



CITY OF PORTLAND

Office of City Auditor LaVonne Griffin-Valade

Hearings Office

1900 SW 4th Avenue, Room 3100

Portland, OR 97201

phone: (503) 823-7307 - fax: (503) 823-4347

web: www.portlandoregon.gov/auditor/hearings



HEARINGS OFFICER'S ORDER

APPEAL OF LEWIS AND CLARK COLLEGE

CASE NO. 3110435

DATE OF HEARING: November 7, 2011

APPEARANCES:

Mr. Harry Auerbach, Attorney on behalf of the City

Mr. Steve Abel, Attorney on behalf of the Appellant

HEARINGS OFFICER: Mr. Gregory J. Frank

FINDINGS OF FACT AND CONCLUSIONS OF LAW

HEARINGS OFFICER JURISDICTION: Portland City Code ("PCC") Title 17.13.120 provides that a person may appeal a decision, made under PCC 17, to the City Hearings Officer. The Hearings Officer finds that an administrative decision was made by the City of Portland Bureau of Parks and Recreation ("City"), under PCC 17, on or about October 3, 2011. (Exhibits 7, 7a and 7b). The Hearings Officer finds that the City of Portland Hearings Officer has jurisdiction over timely filed appeals involving decisions rendered per PCC 17. The Hearings Officer finds the appeal in this case, filed on or about October 7, 2011 (Exhibits 2, 2a and 2b), was timely filed.

EVIDENCE/ARGUMENT CONSIDERED IN MAKING THIS DECISION: The Hearings Officer notes that Mr. Steven W. Abel ("Abel"), attorney appeared at the hearing as the legal representative for Lewis and Clark College ("Appellant"). The Hearings Officer notes that Mr. Harry Auerbach ("Auerbach"), Chief Deputy City Attorney appeared as the legal representative for the City. The Hearings Officer considered documents submitted into the evidentiary record (Exhibits 1 through and including 21) and testimony/argument by Abel and Auerbach that was presented at a hearing held on November 7, 2011, in making this decision.

OVERVIEW OF CITY DECISION AND ISSUES RAISED IN THIS APPEAL: Exhibits 7 and 7a are correspondence from the City to the Appellant. Exhibits 7 and 7a indicate that an application was received from the Appellant for a proposed development ("Proposed Residence Hall" per Exhibit 10) and was assessed a System Development Charge for the Parks and Recreation Bureau ("Park SDC")

based upon the Proposed Residence Hall having residential units (specifically, Single Room Occupancy units, hereafter “SRO Units”). The City argues that the Appellant’s proposed dormitory units should be assessed a Park SDC based upon the SRO rate.

The Appellant argues that the City’s assessment of the Park SDC based upon the SRO Unit rate is not legally defensible. The Appellant argues that its Proposed Residence Hall units are properly characterized as “Non-Residential Development” and, as such, should be assessed a Park SDC based upon the Non-Residential Park SDC rate (Exhibit 17).

GENERAL FINDINGS AND ARGUMENTS: The Hearings Officer finds that the provisions of PCC 17.13 apply to this case. The Hearings Officer finds that PCC 17.13.040 sets forth the framework for calculating a Park SDC.¹

PCC 17.13.040.C generally identifies New Development as “residential uses” and “non-residential uses.” (PCC 17.13.040 C.2 and C.3, respectively). Park SDC rates for “residential uses” are based upon the number of residential dwellings. Park SDC rates for “non-residential uses” are based upon the square footage of the use. PCC 17.13.040.D states that “except as otherwise provided in this Chapter, the amount of the SDC due shall be calculated by determining the dwelling units and/or square footage...”

The Hearings Officer takes notice that the phrase “residential uses” (PCC 17.13.040 C.2) is not a defined phrase (definitions for PCC 17.13 are found in PCC 17.13.020). The Hearings Officer also takes notice that the phrase “non-residential development” is a defined phrase. (PCC 17.13.020.Y).²

The Appellant argues that the definition of “non-residential development” clearly excludes “dwelling units.” The Appellant then argues that the proposed dormitory units are not “dwelling units” as defined in PCC 17.13.020.R.³ The Appellant states that the Proposed Residence Hall does “not contain ‘dwelling units’ because there are no cooking or plumbing facilities within the rooms.” (Exhibit 17, page 2). According to the Appellant, the City “appears to argue that the rooms are ‘dwelling units’ (*i.e.* residential) because there are common kitchens and plumbing facilities located within the residence hall.” (Exhibit 17, page 3). The Appellant states that the City “interpretation ignores the plain language of the code, which requires that the dwelling *unit* (not the building) include cooking facilities.” (Exhibit 17, page 3).

In the alternative, the Appellant argues that the Proposed Residence Hall units “do no qualify as SRO units. (Exhibit 17, page 2).

NON-RESIDENTIAL v. RESIDENTIAL DEVELOPMENT: The central issue in this case is the interpretation of “dwelling unit” as used within PCC 17.13.020 Y. The Appellant argues that its Proposed Residence Hall is not a residential use because its proposal does not meet the PCC 17.13.020 R definition of

¹ “This Chapter applies to all New Development through the City of Portland. The amount of the Parks and Recreation SDC shall be calculated according to this section, using the rates set forth in the SDC Methodology Report.” (The SDC Methodology Report is part of the record of this case and is referenced as Exhibit 5b.)

² “‘Non-Residential Development’ means development which does not include dwelling units.”

³ “‘Dwelling Unit’ means a building or a portion of a building consisting of one or more rooms which include sleeping, cooking, and plumbing facilities and are arranged and designed as living quarters for one family or household.”

“dwelling unit.” (Exhibit 17, page 2, section A.1). The Appellant states that the proposed dormitory project “does not contain ‘dwelling units’ because there are no cooking or plumbing facilities in the rooms” and “moreover the residence hall rooms do not contain *separate* sleeping areas.” (Exhibit 17, page 3).

The Hearings Officer, in this case, is called upon to interpret PCC 17.13.020 R. Interpretation of the PCC is governed by the principles methodology of interpretation as outlined in *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993), *State v. Gaines*, 346 Or 160 (2009) and *Lincoln Loan Co. v. City of Portland*, 317 Or 192 (1993). The initial step, to be taken by a decision maker under the *PGE* decision, is to determine if the section or sections of PCC at issue is/are clear and unambiguous.

The Hearings Officer finds that an initial review of the text and context of PCC 17.13.020 R must be undertaken to determine the intent of Portland City Council in drafting PCC 17.13.020 R. If the intended meaning remains uncertain, after making the initial examination, then the Hearings Officer may resort to a review of relevant legislative history and/or other aids of construction. *State of Oregon v. Neff*, 246 Or App 186 (2011).

The Hearings Officer quotes the entire PCC 17.13.020 R “dwelling unit” definition below:

“‘Dwelling Unit’ means a building or a portion of a building consisting of one or more rooms which include sleeping, cooking, and plumbing facilities and are arranged and designed as living quarters for one family or household.”

The Hearings Officer finds that the initial portion of the “Dwelling Unit” definition states “a building or a portion of a building consisting of.” The Hearings Officer finds this section means that the remaining portion of the definition relates to either a *building* or a *portion of a building*. The Hearings Officer finds that the balance of the “Dwelling Unit” definition may apply to either an entire building or to a portion of a building.

The balance of the “Dwelling Unit” definition refers to what must be within either a *building* or a *portion of a building*. A *building* or a *portion of a building* must include one or more rooms that serve specific purposes: sleeping, cooking, and plumbing facilities. The Hearings Officer references Exhibit 18 as an aide in determining whether or not the Proposed Residence Hall *building* contains sleeping, cooking and plumbing facilities. The Hearings Officer notes that Exhibit 18 indicates the Proposed Residence Hall building contains a total of 169 “beds” and also one (or more) “kitchen” and “bath” on each floor (including the basement). The Hearings Officer finds that the “beds” are located in rooms (singles, doubles and suites) and these rooms may be properly considered sleeping facilities. The Hearings Officer finds, based upon a review of Exhibit 18, that each “kitchen” includes a sink, stove top/oven and refrigerator. The Hearings Officer finds that the Proposed Residence Hall building does include cooking facilities. The Hearings Officer finds, based upon a review of Exhibit 18, that the “bath” designated rooms contain typical bathroom plumbing fixtures. The Hearings Officer finds the Proposed Residence Hall building contains plumbing facilities.

The definition of “Dwelling Unit” concludes by stating that the specific required rooms (sleeping, cooking and plumbing) are “arranged and designed as living quarters for one family or household.” The Hearings Officer notes that PCC 17 does not include a definition for either “one family” or “household.”

Therefore, the Hearings Officer refers to the dictionary definition of “household.” The Merriam-Webster Online Dictionary defines “household” as:

“those who dwell under the same roof and compose a family; also: a social unit composed of those living together in the same dwelling.”

The Hearings Officer finds that the dictionary definition of “household” is broad enough to include a college dormitory residence hall. The Hearings Officer finds that the Proposed Residence Hall building includes sleeping, cooking and plumbing facilities. (Exhibit 18). The Hearings Officer finds that a college dormitory residence hall constitutes a social unit made up of college students living “under the same roof.”

Based solely upon the “text” of PCC 17.13.020 R, the Hearings Officer believes that the Proposed Residence Hall building falls within the definition of “dwelling unit.” As such, the Hearings Officer finds that the Appellant’s argument that the Proposed Residence Hall building would not be properly characterized as a “non-residential use” under PCC 17.13.040 C.3 (per definition found in PCC 17.13.202 R) is not persuasive.

The Hearings Officer also considered PCC 17.13.020 R, PCC 17.13.040 C.2 and PCC 17.13.040 C.3 within the “context” of PCC 17.13. The Hearings Officer notes that PCC 17.13.040 C.2 states: “for residential uses—the number of residential dwellings, including type (i.e., single family, multi-family, etc.)” PCC 17.13.030 sets forth specific “rules of construction” to be used throughout PCC 17.13. PCC 17.13.030 F states “the word ‘includes’ shall not limit a term to the specific example, but is intended to extend its meaning to all other instances or circumstances of like kind or character.”

The Hearings Officer reviewed PCC 17.13.020 (definitions) to determine if there were terms/phrases, in addition to single family and multi-family, of similar kind or character. The Hearings Officer found, in PCC 17.13.020, definitions for single family dwelling unit, multi-family dwelling unit, duplex unit, row house, town house, single room occupancy unit, accessory dwelling unit and manufactured housing. The Hearings Officer finds that each of these terms/phrases are of a similar kind or character in that they include a reference to “dwelling unit,” place of sleeping, place of eating and place of sanitation.

The Hearings Officer takes particular note of the PCC 17.13.020 PP definition of SRO unit.⁴ The Hearings Officer sets forth the full definition of SRO unit as follows:

“means one dwelling unit that provides a living unit that has a separate sleeping area and some combination of shared bath or toilet facilities. The structure may or may not have separate or shared cooking facilities for the residents. ‘SRO’ includes structures commonly called residential hotels and rooming houses.”

The Hearings Officer finds that PCC 17.13.020 PP clearly and unequivocally characterizes an SRO unit as a “dwelling unit.” The definition of SRO unit makes reference to a “structure.” The Hearings Officer finds “structure” and “building” to be synonymous. The Hearings Officer finds that PCC 17.13.020 PP

⁴ The Hearings Officer does not, in this portion of the decision, make a decision whether or not Appellant’s Proposed Residence Hall building includes SRO units. The Hearings Officer discussion, in this portion of the decision, is focused upon the definition of “Dwelling Unit” in the context of PCC 17.13.

contemplates a structure or building that may have within it SRO units and those SRO units have shared bath/toilet facilities and/or shared cooking facilities; i.e. bath/toilet and/or cooking facilities external to the sleeping area.

The Hearings Officer also considered PCC 17.13.040 C.3 as "context" for the PCC definition (PCC 17.13.020 R). PCC 17.13.040 C.3 states:

"For non-residential uses - the square footage for each type of occupancy use type (i.e., office, retail, etc.)."

This definition gives office and retail uses as examples of non-residential uses. Office and retail are not terms defined in PCC 17.13.020. However, the Hearings Officer takes notice that neither the office nor retail use is generally associated with sleeping rooms. The Hearings Officer finds that the Proposed Residence Hall dormitory/student housing use is not of like kind or character as the office and retail examples given in PCC 17.13.040 C.3.

The Hearings Officer finds that the Proposed Residence Hall, within the context of PCC 17.13, is more residential than non-residential in character. As such, the Hearings Officer finds that the Appellant's argument that the Proposed Residence Hall is a non-residential use, per PCC 17.13.040 C.3, is not persuasive. The Hearings Officer finds that the units within the Proposed Residential Hall fall within the PCC 17.13.020 R definition of Dwelling Unit.

The Hearings Officer did consider the legislative history cited by the Appellant (Exhibit 17, page 4). The Hearings Officer finds the cited legislative history does not directly address City Council's intent related to how "dwelling unit" ought to be interpreted. The Hearings Officer finds the cited legislative history does not change the Hearings Officer's findings above related to the proper interpretation of PCC 17.13.020 R.

SINGLE ROOM OCCUPANCY UNIT: Appellant argues that the Proposed Residence Hall building does not contain SRO units. The Hearings Officer, after reviewing the Appellant's written submissions and its legal counsel's oral presentation at the November 7, 2011, hearing, finds that the Appellant presents two arguments: (1) the proposed residence hall building contains no SRO units because it contains no "Dwelling Units," and (2) the underlying zoning, along with prior master plan land use approvals, do not permit the SRO unit use on the Appellant's property.

The Hearings Officer discussion above responds to the Appellant's first argument (proposed residence hall building contains no SRO units because it contains no "Dwelling Units").

The Hearings Officer finds that the Appellant's reference to the Portland Zoning Code (PCC Title 33) and prior land use decisions to be misplaced. The Hearings Officer finds PCC 17.13 to be directed at the description, computation and implementation of system development charges for the City of Portland park and recreation system. The Hearings Officer finds no direct reference to PCC Title 33 incorporating the zoning code into PCC 17.13. The Hearings Officer finds the Appellant provided no compelling evidence or argument why the "context" of the definition of SRO requires a review of Title 33.

The Appellant alleged that SRO units are not allowed under the zoning designations on the Appellant's land. (Exhibit 17, page 4 and the Appellant's representative testimony at the November 7, 2011, hearing). At the hearing, the Appellant's representative stated that SRO units were "not allowed in the

IR zone.” The Hearings Officer notes that Table 120-2 of PCC 33.120.200 indicates SRO units are an allowed housing type in the IR multi-dwelling zone. In a written submission (Exhibit 17, page 4), the Appellant stated that:

“the residence hall was approved under the College’s 2009 Master Plan. Because SRO units are not allowed within the R-5 zone, the City may not assess the Parks SDC based on a per-SRO charge.”

The Hearings Officer reviewed Exhibit 19 (submitted by the Appellant in this case) and Exhibit B of the Decision of the Hearings Officer (Exhibit 20 in this case) and found no property with a R-5 zoning designation.

As discussed above, the PCC 17.13.020 PP definition of SRO references “Dwelling Unit.” The Hearings Officer found, above, that SRO unit use was a residential use and was also a type of “Dwelling Unit.” The Hearings Officer found that a SRO unit could be comprised of a sleeping area, bath facility and cooking facility. The Hearings Officer also found that a SRO unit could be comprised of a sleeping area with bath facilities and/or cooking facilities that are shared with other sleeping areas.

In this case, the Hearings Officer finds that the Proposed Residence Hall has sleeping rooms with bath facilities and cooking facilities separated from the sleeping areas. The Hearings Officer finds each sleeping area shares bath and cooking facilities with other sleeping areas. The Hearings Officer finds that the Proposed Residence Hall building does contain, as defined in PCC 17.13.020, SRO units.

CONCLUSION: The Hearings Officer, considering the evidence in the record and the arguments of the parties, concludes that the Proposed Residence Hall includes Dwelling Units. The Hearings Officer finds that the Dwelling Units within the Proposed Residence Hall are appropriately characterized as SRO units. The Hearings Officer finds that the City, in an exercise of its agency discretion, properly assessed a Park SDC based upon the Proposed Residence Hall containing SRO units. The Hearings Officer finds that the assessment set forth in Exhibits 7 and 7a are valid. The Hearings Officer denies the Appellant’s appeal.

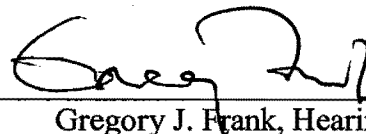
ORDER AND DETERMINATION:

1. The assessment of a Park SDC, as set forth in Exhibits 7 and 7a, is valid; the Appellant’s appeal is denied.
2. This order has been mailed to the parties on March 19, 2012.
3. This order may be appealed to a court of competent jurisdiction pursuant to ORS 34.010 et seq.

Dated: March 19, 2012

GJF:rs/jeg

Enclosure



Gregory J. Frank, Hearings Officer

Exhibit #	Description	Submitted by	Disposition
1	10/7/11 Transmittal	Whitcomb, Riley	Received
2	Appeal form page 1	Whitcomb, Riley	Received
2a	10/4/11 letter, Abel to Whitcomb	Whitcomb, Riley	Received
2b	Appeal Notice	Whitcomb, Riley	Received
3	Appeal form page 2	Whitcomb, Riley	Received
4	10/3/11 letter, Whitcomb to Abel and David Ellis, Lewis & Clark College	Whitcomb, Riley	Received
5	Ordinance No. 181669	Whitcomb, Riley	Received
5a	Backing Sheet Information	Whitcomb, Riley	Received
5b	Park System Development Charge Methodology Update Report	Whitcomb, Riley	Received
5c	Modification to City Code, Chapter 17	Whitcomb, Riley	Received
6	Chapter 17.13 Parks and Recreation System Development Charge	Whitcomb, Riley	Received
7	9/6/11 E-mail, re: Parks SDC Fee Notification 11-102847	Whitcomb, Riley	Received
7a	Notification of System Development Charge	Whitcomb, Riley	Received
7b	Timing Method	Whitcomb, Riley	Received
8	Residential/Commercial Park SDC Fee	Whitcomb, Riley	Received
9	11-102847 CO printout	Whitcomb, Riley	Received
10	Lewis & Clark New Residence Hall Sheet Revisions, A-111	Whitcomb, Riley	Received
10a	Lewis & Clark New Residence Hall Sheet Revisions, A-112	Whitcomb, Riley	Received
11	Lewis & Clark Campus Living - Residence Halls website printout	Whitcomb, Riley	Received
11a	Akin Hall website printout	Whitcomb, Riley	Received
11b	East, Roberst, & West Halls: On-Campus Apartments website printout	Whitcomb, Riley	Received
11c	Copeland Hall website printout	Whitcomb, Riley	Received
11d	Forest Halls website printout	Whitcomb, Riley	Received
11e	Hartzfeld Hall website printout	Whitcomb, Riley	Received
11f	Odell Hall website printout	Whitcomb, Riley	Received
11g	Platt-Howard Hall website printout	Whitcomb, Riley	Received
11h	Stewart Hall website printout	Whitcomb, Riley	Received
11i	Theme Housing website printout	Whitcomb, Riley	Received
12	Settling In, Campus Living Residence Hall Handbook 2011-2012	Whitcomb, Riley	Received
13	Pew Research Center - The Census: College Students Count -- but Where?	Whitcomb, Riley	Received
14	Mailing List	Hearings Office	Received
15	10/14/11 Letter	Abel, Steven W.	Received
16	Hearing Notice	Hearings Office	Received
17	11/3/11 letter	Abel, Steven W.	Received
18	New Residence Hall Plans	Abel, Steven W.	Received
19	Bureau of Planning Map	Abel, Steven W.	Received
20	Decision of the Hearings Officer - LU 08-180498 CU MS (HO 4090017)	Abel, Steven W.	Received
21	Definitions	Abel, Steven W.	Received