

**Moore-Love, Karla**

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**From:** Pfeiffer, Steven L. (Perkins Coie) [SPfeiffer@perkinscoie.com]  
**Sent:** Thursday, February 06, 2014 1:27 PM  
**To:** Moore-Love, Karla  
**Cc:** Fioravanti, Kara; Beaumont, Kathryn; Rees, Linly  
**Subject:** Park Avenue West, LLC File No. LU 13-214772 DZ/MS/AD - Applicant's appeal response  
**Attachments:** 1964\_001.pdf

Ms. Love-Moore,

This office represents West Park Avenue, LLC, the applicant in the Design Review proceeding which is the subject of the above-referenced appeal. Please include the attached submittal in the record of the review proceedings before the City Council, which is scheduled for hearing on 2/12/2014.

Thanks you for your assistance.

Steve

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2/11/2014

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February 6, 2014

VIA EMAIL

Charlie Hales, Mayor  
City of Portland  
1900 SW 4th Ave., Suite 5000  
Portland, OR 97201

**Re: Applicant's Response to Appeal;  
Park Avenue West, File No. LU 13-214772 DZ/MS/AD**

Dear Mayor Hales and Fellow City Commissioners:

This office represents West Park Avenue, LLC, the owner of the property that is the subject of the above-referenced applications and this pending appeal (the "Applicant"). This letter responds to the issues raised to date on appeal by SEIU Local 49 and its representative, David Noren, as discussed below. Please include this letter in the official record of this proceeding.

**1. The Design Commission is the Proper Review Body.**

Appellant challenges the underlying review procedure for this action and asserts that such action requires review by the Hearings Officer, and not by the Design Commission.

Contrary to Appellant's assertion, it is clear that the Design Commission is the proper review body in this proceeding under Oregon law. As discussed in more detail below, the Portland City Code ("PCC") expressly allows Type III proceedings to be heard by the Design Commission.

It is undisputed that the present application, which includes a Central City Master Plan (CCMP) review, is subject to a Type III proceeding. See PCC 33.510.255(D). PCC 33.720.030 governs the process for Type III reviews and provides that a Type III procedure requires a public hearing before "an assigned review body." PCC 33.720 governs the assignment of review bodies and the Design Commission is expressly assigned "[r]eviews in the Central City plan district for height and FAR bonuses and transfers." PCC 33.720.020(C)(4) (emphasis added). Since the sole purpose of the requested master plan is to accomplish a floor area transfer, the Design Commission is the proper body to review this application.

**2. Application is Made By and With Approval of Owners.**

Appellant alleges that the City Parks & Recreation Bureau, as owner of Park Block 5, was required to sign the application form.

First and foremost, the application form in this matter is signed by the applicant, which is the only signature required under the PCC. PCC 33.730.060(C) governs the required information for land use reviews (except land divisions) and expressly requires only “the signature of the applicant.” No other signature is required. Therefore, the City Parks & Recreation Bureau, as owner of Park Block 5, was not required to sign the application form.

Secondly, even though the City Parks & Recreation Bureau is not required to sign the current application form, it has issued a written statement through its Director, Mike Abbate, confirming that it has no objection to this application. *See* Exhibit A to our letter dated November 27, 2013. Moreover, the City Parks & Recreation Bureau has willingly participated in an FAR transfer regarding these properties in the past and has received notice of this current application. *See* Covenant attached to Exhibit A, as well as Exhibit B, to our letter dated November 27, 2013.

**3. FAR Transfer is Allowed in Downtown Subarea.**

Appellant alleges that the requested FAR transfer is prohibited because it is greater than a 3:1 ratio and because it occurs across rights-of-way in the Downtown District.

Contrary to Appellant’s assertion, however, the Central City master plan process authorizes FAR transfers greater than 3:1 and FAR transfers across rights-of-way in the Downtown District. The Central City master plan process is designed to add development potential and flexibility for projects in the Central City. Specifically, a Central City master plan allows additional flexibility in “[a]llocat[ing] allowed floor area to individual development sites that will not remain in the same ownership.” PCC 33.510.255(B)(1). Notably, this authorization has no locational or other limitation within the Central City, and such flexibility includes increasing allowed FAR transfers to greater than 3:1 and allowing FAR transfers across rights-of-way for individual development sites that will not remain in the same ownership. Based upon this broad interpretation, the City has the express authority to grant FAR transfers greater than 3:1 and across rights-of-way utilizing the flexible regulations of PCC 33.510.255, Central City Master Plans. Where a FAR transfer involves individual development sites that will not remain in the same ownership, the Central City master plan process allow such transfer, even if the transfer is greater than 3:1 or across rights-of-way. The City’s interpretation is reasonable, consistent with applicable code provisions, and, accordingly, Mr. Noren’s argument should be rejected.

**4. Application Complies with Central City Plan Policy 3, "Housing."**

Appellant asserts that the application does not comply with the Central City Plan Policy 3 regarding housing.

To the contrary, however, the application complies with Central City Plan Policy 3.C, which represents a broad policy objective to "encourage the development of housing in a wide range of types and prices and rent levels." As well-established under Oregon law, policies such as this are not mandatory permit approval criterion; rather, they are aspirational in nature. Policy 3.C is a legislative directive to the City to "encourage" a mix of housing types through its ongoing legislative policy agenda addressing planning issues city-wide. *Neuharth v. City of Salem*, 25 Or LUBA 267 (1993) (failure to establish compliance with aspirational plan provisions which "encourage" and provide guidance about what a local government should do is not a basis for LUBA to reverse or remand a challenged decision). Accordingly, this general planning policy is not an applicable mandatory review criterion, and the Commission cannot rely upon it as a means to deny or modify the proposed Park Avenue West project when the City Council has not yet reduced this broad aspirational policy to a specific quasi-judicial review criterion.

Nevertheless, it must be acknowledged that Policy 3.C does not solely encourage affordable housing. Rather, Policy 3.C encourages a wide range of housing from affordable to high-end. The Commission's approval of the pending application will, indeed, add a range of housing types to the existing housing mix, albeit just not the type that Mr. Noren and his client desire.

**5. Conclusion.**

For the reasons discussed above and as demonstrated in the record of this proceeding, including the Applicant's final written argument, dated December 12, 2013, which is attached hereto and incorporated herein by reference, the City Council should deny this appeal and uphold the Design Commission's approval of the present applications.

Sincerely yours,



Steven L. Pfeiffer

SLP:crl

Enclosure

Cc: Client (w/enc.) (via email)  
Kara Fioravanti (w/enc.) (via email)  
Kathryn S. Beaumont (w/enc.) (via email)  
Linly F. Rees (w/enc.) (via email)

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December 12, 2013

VIA EMAIL

Guenevere Millius, Chair  
Design Review Commission  
City of Portland  
1900 SW 4th Ave., Suite 5000  
Portland, OR 97201

Re: **Applicant's Final Written Argument;**  
**Park Avenue West, File No. LU 13-214772 DZ/MS/AD**

Dear Chair Millius and Fellow Commissioners:

As you know, this office represents West Park Avenue, LLC, the owner of the property that is the subject of the above-referenced application (the "Applicant"). This letter serves as the Applicant's final written argument and is timely submitted. Please make this letter part of the official record of this proceeding.

**1. The Design Commission is the Proper Review Body and Complies with ORS 227.175.**

As discussed in more detail below, the Portland City Code ("PCC") expressly allows Type III proceedings to be heard by the Design Commission, and nothing in state statute precludes the ability of the Design Commission from doing so. Under Oregon law, the Design Commission is the proper review body in this proceeding.

It is undisputed that the present application, which includes a Central City Master Plan review, is subject to a Type III proceeding. Pursuant to PCC 33.510.255(D), "Central City master plans are processed through a Type III procedure." Notably, this provision does not require that such Type III procedure be heard only by a Hearings Officer. PCC 33.720.030 governs the process for Type III reviews and provides that a Type III procedure requires a public hearing before "an assigned review body." PCC 33.720 governs the assignment of review bodies. The Design Commission is expressly assigned "[r]eviews in the Central City plan district for height and FAR bonuses and transfers." PCC 33.720.020(C)(4) (emphasis added). Since the sole purpose of the requested master plan is to accomplish a floor area transfer, the Design Commission is the proper body to review this application.

Furthermore, no state law precludes the ability of the City from assigning review of a Type III proceeding to the Design Commission. In fact, ORS 227.175 expressly *allows* the assignment of review to the Design Commission. ORS 227.175(1) provides,

“When required or authorized by a city, an owner of land may apply in writing to the hearings officer, *or such other person as the city council designates*, for a permit or zone change, upon such forms and in such a manner as the city council prescribes.”

As allowed under Oregon law, the Portland City Council has specifically assigned review of FAR bonuses and transfers in the Central City Plan District to the Design Commission.

Mr. Noren’s argument that “pursuant to ORS 227.175, appeals of Type II decisions may only be heard by a hearings officer, a planning commission or city council” is wholly irrelevant to the present proceeding. As established above, the present matter is a Type III proceeding. No state statute precludes the ability of the Design Commission from conducting a Type III review.

For the reasons stated above and in the record of this proceeding, the Design Commission is the proper review body in this proceeding.

## **2. The City of Portland, Parks & Recreation has Consented to the Application.**

As discussed in more detail below, the City Parks & Recreation Bureau fully consents to the present application and was not required to sign the application form. Mr. Noren fails to cite to any law requiring a signature by the City Parks & Recreation Bureau, let alone by the Parks & Recreation Commissioner, and he fails to demonstrate that any such procedural error prejudiced his substantial rights.

First and foremost, the application form in this matter is signed by the applicant, which is the only signature required under the PCC. PCC 33.730.060(C) governs the required information for land use reviews (except land divisions) and expressly requires only “the signature of the applicant.” No other signature is required. Consistent with the above language of the PCC regarding signatures, the City’s Land Use Review Application form specifically provides, “For land divisions, all property owners must sign the application.” Notably, property owner signatures are only required for land division applications, and not for any other land use applications. Therefore, the City Parks & Recreation Bureau, as owner of Park Block 5, was not required to sign the application form.

Secondly, even though the City Parks & Recreation Bureau is not required to sign the current application form, it has issued a written statement through its Director, Mike Abbate, confirming that it has no objection to this application. See Exhibit A to our letter dated November 27, 2013. Moreover, the City Parks & Recreation Bureau has willingly participated in an FAR transfer

regarding these properties in the past and has received notice of this current application. *See* Covenant attached to Exhibit A, as well as Exhibit B, to our letter dated November 27, 2013.

Mr. Noren fails to cite to any law requiring a signature by the Parks & Recreation Commissioner because there is no such law. The City Parks & Recreation Bureau, as owner of Park Block 5, consents to the present application, and the failure to obtain its signature or identify the City Parks & Recreation Bureau as an owner of Park Block 5 on the application form does not prejudice any substantial right of Mr. Noren or his client. Mr. Noren's argument does not give rise to any legitimate cause to deny this application; therefore, the Commission should reject Mr. Noren's argument and approve this application.

### **3. Revisions to Application were not Substantive.**

As discussed more fully below, the Applicant's revisions were made at the suggestion of City staff and simply clarified that, rather than carry forward the prior Adjustment and Design Modifications previously granted, the Applicant requests re-approval of such reviews. Accordingly, the Applicant's revisions to the application did not substantially alter the original request.

The Applicant's original application narrative, dated October 9, 2013, sought to retain and carry forward the following approvals, which were previously approved in LU 07-14063 MS DZM AD:

- The Type II Adjustment to permit vehicle access on a "Parking Access-Restricted" Street;
- The Design Modification to reduce required loading spaces from three (3) to two (2) in order to reduce the width of the shared loading dock/garage entrance on SW Park Avenue; and
- The previous Design Modification to permit the building's spire to extend more than 10' above the maximum height limit of 460'.

Even though the Applicant sought to retain and carry forward the above-referenced approvals, the Applicant addressed all of the applicable approval criteria for each review in the original application narrative, dated October 9, 2013.

As the explanatory cover letter from Robert Thompson, dated October 22, 2013, makes clear, City staff suggested during the pre-application conference that the Applicant request that the above-referenced Adjustment and Design Modifications be re-approved, rather than retained and carried forward. *See* attachments to Mr. Noren's letter, dated December 5, 2013.

Mr. Thompson's letter also confirms that the initial application narrative adequately addressed all applicable approval criteria for such requests. Following City staff's suggestion, the Applicant submitted an application form, dated October 22, 2013, which clarifies that the Applicant seeks re-approval of the previously approved Adjustment and two Design Modifications. Subsequently, on November 1, 2013, notice of the hearing on the application was mailed, which correctly

identified the proposal, including the requests for re-approval of the Adjustment and two Design Modifications.

While a revised application narrative was submitted on November 7, 2013, the revisions were merely clerical and typographical for the purpose of clarifying that the above-referenced Adjustment and two Design Modifications be re-approved, rather than retained and carried forward. No substantive nor substantial changes were made; rather, the revised narrative merely offered clarification of the original request, but did not alter the request in any manner.

For the reasons stated above and as demonstrated in the record, the Applicant's revised application did not substantially alter the original request. Therefore, the Commission should reject Mr. Noren's argument and approve this application.

**4. Application Complies with Central City Plan Policy 3, "Housing."**

As discussed more fully below, the application complies with Central City Plan Policy 3.C, which represents a broad policy objective to "encourage the development of housing in a wide range of types and prices and rent levels." As well-established under Oregon law, policies such as this are not mandatory permit approval criterion; rather, they are aspirational in nature. Policy 3.C is a legislative directive to the City to "encourage" a mix of housing types through its ongoing legislative policy agenda addressing planning issues city-wide. *Neuharth v. City of Salem*, 25 Or LUBA 267 (1993) (failure to establish compliance with aspirational plan provisions which "encourage" and provide guidance about what a local government should do is not a basis for LUBA to reverse or remand a challenged decision). Accordingly, this general planning policy is not an applicable mandatory review criterion, and the Commission cannot rely upon it as a means to deny or modify the proposed Park Avenue West project when the City Council has not yet reduced this broad aspirational policy to a specific quasi-judicial review criterion.

Nevertheless, it must be acknowledged that Policy 3.C does not solely encourage affordable housing. Rather, Policy 3.C encourages a wide range of housing from affordable to high-end. The Commission's approval of the pending application will, indeed, add a range of housing types to the existing housing mix, albeit just not the type that Mr. Noren and his client desire.

Therefore, the application complies with Policy 3.C, and the Commission should approve the application.

**5. Master Plans Offer Flexibility to FAR Transfers.**

As described more fully below, this application is allowed because the Central City master plan process authorizes FAR transfers greater than 3:1 and FAR transfers across rights-of-way in the Downtown District.



The Central City master plan process is designed to add development potential and flexibility for projects in the Central City. Specifically, a Central City master plan allows additional flexibility in "[a]llocat[ing] allowed floor area to individual development sites that will not remain in the same ownership." PCC 33.510.255(B)(1). Notably, this authorization has no locational or other limitation within the Central City, and such flexibility includes increasing allowed FAR transfers to greater than 3:1 and allowing FAR transfers across rights-of-way for individual development sites that will not remain in the same ownership. To date, and based upon this broad interpretation, the City has granted FAR transfers greater than 3:1 and across rights-of-way utilizing the flexible regulations of PCC 33.510.255, Central City Master Plans. Where an FAR transfer involves individual development sites that will not remain in the same ownership, the Central City master plan process allow such transfer, even if the transfer is greater than 3:1 or across rights-of-way. The City's interpretation is reasonable, and Mr. Noren's argument should be rejected.

For the reasons stated above and in the record of this proceeding, the Commission should approve this application.

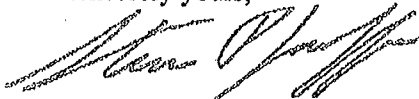
**6. Private Land Use Covenant is Not an Applicable Approval Criterion.**

Private restrictions are not subject to local government review and are not an applicable approval criterion in this proceeding. Private restrictions do not constrain or otherwise affect aspirational public policy objectives, especially because private restrictions can be removed. Whether the applicant "gave" anything in exchange for a right through a private agreement cannot be relied upon as a means to deny or modify this application. There is no nexus between the private agreement and requiring affordable housing, and Mr. Noren has failed to show that this private agreement is relevant to any applicable approval criterion. The Commission should reject his argument and approve this application.

**CONCLUSION.**

For the reasons discussed above and as demonstrated in the record of this proceeding, the Commission can find that the Applicant has met all applicable approval criteria and should approve this application.

Sincerely yours,



Steven L. Pfeiffer

SLP:cr1

Cc: Client (via email)