

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

06/26/18 AM 10:54 LUBA

3
4 RICK MICHAELSON,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF PORTLAND,
10 *Respondent,*

11
12 and

13
14 GUARDIAN REAL ESTATE SERVICES, LLC,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2017-119

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19 NORTHWEST DISTRICT ASSOCIATION,
20 *Petitioner,*

21
22 vs.

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24 CITY OF PORTLAND,
25 *Respondent,*

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27 and

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29 GUARDIAN REAL ESTATE SERVICES, LLC,
30 *Intervenor-Respondent.*

31
32 LUBA No. 2017-120

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34 FINAL OPINION
35 AND ORDER

36
37 Appeal from City of Portland.
38

1 Carrie A. Richter and William K. Kabeiseman, Portland, filed a petition
2 for review and Carrie A. Richter argued on behalf of petitioners. With them on
3 the brief was Batemen Seidel, P.C.

4
5 Lauren King, Deputy City Attorney, Portland, filed a response brief and
6 argued on behalf of respondent.

7
8 Timothy V. Ramis, Lake Oswego, filed a response brief and argued on
9 behalf of intervenor-respondent. With him on the brief was Jordan Ramis PC.

10
11 BASSHAM, Board Member; RYAN, Board Chair; HOLSTUN Board
12 Member, participated in the decision.

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14 AFFIRMED

06/26/2018

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

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NATURE OF THE DECISION

Petitioners appeal a city council decision granting design review approval and a master plan amendment to allow development of a seven-story residential building.

REPLY BRIEF

Petitioners move to file a reply brief to respond to waiver issues in the response briefs. There is no opposition to the motion or brief, and they are allowed.

FACTS

The subject property is the western half of Block 290 (Block 290 West), within the Con-Way Master Plan (CMP) area of the city's Northwest Plan District. The site is zoned Central Employment (EX) with a Design Overlay zone. Development within the CMP is subject to the city's code-based design review standards and guidelines, but also standards and guidelines within the CMP. Under the applicable CMP design standards, building height on Block 290 West is limited to 77 feet, except the southwest corner of Block 290 West, which is limited to 47 feet.

The CMP encompasses 17.49 acres and includes a number of 200 by 460 square foot blocks that are generally planned under the CMP and Northwest District Plan for redevelopment to mixed uses, including high-density residential uses. The CMP calls for approximately 25 percent of the CMP area

1 to be set aside for public open space. Some of the required public open space
2 is to be provided on Block 290 West, which under the CMP must include a
3 “publicly accessible, urban square,” which the CMP describes as a “significant
4 iconic urban place” that is fully accessible by the public and surrounded by
5 active retail space. CMP 15, 74. A significant portion of the remainder of
6 required open space in the CMP area will be provided by a proposed
7 neighborhood park on the eastern half of Block 290 (Block 290 East).

8 Block 290 West is bordered on the south by NW Pettygrove Street, and
9 on the west by NW 21st Ave. On the north, Block 290 is bordered by a
10 privately-owned street, NW Quimby Street. Under the CMP, NW Quimby
11 Street is to be improved for open space as a “festival street,” serving primarily
12 as a pedestrian and bicycle connection. The CMP requires that development on
13 Block 290 West include a “ground plane connection” between the public
14 square on Block 290 West and the neighborhood park to be developed on
15 Block 290 East.

16 Intervenor applied to the city for design review approval and proposed
17 amendments to the CMP, along with five “modifications,” a type of variance to
18 CMP design standards pursuant to PCC 33.825.040, in order to develop a
19 multi-story residential building with ground floor retail and below grade
20 parking. The approved seven-story building is U-shaped, with an opening
21 facing south to NW Pettygrove Street, and a proposed 16,007-square-foot
22 public square in the middle. The southern tip of the west wing is “clipped,”

1 shortening the footprint of the west wing by 31 feet and opening up the square
2 to the corner of NW 21st Avenue and NW Pettygrove Street. As discussed
3 below, this clipped corner creates a small area of public open space in the
4 southwest corner of Block 290 West that requires a modification to a CMP
5 standard that requires the public square to have at least 100-foot dimensions on
6 each side. The small portion of the public square is termed “the panhandle” in
7 the decision and record. In earlier designs, the southern end of the west wing
8 had featured a ground level private space available only to the building’s
9 residents. The design ultimately approved by the city moves this private
10 amenity to a roof terrace on top of the west wing.

11 The proposed east wing includes a breezeway at ground level to satisfy
12 the requirement for a “ground plane connection” with the neighborhood park
13 planned for Block 290 East. Intervenor also proposed a CMP map amendment
14 that would allow the building footprint to extend 15 feet into Block 290 East,
15 the western 45 feet of which would be converted to a north-south, 45-foot wide
16 pedestrian accessway connecting Block 290 to development to the north. For
17 vehicular access to the underground parking garage, intervenor proposed
18 access via the northwest corner of Block 290 West and the western portion of
19 the privately owned “festival street,” NW Quimby Street.

20 As noted, the proposed building required five modifications or variances
21 to applicable site-development standards, three of which are at issue in this
22 appeal. The first modification is an increase in the maximum building height

1 from 47 feet to 57 feet in the southwest corner of Block 290 West, to facilitate
2 the private rooftop club house and terrace at the southern end of the west wing.
3 The second modification is to approve the panhandle portion of the public
4 square in the southwest corner of Block 290 West with dimensions less than
5 100 feet per side. The third modification is to reduce the height of the
6 breezeway establishing the “ground floor connection” between Block 290 West
7 and Block 290 East, from 25 feet to a little over 14 feet.¹

8 Prior to filing its application, intervenor participated in three design
9 advice meetings held by the city’s design commission, which involved advisory
10 review of different design concepts for the proposed development. On January
11 16, 2016, intervenor filed its applications, which initially proposed four smaller
12 buildings on Block 290 West. In March 2017, intervenor modified the design
13 to propose the single U-shaped building with a clipped corner, described
14 above, that was ultimately approved. After holding several public hearings, the
15 design commission approved the proposal.

16 Petitioner Northwest District Association (NWDA) appealed the design
17 commission decision to the city council, which held a hearing on October 17,
18 2017. On November 8, 2017, the city council issued its decision denying the

¹ The other two modifications not directly challenged in this appeal include (1) reducing the depth and amount of retail fronting portions of the public square, and (2) reducing the setback of the upper floors on the east wing.

1 appeal and affirming the design commission decision, with adoption of
2 additional findings. This appeal followed.

3 **FIRST ASSIGNMENT OF ERROR**

4 Petitioners argue that the CMP map amendment allowing the building
5 footprint to extend 15 feet eastward into the area that was designated as a
6 neighborhood park is inconsistent with the CMP's overall purpose and vision,
7 because it reduces the area of what would otherwise become part of the
8 planned neighborhood park on Block 290 East.

9 Portland Zoning Code (PCC) 33.562.300.F provides the standards
10 governing amendment of master plans such as the CMP, and requires a finding
11 that the amendment is consistent with the CMP's "vision and purpose." The
12 CMP does not include any section that explicitly sets out a "vision" or
13 "purpose," but the city council evaluated statements in Section 2 of the CMP,
14 entitled "Overall Scheme," for that purpose.² One of the statements in Section
15 2 that the city council evaluated is that "approximately 25 [percent] of the total

² The city council findings state, in relevant part:

"As described in the [CMP], Section 2 'Overall Scheme,' the intent of the plan is that 'these properties be developed in a manner that generates a vibrant mixed-use urban environment.' In addition: 'This Master Plan is intended to serve as a framework for each new development.' The City Council interprets these sentences to express the vision and purpose of the master plan, and finds that the amendment process allows the [CMP] to evolve organically and not to be applied with scientific precision."
Record 48.

1 land area owned by Con-way is designated to become open space[.]” Record
2 48. The city council concluded that the amendment to allow the building to
3 extend 15 feet eastward is consistent with the vision and purpose of the CMP,
4 notwithstanding that it would reduce the area designated for the neighborhood
5 park on Block 290 East, in part because the shift eastward allows
6 improvements in the public square on Block 290 West.³

³ The city council findings continue:

“As noted above, the [CMP] states that desired densities are to be balanced with livability and positive urban qualities, with a strong emphasis on the quality of the pedestrian realm. The proposed 15 [foot] move to the east increases the width of the square at the upper levels by 35 [feet], from 65 [feet] to 100 [feet], which provides significantly more solar exposure to the square. As noted above, the [CMP] requires a minimum width public square and minimum width retail spaces which cannot fit on a site that is only 197 [feet] wide. With this 15 [foot] shift, and small modifications to the depth of the retail spaces, the City Council finds several public benefits are provided, including the covered arcade which allows sheltered outdoor dining and retail displays in addition to the full width square, as well as additional retail and dozens of additional apartments. * * *

“In addition, the remaining 45 [feet] to the east of the building, and west of the realigned boundary of the park, is a continuation of the future north-south pedestrian accessways to the north, thus providing a linear connection that was not necessarily envisioned in the original master plan, but nonetheless provides a valuable pedestrian connection across the site and between the project and the future park. * * * The proposed reconfiguration of the neighborhood park in the east portion of Block 290, to allow for the expanded footprint of the proposed development on this block,

1 Petitioners argue that the city’s findings fail to demonstrate that reducing
2 the area available for the neighborhood park is consistent with the vision or
3 purpose stated in CMP Section 2, to designate “approximately 25 [percent]” of
4 the CMP area to become open space. We understand petitioners to contend
5 that no reduction in the area of designated open space can be consistent with
6 the language requiring that approximately 25 percent of the CMP area be open
7 space, unless the city amends that language and other language in the CMP
8 describing the importance of open space within the CMP area.

9 The city and intervenor (together, respondents) argue, and we agree, that
10 petitioners have not demonstrated error or inadequacy in the city’s findings.
11 The city council interpreted the relevant language of CMP Section 2 to the

will better enable the development of a vibrant square, which will be supported by the surrounding mixed-use development. The City Council finds that the proposed encroachment is consistent with the [CMP]’s vision and purpose as described in the summary framework of Section 2.

“The City Council considered [petitioners’] critique that Northwest Portland is deficient in open space, and finds that fully 65 [percent] of this site will be open to the public, and in addition, the entire east portion of Block 290 will be as well when the new park is developed. The City Council interprets the [CMP] open space requirements to be flexible and weighed the smaller park against the improved square. It concludes the vision and purpose of the [CMP] are followed by the provision of several public benefits including additional housing supply, a square open to the transit stop and intersection, and additional ground floor retail, which outweigh the small difference in area at the west edge of the future public park.” Record 49-50.

1 effect that the vision and purpose of the CMP is to generate a vibrant mixed-
2 use urban environment, using the CMP as a framework that is allowed to
3 evolve organically through the amendment process. Petitioners have not
4 established that that interpretation is inconsistent with the express language,
5 purpose or policies underlying the CMP, or “implausible,” under the deferential
6 standard of review we must apply to a governing body’s interpretation of local
7 land use legislation. ORS 197.829(1); *Siporen v. City of Medford*, 349 Or 247,
8 243 P3d 776 (2010).⁴

9 As respondents argue, the CMP qualifies the 25 percent open space
10 designation with the adverb “approximately,” which does not support
11 petitioners’ apparent view that no reduction in open space area can be
12 consistent with the vision and purpose of the CMP. Intervenor notes that the
13 15-foot encroachment to the east represents about 2,941 square feet, less than
14 one-half of one percent of the 762,138 square feet in the CMP area. Intervenor

⁴ ORS 197.829(1) provides, in relevant part:

“[LUBA] shall affirm a local government’s interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government’s interpretation:

“(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;

“(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation; [or]

“(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]”

1 also notes language at CMP 116 estimating the amount of the originally
2 designated open space to be “just over 25 [percent]” of the CMP area, and
3 argues that the slight reduction in open space area resulting from the
4 amendment still leaves the CMP with “approximately 25 [percent]” of the CMP
5 area designated open space. We agree with respondents that, under the city
6 council’s interpretation of the CMP vision and purpose and the flexibility
7 provided by the amendment process, petitioners have not demonstrated that the
8 city erred in concluding that amending the CMP maps to allow a relatively
9 small reduction in the area designated for the neighborhood park, in order to
10 facilitate improvements to the public square, is inconsistent with the CMP
11 vision or purpose of providing “approximately 25 [percent]” of the CMP area
12 as open space.

13 The first assignment of error is denied.

14 **SECOND, THIRD AND FOURTH ASSIGNMENTS OF ERROR**

15 As noted, the city approved five “modifications” to site-related CMP
16 development standards, pursuant to PCC 33.825.040, which requires a finding
17 that under a proposed modification “[t]he resulting development will better
18 meet the applicable design guidelines,” and that “[o]n balance the proposal will
19 be consistent with the purpose of the standard modified[.]”⁵ As noted,

⁵ PCC 33.825.040 provides, in relevant part:

**“Modifications That Will Better Meet Design Review
Requirements**

1 petitioners challenge three of those modifications. The applicable design
2 guidelines include (1) ten Community Design guidelines and (2) seven CMP
3 design guidelines. The city council adopted findings addressing all Community
4 Design guidelines and CMP design guidelines, concluding with respect to each
5 guideline found to be applicable, that the development meets each guideline.
6 Record 22-29. In addition, the findings evaluate each of the proposed
7 modifications under the PCC 33.825.040 “better meet” and “consistent with the
8 purpose” standards. Record 40-47.

9 One of the proposed modifications to applicable site-development
10 standards increases the height of the southern tip of the west wing from 47 feet
11 to 57 feet, effectively increasing the height from four stories to five stories, to
12 allow for a private clubhouse and terrace sitting atop what would otherwise be
13 the roof of the fourth story. The terrace itself requires no modification. In the

The review body may consider modification of site-related development standards * * * as part of the design review process. * * * The review body will approve requested modifications if it finds that the applicant has shown that the following approval criteria are met:

- “A. **Better meets design guidelines.** The resulting development will better meet the applicable design guidelines; and
- “B. **Purpose of the standard.** On balance, the proposal will be consistent with the purpose of the standard for which a modification is requested.”

1 second, third and fourth assignments of error, petitioners challenge the city's
2 findings regarding the height modification.

3 **A. Second Assignment of Error**

4 Under the second assignment of error, petitioners argue that the city's
5 findings addressing the PCC 33.825.040(A) "better meet" standard evaluate
6 only some of the applicable design guidelines, and that the city erred in failing
7 to address other, also applicable design guidelines.⁶ Petitioners note that, in the

⁶ The city's findings regarding the height modification under PCC 33.825.040(A) state, in relevant part:

"The City Council reviewed the Design Commission decision regarding the design guidelines relevant to this modification, and agrees that Guidelines E4 *Corners that Build Active Intersections* and D1 *Outdoor Areas* apply because the primary design goal of this project is an active public square. * * * The current design removes the south segment of the west wing, and decreases the area for the residential amenity on the ground level, to open the square to the intersection and its transit stop. This converts enclosed private space to public open space right at the intersection corner, where high pedestrian traffic is anticipated. Because the square now extends to the intersection corner, Guideline E4 is relevant, and because the design activates the intersection and the adjacent square for public pedestrian uses, the modification better meets Guideline E4 than a design without the modification for a rooftop amenity, because it replaces enclosed private space at the intersection with open public space that allows more afternoon sun into the square. The City Council considered this bold move [by the architect], and finds [the Design Commission's] judgment on this architectural question is substantial evidence to be weighed carefully by the City Council.

1 findings addressing the height modification to the southern tip of the west
2 wing, which increased the height from 47 feet to 57 feet to allow for a private
3 club house and rooftop terrace as an apparent trade-off for the clipped corner,
4 the city council concluded that community design guidelines E4 and D1 apply,
5 and concluded that those guidelines are better met by the modified
6 development. Record 40. However, petitioners argue that the city failed to
7 address another applicable guideline, CMP Guideline 4, to determine whether
8 the modification results in development that better meets that guideline.

9 CMP Guideline 4 is to “Develop buildings that are appropriately scaled
10 to the neighborhood.” CMP 17. Petitioners contend that the city council failed
11 to consider whether increasing the height of the southern tip of the west wing

“The City Council also finds that Guideline D1 Outdoor Areas applies because the modification is used to create a rooftop gathering space that includes an outdoor patio. It again recalls opponent testimony that the ground level residential amenity wrongfully lends a private atmosphere to the public square and displaces too much retail use. Because the modification moves the needed private amenity space well away from the public square, this guideline is better met by this design than by a design without an outdoor roof patio that compels the apartment residents to use the public square like they would a private outdoor patio. Similarly, the guideline is also better met by the design because it shifts the west wing north away from the intersection opening up the square to afternoon sunlight. The City Council also considered [petitioners’] concern about increasing the sense of enclosure, and finds this design actually reduces the sense of enclosure on the square better than a west wing which complies with the height standard but extends further south. *These guidelines are better met by this design.*” Record 40 (emphasis in original).

1 “better meets” CMP Guideline 4. To the extent it does not, petitioners argue
2 that the city must attempt to “balance” those guidelines that are “better met”
3 against those that are merely “met,” but the findings do not attempt to conduct
4 any such balancing.

5 The city council’s findings address CMP Guideline 4 at Record 30, and
6 those findings conclude that the modified proposal, which includes the taller
7 west wing, is consistent with CMP Guideline 4, in part because a seven-story
8 building is located directly to the west across NW 21st Avenue, along with
9 several other nearby five and six-story buildings.⁷ We understand respondents
10 to argue that the city council did not deem CMP Guideline 4 to be an

⁷ The city council’s decision finds that CMP Guideline 4 is met, based in part on the following findings:

“The City Council * * * finds the general scale of new development in the neighborhood, both within the [CMP] and other properties south of this site, is in the three to seven story range. Neighborhood projects include: a 2016 [five]-story multi-dwelling building; to the west, the [seven]-story Q21 mixed-use development, and the [six]-story LL Hawkins multi-dwelling building with New Seasons further west, and the [five]-story XPO building further north.

“The City Council finds the wings of the building are four stories with a penthouse at the west, and seven stories at the north and east, with the square open to the south. The varied heights are appropriate for the neighborhood—a [seven]-story building is located directly to the west across NW 21st Ave[nue] and five and six story buildings are located in the general vicinity within and adjacent to the [CMP] area.” Record 30.

1 applicable guideline for purposes of the PCC 33.825.040(A) “better meet”
2 standard or that, to the extent it is applicable, the city’s findings as a whole are
3 sufficient to explain why the increased height “better meets” CMP Guideline 4.

4 PCC 33.825.040(A) is expressly limited to the “applicable design
5 guidelines.” The city council’s findings addressing PCC 33.825.040(A)
6 evaluate each modification under only some of the guidelines, apparently only
7 the ones that the design commission and the city council deemed to be
8 applicable. The findings do not explain why other guidelines were not deemed
9 to be applicable to particular modifications. We tend to agree with petitioners
10 that CMP Guideline 4 appears to be applicable to a proposal to increase the
11 building height ten feet, as that increase in height could impact the scale of the
12 development, compared to the scale of nearby development. That said, we
13 agree with respondents that the city’s findings at Record 30, while not aimed at
14 PCC 33.825.040(A), appear sufficient to demonstrate that the ten-foot height
15 increase “better meets” CMP Guideline 4.

16 CMP Guideline 4 promotes a development scale that is “appropriate[]”
17 to the neighborhood. The decision finds that CMP Guideline 4 is met because
18 the height of the proposed seven-story building, including its four-story west
19 wing, is “appropriate[]” given the existence of several nearby multi-dwelling
20 buildings that are up to seven stories tall. Although those findings do not use
21 the words “better meet,” it is evident from the findings that the city council
22 believed that development with a five-story west wing across the street from a

1 seven-story building is more “appropriately scaled” and hence more consistent
2 with CMP Guideline 4 than the same development with a four-story west wing.
3 If there is some reason why the findings at Record 30 do not suffice to
4 adequately address the PCC 33.825.040(A) “better meet” standard, petitioners
5 do not identify it. Accordingly, petitioners’ arguments regarding CMP
6 Guideline 4 do not provide a basis for reversal or remand.

7 The second assignment of error is denied.

8 **B. Third Assignment of Error**

9 As noted, in the findings at Record 40 quoted at n 6, the city council
10 concluded that the modification to increase the building height from 47 feet to
11 57 feet on the southern end of the west wing “better meets” two applicable
12 guidelines, Community Design Guidelines E4 and D1, because the height
13 increase allowed a private amenity originally planned for the ground level to be
14 moved to the rooftop terrace, and facilitated a clipped corner that opens up the
15 public square to the southwest, improving pedestrian and solar access.⁸ Under
16 the third assignment of error, petitioners argue that the findings fail to establish

⁸ Community Design Guideline E4 recommends that the design “[c]reate intersections that are active, unified, and have a clear identity through careful scaling detail and location of buildings, outdoor areas, and entrances.” Record 25. Community Design Guideline D1 states that “[w]hen sites are not fully built out, place buildings to create sizable, usable outdoor areas. Design these areas to be accessible, pleasant and safe. Connect outdoor areas to the circulation system used by pedestrians[.]” *Id.*

1 that the modification in height results in development that “better meets”
2 Guidelines E4 and D1.

3 Specifically, petitioners contend that the findings quoted at n 6 are
4 defective because they (1) assume the necessity for a private amenity
5 somewhere on the property, and (2) focus on the benefits of the clipped corner
6 opening up the square to NW 21st Avenue, a feature that is not required, and in
7 any case could be achieved without greater building height. Petitioners argue
8 that nothing in the community design or CMP guidelines requires a private
9 amenity like the proposed rooftop clubhouse and terrace. And, petitioners
10 contend that there is no relationship between the benefits derived from the
11 clipped corner (opening up the square to the southwest) and the increased
12 height to accommodate a fifth-floor private clubhouse on the west wing.
13 Petitioners argue that the clipped corner was necessary in any event to bring the
14 total area devoted to the public square to the 16,000 square feet required under
15 the CMP, and that if a private amenity is desired it could be located elsewhere
16 in the building without any modification to the height standard.

17 Relatedly, petitioners argue that the city’s findings are flawed because
18 they compare the preferred design (a U-shaped building with a clipped corner
19 and height modification for a rooftop terrace) to a different design that was
20 apparently reviewed at the Design Advice stage (a complete U-shaped building
21 and no clipped corner or height adjustment, with the private amenity located at
22 ground level). We understand petitioners to argue that it is irrelevant that the

1 preferred design “better meets” the applicable guidelines compared to an
2 alternative design put forth as a strawman proposal. The relevant question,
3 according to petitioners, is whether a design with the proposed modification
4 better meets the applicable guidelines, compared to the *same* design *without* the
5 modification under consideration, in this case the increase in height to the
6 southern end of the west wing. We understand petitioners to argue that the city
7 erred in evaluating the benefits of the clipped corner and removal of the private
8 amenity from the public square as justifications or tradeoffs for the
9 modification for increased height of the west wing. Without those perceived
10 benefits, petitioners argue, the record does not support a finding that the
11 increased height, viewed in isolation, “better meets” any applicable guideline.

12 Respondents argue that the comparative approach employed by the city
13 council is consistent with the language of PCC 33.825.040(A), which is
14 focused on the “resulting development” as a whole, rather than each proposed
15 modification or design feature in isolation. Respondents contend that a
16 modification may be integrally related to other proposed design changes that do
17 not require a modification, and that in such circumstances there is no error in
18 evaluating all related design changes together in order to determine whether the
19 “resulting development” “better meets” the applicable guidelines. In the
20 present case, respondents argue, intervenor proposed (in response to criticism
21 from petitioners and others) to move a planned ground-floor private amenity to
22 an upper floor to avoid impacting the public nature of the square. That

1 proposal involved moving the south end of the west wing 31 feet northward to
2 create a “clipped corner,” bringing additional solar exposure and public access
3 to the square, and increasing the height of the west wing to accommodate the
4 relocated private amenity.

5 We agree with respondents that petitioners have not established that the
6 city council erred in evaluating all design changes related to a proposed
7 modification, in determining whether the resulting development better meets
8 applicable guidelines. To the extent the city council’s comparative approach is
9 based on an interpretation of the relevant PCC and CMP language, the city
10 council’s interpretations are entitled to deferential review under ORS
11 197.829(1), and petitioners make no attempt to establish that the city council’s
12 apparent understanding of the relevant language is reversible under that
13 deferential standard of review. *See* n 4; *Siporen*, 349 Or 247. Even in the
14 absence of an interpretation, we see no error in applying PCC 33.825.040(A) in
15 a manner that evaluates the proposed modification in context with associated
16 design changes. The nature of design review often involves tradeoffs and
17 balancing between design features to achieve a more optimal overall design
18 under the applicable guidelines. Petitioners’ arguments under the second and
19 third assignments of error do not provide a basis for reversal or remand.

20 **A. Fourth Assignment of Error**

21 PCC 33.825.040(B) requires a finding that “[o]n balance, the proposal
22 will be consistent with the purpose of the standard for which a modification is

1 requested.” See n 5. The city council identified portions of CMP Section 2
2 discussing massing and height as embodying the purpose of the height limits in
3 the CMP.⁹ The city council’s findings focus on language emphasizing the
4 balancing of “desired densities with livability and positive urban qualities,” and
5 the “strong emphasis on the quality of the pedestrian realm,” to conclude that
6 the height increase is on balance consistent with the purpose of the height
7 standard, because it facilitates relocation of the private amenity away from the
8 public square and the associated benefits of the clipped corner with respect to
9 pedestrian and solar access to the public square.¹⁰

⁹ The portion of CMP Section 2 identified as the purpose of the height standards in the CMP state:

“Consistent with Con-way’s approach to development described above, specific building heights and dimensional characteristics for each proposed new structure will be described at the time development applications are submitted for each project. Map 02-3 describes the maximum heights that are allowed within the [CMP] boundary.

“Massing is carefully addressed to ensure that new structures are compatible with desired neighborhood characteristics via a series of Design Standards and Guidelines described in Section 5. These criteria attempt to balance desired densities with livability and positive urban qualities, with a strong emphasis on the quality of the pedestrian realm.” CMP 15.

¹⁰ The city council findings addressing PCC 33.825.040(B) state, in relevant part:

“The City Council interprets the maximum height standards in the master plan to be eligible for modification, because additional

1 Petitioners argue that the foregoing findings are defective because they
2 focus only on alleged pedestrian and retail improvements to the square that are
3 only tangentially related to the increased height, and ignore what petitioners
4 argue is the city’s restatement of the primary purpose of the CMP stated in
5 Section 2, to ensure that “new structures are compatible with desired
6 neighborhood characteristics” as set by the design review standards and
7 guidelines. Record 40. However, the findings state that the increased height at
8 the fourth floor “activates the roof which is very visible to other wings of this

height is not explicitly prohibited, either in the base zone or in the Master Plan. See Table 140-3 in Section 33.140.

“The placement of the residential amenity space to the roof of the 4th floor allows additional ground floor area to be developed for customer-activated commercial space, including retail. As is stated in the overall scheme for height and massing: *These criteria attempt to balance desired densities with livability and positive urban qualities, with a strong emphasis on the quality of the pedestrian realm.* The increased height at the 4th floor activates the roof which is very visible to other wings of this building as well as surrounding neighborhood development.

“The City Council considered the opponent testimony that the public square is more akin to a private courtyard than a public square, and that the modification criteria of Section 33.825.040 are not satisfied. It finds that the residents will need an outdoor gathering space, and that placing that function on the fourth floor roof instead of on the public square appropriately addresses opponent concerns about privatization of the pedestrian realm within the ground level square. This protects the public qualities of the pedestrian realm. *The modification is consistent with the purpose of the height standard.*” Record 41 (emphases in original).

1 building as well as surrounding neighborhood development,” which appears to
2 be directed at compatibility with desired neighborhood characteristics. Record
3 41. The city council apparently views an active rooftop amenity to be a desired
4 neighborhood characteristic consistent with the applicable standards and
5 guidelines, and petitioners offer no basis to conclude otherwise.

6 With respect to the purpose language regarding balancing “desired
7 densities with livability,” petitioners contend that the city errs in resetting the
8 existing balance that has been set by the original design standards and
9 guidelines. Record 40. We do not understand the argument, which seems to
10 suggest that the city cannot grant any modification, because any modification
11 would necessarily change the balance that has been set by the unmodified
12 design standards and guidelines. The CMP allows for modification of design
13 standards, if the resulting development is consistent with the purpose of the
14 standard modified. The city council concluded that the resulting development,
15 with an active rooftop and improved public square, is consistent with the
16 purpose to balance density with livability, essentially because it achieves a
17 better balance. Petitioners have not demonstrated that the city erred in so
18 concluding.

19 Petitioners dispute the finding that relocating the private amenity to the
20 rooftop provides for additional ground floor retail, arguing that in fact the city
21 granted a separate modification that reduces the depth and amount of retail
22 allowed in several portions of the public square. However, petitioners do not

1 dispute that the relocation freed up additional space that would have been
2 occupied by the private ground-floor amenity. That the city approved unrelated
3 modifications to the depth and size of retail allowed in certain frontages of the
4 public square does not undermine the finding that the relocated amenity freed
5 up additional ground-floor space that is available for retail uses.

6 Finally, petitioners repeat their argument, rejected above, that nothing in
7 the guidelines requires a private amenity, and that, if intervenor desired such an
8 amenity, it did not need to go onto the rooftop in order to improve the
9 pedestrian realm. Petitioners' arguments add no bases to reverse or remand.

10 The second, third and fourth assignments of error are denied.

11 **FIFTH ASSIGNMENT OF ERROR**

12 The fifth assignment of error concerns the modification to reduce the
13 size of the southwest corner of the public square from 100 feet per side to 31
14 feet, six inches per side, and the modification to reduce the height of the
15 breezeway between the public square and the neighborhood park from 25 feet
16 to 14 feet, nine inches. Petitioners argue that the city's findings fail to establish
17 that these two modifications are, on balance, "consistent with the purpose of
18 the standard for which a modification is requested." PCC 33.825.040(B). The
19 city council found that the purpose of the standards governing the public square
20 are set out in CMP Section 10, Square Standards: "The square shall be a
21 significant, iconic, urban place, framed by active buildings on at least three
22 sides, and connected to nearby open spaces." Record 46.

1 **A. Southwest Panhandle**

2 CMP Design Standard 10 requires that the public square has no
3 dimension less than 100 feet and be at least 16,000 square feet in size. The city
4 council found that moving the west wing footprint north to create a reduced
5 size panhandle in the southwest corner was on balance consistent with the
6 purpose of CMP Standard 10, in part because it opened the square to the
7 southwest and better connected it to nearby open spaces, specifically the transit
8 stop along NW Pettygrove Street.¹¹

¹¹ The city council’s findings state, in relevant part:

“The City Council notes the square is the primary feature of this site. This modification only applies to the southwest ‘panhandle’ which is the new area added to the square created by the shift of the west wing to the north. The applicant has explained that the panhandle accomplishes several design goals. It increases solar exposure to the square by removing the building area at what used to be the square’s southwest corner. It opens the square directly, whereas access in the prior design of the west wing was via a breezeway within the building. Third, it increases the square’s south frontage on NW Pettygrove St[reet] up to 152 [feet] 5 [inches] to mitigate what was previously described as an excessively enclosed square. * * *

“The City Council finds that the transit stop on NW 21st Ave[nue] is a narrow public open space, and that this design (and the resultant reduction of the 100 [foot] dimension) meets the purpose of the standard because it better connects the square to that open space and effectively expands the transit stop and merges it with the public square.

“The City Council finds this shift (and resultant reduction of the 100 [foot] dimension) meets the purpose of the standard in that it

1 Petitioners first fault the city’s findings for their failure to address and
2 find that the reduced panhandle size is consistent with the language stating that
3 one purpose of the square standards is to provide a “significant and iconic
4 urban square.” Petitioners note that elsewhere in the decision the city council
5 defined “iconic” as a design acknowledged for “distinctive excellence.”
6 Record 32 (quoting Merriam Webster Dictionary definition). However,
7 petitioners argue that the findings addressing the reduction in square size do
8 not attempt to explain why the modification results in a design that exhibits
9 “distinctive excellence.”

10 Respondents argue that the “significant and iconic urban square”
11 language derives from CMP Guideline 7B, and the city council adopted
12 findings explaining why the proposed square, including the panhandle, is a
13 significant, iconic space consistent with CMP Guideline 7B. Record 32. We
14 agree with respondents that, to the extent the city’s findings addressing the
15 panhandle modification are inadequate for failure to explain why the panhandle
16 contributes on balance to an “iconic” public square, petitioners have not
17 explained why the findings at Record 32 addressing the nearly identical
18 language of CMP Guideline 7B are insufficient to remedy any inadequacy.

provides additional area for the square to better activate the intersection and transit stop while also ensuring that significant amounts of retail will remain along the corridor of NW 21st Ave[nue].” Record 46.

1 Petitioners next argue that the findings extolling the connection to the
2 existing transit stop and opening the southwestern corner do nothing to
3 demonstrate that the public square, as modified, results in a significant, iconic
4 design. However, we agree with respondents that the city’s findings at Record
5 46, considered with those at Record 32, clearly express and explain the city
6 council’s conclusion that the square as modified is consistent on balance with
7 the purpose of establishing a public square that is a significant, iconic, urban
8 place.

9 Finally, petitioners object that the findings do not address the language
10 requiring that the square be “framed by active buildings on at least three
11 sides[.]” Record 46. Petitioners suggest that the clipped corner creating the
12 panhandle is inconsistent with this purpose language, because it results in a
13 square that is not *fully* enclosed on three sides. Respondents note other
14 findings at Record 51 that the square “will be framed by active buildings on
15 three sides,” and argue that the purpose language does not require that the
16 square be *fully enclosed* on three sides. We agree with respondents that
17 petitioners have not demonstrated any error or inadequacy in the city’s findings
18 regarding this purpose language.

19 **B. Height of the Breezeway**

20 CMP Design Standard 10(C) requires a ground plane connection
21 between the square and the neighboring park that, if located within a building,
22 must have a clear height of 25 feet. The city approved a modification to allow

1 the proposed ground plane connection, a breezeway through the east wing, to
2 have a height of 14 feet, nine inches. The city council concluded that the lower
3 height “better meets” applicable guidelines, and petitioners do not challenge
4 those findings. Instead, petitioners argue that the 25-foot height requirement is
5 a design feature that serves to make the square a “significant, iconic” place, and
6 the city failed to demonstrate that the lower breezeway height is consistent with
7 the purpose of the height standard, to create a significant, iconic urban square.

8 The city council determined that the breezeway is not part of the public
9 square itself, and therefore the “significant, iconic” purpose language relates
10 minimally to the breezeway.¹² Petitioners dispute this interpretation, arguing

¹² The city council’s findings state, in relevant part:

“Regarding the requested reduction of the vertical clearance between the square and the park, the City Council reviewed the [petitioners’] argument that this guideline is not satisfied due to the limitation on visibility and spatial connection from the park to the square. It also reviewed the Design Commission findings that the breezeway was located between heavily glazed retail on either side of the entrance from the square and the ground level in general was heavily glazed which expands views between the square and the outer perimeter of the building on all sides around the breezeway. The design features heavily glazed retail on the south side with a similarly visible bike facility and live/work spaces on the north. The City Council finds the ample glazing in these areas improves visibility and the sense of spatial connection, effectively responding to this concern.

“The City Council finds that the purpose statement for this standard speaks to the square and that the breezeway is not part of the square, therefore the purpose statement relates minimally to

1 that the visual and experiential effect of a 25-foot tall connection is a unique
2 design element intended to help create an iconic square. Petitioners contend
3 that the city failed to demonstrate that a lower breezeway height is consistent
4 with an iconic square.

5 The city council had elsewhere agreed with petitioners that the
6 breezeway is not part of the public square for purposes of satisfying the
7 requirement that the square be at least 16,000 square feet in size. Consistent
8 with that view, the city council concluded that the breezeway is not part of the
9 square, and therefore the purpose language requiring a “significant, iconic”
10 urban square does not govern the breezeway design. While the city council
11 could easily have interpreted the relevant CMP language differently, petitioners
12 have not demonstrated that the interpretation the city council chose is

the breezeway other than the fact that the breezeway serves as the connection between the square and the park. To that end, the breezeway meets the purpose of the standard in that this connection is provided. In addition, Guideline D8 Interest, Quality, and Composition is better met by the proposal in that the architectural design concept is more cohesive by allowing the brick tube concept to extend the length of the east wing rather than jogging upward to accommodate for additional height at the breezeway. Guideline 1 is also better met by providing human scale to this breezeway in that the proposed clearance is generous despite not meeting the standard 25 [feet]. * * * The proposed breezeway will provide a comfortable passageway between the park and the square and will feature design elements such as the round wood benches, lighting, and artwork to engage pedestrians.” Record 46-47.

1 inconsistent with the express language, purpose or policy underlying any of the
2 relevant CMP language. ORS 197.829(1)(a)-(c).

3 The fifth assignment of error is denied.

4 **SIXTH ASSIGNMENT OF ERROR**

5 The CMP imposes a 3:1 floor area to site area ratio (FAR) within the
6 plan area, including Block 290, and allows a total maximum floor area of
7 2,280,850 square feet within the CMP. The city council determined that the
8 relevant “site” in the present case for purposes of the FAR standard is the entire
9 area of Block 290 West that will remain in private ownership, plus a transfer of
10 the western 260 feet of the privately-owned NW Quimby Street, for a total of
11 66,820 square feet.¹³ Multiplied by the 3:1 FAR ratio, this allowed up to
12 200,460 square feet of floor area to be developed.

¹³ The city council findings state, as relevant:

“[Petitioners] argue that a modification is required for FAR, because in their view the site is only 200 [feet] x 197 [feet]. The City Council finds the site area includes all of the private property which is included in the project that will remain in private ownership, which is comprised of Lots 9 through 18 of BLOCK 290, and the western 260 feet of the vacated Quimby [Street], less three feet for a dedication to widen NW 21st Avenue, as shown on the ALTA survey in the record. FAR is calculated based on that legal description, which totals 66,820 square feet. The City Council reviewed the assertion that the [CMP] standards establish the site area at only 200 [feet] x 197 [feet] and finds that it is unable to see how those standards determine that only this area serves as the basis for the FAR.” Record 52-53.

1 Petitioners argue that the city erred in determining the relevant “site” and
2 in calculating the maximum floor area, with the result that the city granted
3 intervenor far more floor area than authorized under the CMP. Petitioners’
4 alternative calculations are based on CMP Appendix A, which consists of a
5 table entitled “Proposed Program Area Detailed Model,” and which in relevant
6 part states that for Block 290 West the “Site Area” is 50,296 feet, and the “Base
7 Area” after applying the 3:1 FAR ratio to the “Site Area” is 150,887 square
8 feet. *Id.* Footnote 2 of the table states that “Block 290 areas borrow from the
9 Quimby ROW [right-of-way], such that the total development area does not
10 exceed 2,280,850.” *Id.* As noted, 2,280,850 square feet is the total maximum
11 floor area for the entire CMP. The Appendix A table estimates how much
12 square footage in each block will be devoted to retail, housing and office uses,
13 and totals those numbers in a final sum that exactly equals 2,280,850 square
14 feet.

15 Petitioners contend that CMP Appendix A requires the city to calculate
16 FAR based on a “site area” of 50,296 square feet, which in petitioners’ view
17 represents the sum of the square footage of Block 290 West (approximately
18 46,000 square feet for a 200 by 197-foot half-block) plus approximately 4,296
19 square feet that can be permissibly borrowed from the NW Quimby Street
20 right-of-way. Further, petitioners contend that CMP Appendix A limits the
21 maximum floor area on Block 290 West to 150,887 square feet, after
22 multiplying the site area by the 3:1 ratio. Finally, petitioners argue that

1 Appendix A effectively allocates to each CMP block a certain proportion of the
2 total floor area allowed in the CMP (2,280,850 square feet), and therefore the
3 city cannot approve a floor area for Block 290 West that exceeds that
4 proportional allocation, because doing so threatens to exceed the total cap of
5 2,280,850 square feet, unless development on other blocks is reduced
6 accordingly.

7 Respondents dispute that CMP Appendix A controls or limits the
8 distribution of floor area in the CMP, noting that the CMP describes Appendix
9 A as a more detailed version of the floor area figures set out in CMP Table 03-
10 01, which is expressly labeled as “For Informational Purposes Only.”¹⁴ CMP
11 25. Further, respondents note CMP Design Standard 4 freely allows transfers
12 of floor area within the CMP. CMP 39. Respondents argue that intervenor
13 owns all portions of Block 290 East and West, as well as the NW Quimby

¹⁴ The text accompanying Table 03-1, at CMP 25, states in relevant part:

“* * * Anticipated program areas are summarized below on Table 03-1, and are described in detail in Appendix A.

“The floor areas referenced in Table 03-1 are approximate in nature and for informational purposes only. Exact floor areas will ultimately be determined by future development applications. However, this floor area summary does serve as the maximum amount of development allowed through the [CMP].”

Further, footnote 2 to Table 03-1 states: “See Appendix A to see a detailed program area model that describes these numbers in greater detail.” *Id.*

1 Street right-of-way, and can freely add square footage from these adjoining
2 areas to the base square footage of Block 290 West, subject to the maximum
3 cap of 2,280,850 square feet for the entire CMP area. We understand
4 respondents to argue that the “site” the city used to calculate square footage is
5 based on the half-block Block 290 West, plus transfer of all the footage from
6 the western 260 feet of the NW Quimby Street right-of-way, and a smaller
7 amount from the approved 15-foot encroachment into Block 290 East, with a
8 sum total of 66,875 square feet.

9 We agree with respondents that petitioners have not established that
10 Appendix A limits the maximum amount of square footage on the subject
11 property to 150,887 square feet. Appendix A simply reflects in more detail the
12 figures set out in CMP Table 03-1, which is expressly labeled “for
13 informational purposes only,” and which, as explained in the text, is not
14 controlling as to the exact floor area to be determined in future development
15 applications. Petitioners do not dispute that CMP Design Standard 4 allows
16 intervenor to transfer square footage from adjoining areas that it owns, but
17 argues only that Design Standard 4 requires execution of a covenant, recorded
18 with the deeds of the affected sites, that reflects the respective increase and
19 decrease of potential floor area. However, as respondents argue, Design
20 Standard 4 does not require that such a covenant be executed or recorded as
21 part of the present design review approval. As respondents note, PCC

1 33.800.060 requires only that covenants be in place prior to issuance of
2 building permits.

3 Petitioners may be correct that authorizing up to 200,460 square feet of
4 floor area to be developed on Block 290 West may mean that other future
5 development within the CMP may have reduced square footage from what
6 would otherwise be the case, in order for all development within the CMP to
7 stay under the cap of 2,280,850 square feet. However, petitioners have not
8 established that front-loading development capacity in this manner is
9 prohibited by the CMP, or otherwise erroneous.

10 The sixth assignment of error is denied.

11 **SEVENTH ASSIGNMENT OF ERROR**

12 The seventh assignment of error concerns the privately-owned NW
13 Quimby Street, which stretches east-west along the northern boundaries of
14 Block 290 East and West.

15 **A. Links between North and South**

16 CMP Design Guideline 7C provides:

17 “NW Quimby Parcel—Provide a multi-use street and open space
18 that links the neighborhood park and square to the south and
19 development to the north, and serves primarily as a pedestrian and
20 bicycle connection.” CMP 75.

21 The city council found that proposed development of NW Quimby Street as a
22 “festival street” meets this guideline, in part because NW Quimby Street links
23 or connects development to the north with the neighborhood park and square to
24 the south, via the north-south accessway to be built between Block 290 East

1 and Block 290 West, extending north and south from the middle of NW
2 Quimby Street.¹⁵

3 Petitioners argue, however, that CMP Design Guideline 7C requires the
4 development on Block 290 West provide a direct link between NW Quimby
5 Street and the public square, in the form of a second breezeway or other
6 pedestrian access that runs north-south directly from the western half of NW
7 Quimby Street through or between buildings into the northern portion of the
8 public square on Block 290 West. Respondents argue that the city council
9 rejected a similar argument below, and interpreted Guideline 7C to apply to
10 NW Quimby Street, not to the square, and that the design of the square is not
11 subject to this guideline. Record 36.

12 We agree with respondents that Guideline 7C requires that NW Quimby
13 Street *itself* functions as the required link between development to the north
14 and south of it, and does not require that development to the south on Block

¹⁵ The city council findings state, as relevant:

“The City Council finds that the vacated NW Quimby Festival Street will be redeveloped as a 60-foot wide private Festival Street that connects the future neighborhood park with the transit on NW 21st Ave[nue], with direct access to the north-south accessway, the breezeway leading to the square, and then further south to NW Pettygrove St[reet]. The parcel will provide direct pedestrian and bicycle connections between the public park and other points to the east and the NW 21st Ave[nue] transit stop. This link to transit ensures the parcel will primarily serve pedestrians and bicyclists.”
Record 36.

1 290 West or elsewhere be designed in any particular way. Specifically,
2 Guideline 7C does not require that development on the northern boundary of
3 Block 290 West be designed to include a breezeway or pedestrian connection
4 to allow direct access between the western half of NW Quimby Street and the
5 public square. As designed, the NW Quimby “festival street” will run east-
6 west across the northern boundaries of Block 290 West and a portion of Block
7 290 East, and provide links or connections via the pedestrian accessway
8 between development to the north and the neighborhood park and public
9 square (via the breezeway in the east wing) to the south. Petitioners have not
10 established that CMP Design Guideline 7C requires more.

11 **B. Vehicular Access to NW Quimby Street**

12 The city council approved use of NW Quimby Street to provide
13 vehicular access to the underground parking garage on Block 290 West. In so
14 doing, the city council rejected petitioners’ arguments that such vehicular
15 access to the parking garage is inconsistent with a “festival street.” Record 36-
16 38. On appeal, petitioners do not renew that argument. However, petitioners
17 argue that in rejecting its arguments regarding access to the underground
18 garage the city went further and erroneously opened up NW Quimby Street to
19 unrestricted vehicular access.

20 We have reviewed the cited findings at Record 36-38 and disagree with
21 petitioners that the city council’s findings have the inadvertent effect of
22 opening up NW Quimby Street to unrestricted public vehicular access. The

1 former NW Quimby Street right-of-way is now privately owned, and although
2 it will be subject to an easement for pedestrian and bicycle use, and used for
3 vehicular access to the underground parking garage, nothing in the city's
4 decision cited to our attention purports to authorize unrestricted vehicular
5 access to NW Quimby Street.

6 The seventh assignment of error is denied.

7 The city's decision is affirmed.