whether a 10-foot minimum front
8 setback requirement or a 40-foot height limit is accurately characterized as a
9 "site-related development standard[]" rather than a "use-related development
10 standard[]." The use-related development standards parenthetical in PCC
11 33.430.280 "(such as floor-area ratios, intensity of use, size of the use, number
12 of units, or concentration of uses)" lends some support for opposite
13 conclusions. Height limits and setback requirements could have been included
14 in the parenthetical but were not. Their omission from the examples in the
15 parenthetical lends some support to the hearings officer's conclusion that they
16 are site-related development standards rather than use-related development
17 standards. But on its face, it certainly seems possible to characterize a
18 maximum height standard as a "size of the use" standard, which is one of the
19 examples of use-related development standards. The lack of a corresponding
20 parenthetical list of examples for "site-related development standards" in PCC

also find that the development will not significantly detract from
the livability or appearance of the area."

1 33.430.280 and the decision to include “size of the use” and “concentration of
2 uses” in the parenthetical list of examples of use-related development standards
3 is at the heart of the interpretive issues presented in the first two assignments of
4 error. That is because one of the primary purposes of environmental zones and
5 environmental review is to avoid developing environmentally sensitive
6 portions of a site in favor of less environmental sensitive portions of the site,
7 which will frequently mean concentrating development away from the
8 environmentally sensitive areas.

9 **A. The Hearings Officer’s Interpretation**

10 Approximately one-third of the site along SW Cardinell Drive was
11 cleared and there was grading and filling activity in 2008 associated with a
12 similar development proposal that was approved in 2006. That 2006 approval
13 apparently has expired. The other approximately two-thirds of the site retains
14 its original topography and is covered with native tree canopy. The proposed
15 36 units would be developed on the already-degraded one-third of the property,
16 entirely on the R2 zoned portion of the property. The hearings officer notes the
17 modification of the minimum front yard setback allows the development to be
18 located further away from the environmentally sensitive portion of the property
19 that is to be preserved.

20 The R1 and R2 zoning that applies to the property would permit
21 development of up to 40 residential units. Record 7. The proposed 36 units are
22 therefore four fewer residential units than permitted under existing zoning.

1 The hearings officer first points out that intervenors are therefore not relying on
2 either of the modifications to increase the number of dwelling units and the
3 hearings officer speculates that if intervenors were proposing a modification to
4 increase the permissible number of units under existing zoning that likely
5 would be viewed as modification of a use-related development standard, which
6 could only be achieved through an adjustment. Record 14. While one of the
7 examples of use-related development standards is “concentration of uses,” in
8 this case the hearings officer points out the proposed 36 units are to be
9 concentrated on the R2-zoned portion of the site through a density transfer,
10 which is authorized by PCC 33.120.205.G, not by the disputed modifications of
11 the maximum height standard or the minimum setback standard.⁴

12 But as petitioners point out, the hearings officer’s point that the
13 concentration of the permitted dwelling units on the R2-zoned portion of the
14 site is attributable to a PCC 33.120.205.G density transfer, and not to the

⁴ PCC 33.120.205.G authorizes transfer of density “from one site to another[.]” In a footnote, petitioners take the position that because the property is in a single ownership it is a single site. Petition for Review 6 n 2. That undeveloped footnote is not sufficient to challenge the hearings officer’s reliance on PCC 33.120.205.G density transfer authorization as the legal authority for concentrating all 36 of the permitted multi-family dwelling units on the R2 zoned portion of the property. We limit our consideration to the arguments that petitioners make and develop under the first two assignments of error—that because the maximum building height and minimum front setback standards had to be modified to accommodate the permitted number of residential units on the R2 zoned portion of the property the maximum building height and minimum front setback standards necessarily are use-related development standards.

1 disputed modifications, is not entirely accurate. While intervenors propose to
2 utilize the density transfer authorized by PCC 33.120.205.G to transfer and
3 concentrate the density that is permitted by the underlying zones on
4 approximately one-third of the property that is zoned R2, that apparently would
5 not be possible without the disputed height variance to construct a building that
6 is 75 feet tall, which is 35 feet taller than the 40-foot maximum building height
7 in the R2 zone. And the modified minimum front yard setback similarly might
8 be necessary to allow construction of the building on the R2-zoned portion of
9 the site. The relevant question is not really addressed and answered by the
10 hearings officer's decision. That question is: must the maximum building
11 height standard and minimum front yard setback standards be viewed as use-
12 related development standards, simply because modification of those standards
13 is necessary to allow intervenors to transfer density via PCC 33.120.205.G to
14 the R2-zoned portion of the site and build a multi-family building on the
15 desired footprint that is tall enough to produce the desired 36 units?

16 Although we might simply stop at this point and remand for the hearings
17 officer to do a better job of answering that question, PCC 33.430.280 has a
18 long history in the way it has been applied and amended that we conclude
19 makes such a remand a pointless exercise. As we point out below, the city
20 hearings officer and city council have consistently interpreted height and
21 setback standards to be site-related development standards and the legislative

1 history of PCC 33.430.280 suggests height and setback standards are correctly
2 viewed as site-related development standards.

3 **B. The BDS Decision**

4 The hearings officer's decision also adopts the original BDS decision to
5 bolster his findings. Record 27. That decision sets out the text of PCC
6 33.430.280, acknowledges petitioners' attorney's argument that the building
7 height and setback requirements are use-related rather than site-related
8 standards and then finds that in prior decisions the city has concluded
9 otherwise:

10 "The City hearings officer has held that modification of building
11 height is a site-related development standard, not a use-related
12 development standard, and can be modified through design review
13 without an adjustment. The hearings officer has also held, and
14 LUBA has affirmed, that the setback requirement is a site-related
15 development standard, not a use-related development standard,
16 and can be modified through environmental review, without
17 requiring an adjustment. The [BDS] can grant [the applicant's]
18 request to modify the building height and setback requirements
19 through this environmental review and does not need to process
20 his requests as an adjustment." Record 128 (footnotes omitted).

21 In the first of the omitted footnotes, BDS cites a 2010 hearings officer
22 decision that "held that a request to increase the maximum height of a proposed
23 residential development project by 5 feet above the district limit is a site-related
24 development standard." *Id.* In the second of the omitted footnotes, BDS cites a
25 2012 LUBA decision that affirmed a city hearings officer's "determination that
26 a request to reduce the setback for property within an environmental overlay is

1 a request to modify a site-related development standard, and is thus a
2 modification under PCC 33.430.280 and does not require an adjustment.” *Id.*

3 **C. The City Council’s Interpretation of Site-Related Development**
4 **Standards**

5 Beyond the city hearings officer’s interpretations of PCC 33.430.280 to
6 permit modification of height limits and setbacks, the city council has also
7 interpreted PCC 33.430.280 in that way. In *Brown v. City of Portland*, 33 Or
8 LUBA 700 (1997), LUBA affirmed a city council decision that interpreted PCC
9 33.825.070 to permit height and setback standards to be modified in design
10 review without requiring approval of an adjustment. PCC 33.825.070 (1996)
11 governing modifications in design review was substantively identical to PCC
12 33.430.280 governing modifications in environmental review, and like PCC
13 33.430.280, granted the city’s design review board authority to grant
14 modifications of *site-related development standards* in design review.⁵ Citing
15 its decision in *Brown*, the city council in approving the previously mentioned
16 nearly identical development proposal for the subject property in 2006 relied

⁵ PCC 33.825.070 (1996) provided:

“The review body may consider modification of site-related development standards as part of the design review process. These modifications are done as part of design review and are not required to go through the adjustment process. Adjustments to use-related development standards (such as floor area ratios, intensity of use, size of the use, number of units, or concentration of uses) are required to go through the adjustment process. * * *”
Respondent’s Brief, App 2, at 8.

1 on *Brown* to conclude that the similar code authorization for modification of
2 base zone standards in environmental review authorizes modification of height
3 and setback requirements as site-related development standards, without
4 requiring an approval of an adjustment. Record 314.

5 The decision that is before us in this appeal is the hearings officer's 2018
6 decision, not the city council's 2006 decision. And the hearings officer's 2018
7 decision is not subject to the same deferential standard of review that the city
8 council's 2006 decision would be entitled to under ORS 197.829(1) if it was
9 the decision before us for review. Nevertheless, the hearings officer was
10 presumably aware that prior hearings officers and the city council had
11 interpreted the term "site-related development standards" in PCC 33.430.280 to
12 include height and setback standards. As we have already explained, the term
13 "site-related development standards" is ambiguous, which means it is
14 susceptible to more than one reasonable interpretation. Given the ambiguity
15 present in that term, that prior city hearings officers and the city council have
16 interpreted the term to include height and setback standards is some support for
17 the hearings officer to interpret the term in the same way, if for no other reason
18 than to be consistent. *See Gould v. Deschutes County*, 67 Or LUBA 1, 7
19 (2013) (where different interpretations are equally plausible, and context
20 supports a hearings officer choice of interpretation, LUBA will defer to the
21 hearings officer's interpretation).

1 **D. Context and Statutory History**

2 **1. Context**

3 The city argues in its brief that the purpose statements for the
4 environmental zones and for environmental review provide contextual support
5 for interpreting PCC 33.430.280 to authorize modification of height and
6 setback standards to allow development to be shifted away from more sensitive
7 resource areas that may be located on the property.⁶ The city offers the

⁶ PCC 33.430.010 provides:

“Environmental zones protect resources and functional values that have been identified by the City as providing benefits to the public. The environmental regulations encourage flexibility and innovation in site planning and provide for development that is carefully designed to be sensitive to the site's protected resources. These regulations also help meet other City goals, along with other regional, state, and federal goals and regulations. The environmental regulations also carry out Comprehensive Plan policies and objectives.”

PCC 33.430.210 provides, in part:

“Environmental review is intended to:

- “A. Prevent harm to identified resources and functional values, compensate for unavoidable harm, and ensure the success of mitigation and enhancement activities;
- “B. Provide a mechanism to modify the development standards of this Chapter if the proposed development can meet the purpose of these regulations;
- “C. Provide flexibility for unusual situations. The review provides for consideration of alternative designs for

1 following explanation for how site-related development standards and use-
2 related development standards should be distinguished from each other,
3 consistent with those purposes:

4 “In other words, ‘site related’ includes development standards that
5 affect how much of the site is available for resource protection in
6 the environmental zone, consistent with the purpose of minimizing
7 impact on protected resources. To highlight that purpose, the
8 Hearings Officer discussed how the height and setback
9 modifications allow the development to be pulled away from the
10 portion of the site with the most valuable resources.

11 “By contrast, intensity and concentration of *use* is meant to capture
12 development standards that permit more of a *use* on a site, not a
13 standard that changes the dimensions of the development.
14 Modifications may allow an applicant to change the focus of a
15 development on a site, but an adjustment is required to allow the
16 applicant to change use *entitlements*. As noted by the Hearings
17 Officer, a proposal to include more units on the site would require
18 an adjustment. Rec. 14. Similarly, and by way of example, a
19 request to increase the number of parking spaces allowed, a
20 development standard set forth in PCC 33.266, would intensify or
21 concentrate the use.

22 “Requests to change the nature or overall quantity of a use are use-
23 related. Height increases, setback decreases, decreases in the size
24 of parking spaces, decreases in landscaping widths or any number
25 of development standards that affect site layout or development
26 dimensions are site-related development standards. Any other
27 interpretation would be inconsistent with the purposes of allowing
28 modifications through environmental review.” Respondent’s Brief
29 16-17 (emphasis added).

development that have the least impact on protected
resources in the environmental conservation zone and more
exacting control over development in the environmental
protection zone[.]”

1 We are not sure the above use of the increasingly ubiquitous term
2 “entitlements” to distinguish between site-related development standards and
3 use-related development standards based on whether the quantum of
4 entitlement is increased is an entirely satisfactory way to distinguish those
5 inherently ambiguous concepts. But be that as it may, we agree with the city
6 that interpreting site-related development standards to include height and
7 setback standards is generally consistent with the purposes of environmental
8 zones and review, which provides contextual support for the city’s
9 interpretation.

10 2. Legislative History

11 Before 1995, PCC 33.430.350 authorized modification of only height
12 and setback standards. So not only could height and setback standards be
13 modified, they were the only standards that could be modified. Respondent’s
14 Brief, App 4 at 8. Ordinance 168698, adopted in 1995, recodified the
15 environmental review modification authority at PCC 33.430.280, and adopted
16 the amended language that now appears at PCC 33.430.280:

17 **“33.430.350 280 Modifications Which Will Better Meet** 18 **Environmental Review Requirements**

19 ~~“Building heights maybe increased and building setbacks may be~~
20 ~~decreased through environmental review. These modifications~~
21 ~~cannot be approved unless they are necessary to avoid or minimize~~
22 ~~significant detrimental environmental impacts. Modifications~~
23 ~~approved through environmental review do not require~~
24 ~~adjustments.~~

1 “The review body may consider modifications for site-related base
2 zone development standards as part of the environmental review
3 process. These modifications are done as part of the environmental
4 review process and are not required to go through the adjustment
5 process. Adjustments to use-related development standards (such
6 as floor-area ratios, intensity of use, size of the use, number of
7 units, or concentration of uses) are subject to the adjustment
8 process of Chapter 33.805. In order to approve these
9 modifications, the review body must find that the development
10 will result in greater protection of the resources and functional
11 values identified on the site and will, on balance, be consistent
12 with the purpose of the applicable regulations.” Respondent’s
13 Brief, App 5 at 24.⁷

14 The commentary for Ordinance 168698, which was adopted by the city
15 council when it adopted Ordinance 168698, addressed the above amendment:

16 “The language has been changed to make the intent and process
17 more clear. An approval criterion has been added to allow for
18 modifications.” Respondent’s Brief, App 5 at 25.

19 The city asks that we take official notice of the above ordinance language and
20 commentary. Petitioners do not object, and we take official notice of the
21 ordinance and commentary. In doing so, however, we note that in *Byrnes v.*
22 *City of Hillsboro*, 104 Or App 95, 798 P2d 1119 (1990), the Court of Appeals
23 held that local legislative history that is not part of a local enactment itself is
24 not subject to judicial notice. But here petitioner does not object, and the
25 commentary apparently was adopted by the city council along with Ordinance

⁷ The strike-through language is the repealed former language and the underlined language is the new language adopted in 1995. The language of PCC 33.430.280 was subsequently amended in ways that do not affect our analysis in this opinion.

1 168698. Because we can take official notice of enactments under ORS
2 40.090(4), and because the commentary was adopted along with Ordinance
3 168698, we take official notice of Ordinance 168698 and the commentary that
4 was adopted with it.

5 It is certainly open to debate whether the amendments adopted by
6 Ordinance 168698 made “the intent and process more clear,” as the
7 commentary states. Respondent’s Brief, App 5 at 25. The scope of the prior
8 modification authority was much clearer, and it expressly included building
9 heights and building setbacks. Nevertheless, it is relatively clear that the city’s
10 intent in enacting Ordinance 168698 was to broaden the scope of development
11 standards that are subject to modification in environmental review, beyond
12 building height and building setback standards. While the decision to insert the
13 ambiguous terms “site-related base zone development standards” in place of
14 the terms “[b]uilding heights” and “building setbacks” unfortunately introduces
15 ambiguity, if the intent had been to abruptly change course and not allow
16 modifications of building heights and building setbacks any longer, we believe
17 the commentary would have mentioned such a significant change of course.
18 The Ordinance 168698 amendment lends some support to the city’s position
19 that site-related development standards include height limits and building
20 setbacks.

1 Finally, the city also asks that we take official notice of legislative
2 history of Ordinance 187216, which was adopted in 2015. The commentary to
3 Ordinance 187216 includes the following:

4 “[M]odification is an additional review process that is added to
5 and considered with the overarching land use review. For
6 example, an applicant may seek to modify a height limit or setback
7 development standard as part of a design review.” Respondent’s
8 Brief, App 6 at 15.

9 We decline to assign any significance to this legislative history for two reasons.
10 First, Ordinance 187216 adopted amendments to other sections of PCC 33.430;
11 it adopted no changes to PCC 33.430.280. It therefore could not be legislative
12 history regarding the meaning of PCC 33.430.280. Second, the commentary is
13 not referring to modification of standards through environmental review; the
14 commentary refers to design review.⁸

15 **E. Conclusion**

16 The meaning of the terms “site-related development standards” and use-
17 related development standards” in PCC 33.430.280 is ambiguous, and the
18 hearings officer’s decision did not provide a very cogent explanation for why
19 the hearings officer concluded building height limits and building setbacks are
20 properly viewed as site-related development standards and are not properly
21 viewed as use-related development standards, particularly in view of the
22 parenthetical examples of use-related development standards, which include

⁸ The reference to “design review” rather than “environmental review” was no doubt a mistake.

1 standards concerning “size of use” and “concentration of use.” However, the
2 hearings officer’s interpretation is consistent with prior hearings officer’s and
3 city council interpretations of PCC 33.430.280 and substantially identical
4 language in a different section of the PCC. The hearings officer’s interpretation
5 is also consistent with the city council’s interpretation of PCC 33.430.280 in
6 approving a substantially identical proposal on the same property in 2006. And
7 the hearings officer’s interpretation is consistent with the purpose statements of
8 the environmental zones and environment review, which provide relevant
9 context. Finally, the hearings officer’s interpretation is consistent with the
10 legislative history of Ordinance 168698, which adopted the key text of PCC
11 33.430.280 that created the ambiguity. Given all the above, we do not believe
12 the hearings officer’s interpretation of PCC 33.430.280 “improperly construed
13 the applicable law[.]” ORS 197.835(9)(a)(D). And given all the above, we do
14 not believe any purpose would be served by remanding the challenged decision
15 for the hearings officer to adopt more responsive explanatory findings.

16 The first and second assignments of error are denied.

17 **(QUILLIN/MORGAN) THIRD AND FOURTH ASSIGNMENTS OF**
18 **ERROR**

19 In their third assignment of error, petitioners argue even if the maximum
20 building height standard and minimum front setback standards are subject to
21 modification through environmental review, PCC 33.430.280 requires the city
22 to “find that the development * * * will, on balance, be consistent with the

1 purpose of the applicable regulations.” See n 3. Petitioners contend the city
2 found that because the property slopes away sharply from SW Cardinell Drive,
3 as viewed from the property’s frontage on SW Cardinell Drive, the building
4 will not appear to be any taller than existing single-family residences in the
5 area. Petitioners contend those findings have nothing to do with the purposes
6 of the multi-family zone maximum height standards, which are as follows:

7 “Purpose. The height standards serve several purposes:

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

10 “● They promote options for privacy for neighboring
11 properties; and

12 “● They reflect the general building scale of multi-dwelling
13 development in the City’s neighborhoods.” PCC
14 33.120.215.A.

15 In their evidentiary challenge under the fourth assignment of error,
16 petitioners argue the city’s findings regarding PCC 33.430.280 are not
17 supported by substantial evidence. Petitioners contend the city focused on
18 evidence that shows the proposal will be of similar height compared to other
19 structures along SW Cardinell Drive and ignored evidence that the structure
20 will be much taller when viewed from Tax Lots 5300 and 2000. As regards
21 those structures, petitioners contend the evidence shows the scale and
22 relationship are unreasonable and privacy options are not promoted.

23 Referring to the map at the beginning of this opinion, SW Cardinell
24 Drive climbs steeply up as it travels a winding route up the hill from the I-405

1 Freeway to SW Rivington Drive. The subject property is at a much higher
2 elevation than the properties to the north, and the properties to the south of the
3 subject property are at a much higher elevation than the subject property.
4 Because of the steep, north-to-south elevation gain, the views from houses are
5 primarily to the north, northeast and northwest and the houses are oriented to
6 make the most of those views. Petitioners submitted photographs that show the
7 subject property and the house located on TL 5300 (Record 238-39) and a
8 number of houses located at various points along SW Cardinell Drive. (Record
9 244-50). The record includes a number of drawings of the proposed building.
10 Record 212-24. Tax Lot 5300 is the roughly triangular lot immediately to the
11 south of the R2-zoned portion of the property. Tax Lot 2000 is located directly
12 east of the R2-zoned portion of the property, on the east side of a walkway that
13 extends south from SW 12th Avenue and divides the R2-zoned portion of the
14 property from Tax Lot 2000. The south elevation of the building would be
15 visible from the dwelling on Tax lot 5300. Record 222. The east elevation of
16 the building would be visible from the dwelling on Tax Lot 2000. Record 221.
17 Petitioner Patel is the owner of the dwelling on Tax Lot 5300. The photo at
18 Record 238 shows that Tax Lot 5300 is located at a higher elevation than the
19 subject property and therefore looks down on the subject property. The owner
20 of Tax Lot 2000 is not a party to this appeal. Petitioners Quillin and Morgan
21 reside on a lot further up SW Cardinell Drive from Tax Lot 5300, at a higher
22 elevation.

1 As noted earlier, the hearings officer adopted the BDS findings in
2 support of his decision. Record 27. The BDS findings, after quoting the above-
3 quoted purposes, provide the following explanation for why the city found the
4 proposal with the approved modifications will on balance, be consistent with
5 the purposes of the maximum building height limit in multi-dwelling zones:

6 “This site is adjacent to an R10 zone to the east, south, and west.
7 To the north and west, the site is adjacent to R2, R1 and RH zones.
8 The maximum allowed heights of buildings on surrounding
9 adjacent lots, as listed in Zoning Code Table 120-3 and 110-3 are
10 as follows:

11

R10	30 feet
R2	40 feet
R1	45 feet
RH	65 feet

12 “The proposed building will be 30 to 35 feet taller than what is
13 allowed on the R10, R2, and R1 zoned surrounding lots. However,
14 due to the slope of the site, the building will be 25 feet high at the
15 SW Cardinell Drive street frontage, and 45 feet at the south
16 property line farther west (where the R10 zoning abuts the site).
17 As proposed, the building will have a reasonable building scale
18 and relationship to the varying housing types (multi-family and
19 single family) on adjacent lots. Further, because of the separation
20 between the proposed building and existing development, the
21 proposal will not impact the ability to promote options for privacy
22 for the neighboring property. * * *

23 “* * * * *

24 “The residence on the neighboring lot immediately south of the
25 proposed apartment building (the residence closest to the

1 proposal) is positioned approximately 50 feet south of the property
2 line, with the proposed reduced setback. Additionally, the two
3 buildings would be offset, east to west, as shown on Exhibit C.6.
4 This building arrangement would maintain light, air, separation for
5 fire protection, and access for fire-fighting, and maintain a
6 reasonable physical relationship between residences, as well as
7 allowing options for privacy. The neighborhood mostly has
8 development which is located close to the street. A reduction to
9 the setback will situate the building closer to the street, which
10 reflects the building placement in the neighborhood. In addition,
11 the site slopes down from SW Cardinell, so a reduced setback will
12 allow the building to be constructed to fit within the topography of
13 the site.

14 “The proposed modifications allow the allowed density to be
15 clustered close to Cardinell to minimize the physical impact on the
16 ecological values of the property Considering the mix of multi-
17 dwelling and single-dwelling zoning as well as characteristics of
18 the site, the proposed building is on balance, consistent with the
19 purposes of the height and setback regulations, *and this criterion*
20 *is met.*” Record 694 (emphasis in original).

21 Far from ignoring the potential impacts on Tax Lot 5300, the next-to-last
22 paragraph directly addresses them. As noted earlier that dwelling is at a higher
23 elevation than the subject property and the proposed building. Record 238. The
24 findings recognize the proposed building would be approximately 45 feet tall
25 in places along the southern property line. Exhibit C.6, cited in the above-
26 quoted findings, appears at Record 702, and shows the relationship of the
27 dwelling on Tax Lot 5300 and the downslope proposed building. The city
28 ultimately concluded because the buildings are offset and 50 feet apart, and
29 given the steeply sloped nature of the property, privacy and reasonable scale
30 would be maintained with regard to that dwelling and the other dwellings

1 located in the area. It is certainly understandable that petitioner Patel objects to
2 the impacts the proposed building will have on his dwelling. But given the
3 subjective nature of the “on balance” inquiry that is required by PCC
4 33.430.280, those findings are adequate and supported by substantial evidence
5 in the record. As intervenors point out, the purposes are not individual approval
6 criteria but rather factors to be balanced and the standard addresses the total
7 impact of the modifications rather than impacts on individual properties.

8 The city apparently did not adopt any findings that specifically address
9 the dwelling on Tax Lot 2000, which is across the walkway that extends up
10 from SW 12th Avenue to SW Cardinell Drive. However, as we have already
11 noted, the PCC 33.430.280 “on balance” inquiry need not be applied to
12 individual properties. We agree with intervenors that given the presence of the
13 walkway that travels between the existing dwelling on Tax Lot 2000 and the
14 proposed building, any expectations of privacy along that portion of the subject
15 property and Tax Lot 2000 are presumably reduced. And as the decision
16 explains, the dwellings in this area on the north side of SW Cardinell Drive are
17 located immediately adjacent to SW Cardinell Drive, because the topography
18 drops off so steeply to the north. Therefore, the dwelling on Tax Lot 2000 will
19 adjoin the approximately 25-foot-high portion of the building shown on the
20 east elevation drawing rather than the taller parts of the building downslope
21 from SW Cardinell Drive. Record 221.

1 We conclude the city’s findings—that the development will “on balance,
2 be consistent with the purpose[s] of the applicable regulations”—are adequate
3 and supported by substantial evidence.

4 The third and fourth assignments of error are denied.

5 The city’s decision is affirmed.