BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

HILARY MACKENZIE,
Petitioner,

vs.

CITY OF PORTLAND,
Respondent,

and

PORTLAND JAPANESE GARDEN SOCIETY,
Intervenor-Respondent.

LUBA No. 2014-089

ELIZABETH AMES, SARA ASHCRAFT
and ADAM SPANGLER,
Petitioners,

vs.

CITY OF PORTLAND,
Respondent,

and

DEAN N. ALTERMAN and PORTLAND
JAPANESE GARDEN SOCIETY,
Intervenors-Respondents.

LUBA No. 2014-099

FINAL OPINION
AND ORDER

Appeal from City of Portland.

Daniel Kearns, Portland filed the petition for review and argued on behalf of petitioners. With him on the brief was Reeve Kearns, PC.

Kathryn S. Beaumont, Chief Deputy City Attorney, Portland, filed a response brief and argued on behalf of respondent.

Kelly S. Hossaini, Portland, filed a response brief and argued on behalf of intervenor-respondent Portland Japanese Garden Society. With her on the brief was Miller Nash Graham & Dunn LLP.

Dean N. Alterman, Portland, filed a response brief and argued on his own behalf.

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

AFFIRMED (LUBA No. 2014-089)	03/10/2015
DISMISSED (LUBA No 2014-099)	03/10/2015

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

Opinion by Bassham.

NATURE OF THE DECISION

In these consolidated appeals, petitioners challenge a city council decision approving a conditional use permit to expand the Japanese Garden within the city's Washington Park.

FACTS

Intervenor-respondent Portland Japanese Garden Society (intervenor) operates the Japanese Garden on a 9.1-acre portion of Washington Park, pursuant to a license from the city. Washington Park is a large 400-acre city park with a base zoning of Open Space (OS). A botanical garden is a permitted use in the OS zone, although some of the buildings and accessory facilities in the Garden require conditional use approval. Portions of the Garden site are in an environmental/conservation sub-zone that requires environmental review.

On February 28, 2014, intervenor applied to the city for conditional use permit and environmental review to expand the Garden from 9.1 acres to 12.56 acres, including replacement and construction of buildings. Among the proposed changes is a new perimeter fence that will have the effect of cutting off public access to a spur trail along the Garden's service road. The spur trail currently allows hikers to take a short cut between the nearby Rose Garden and the parks' main trail, the Wildwood Trail, which connects the Hoyt Arboretum to the west of the Japanese Garden to Forest Park to the northwest. The spur trail is signed and depicted on park maps.

As proposed, the expanded Japanese Garden will occupy 12.56 acres on portions of three tax lots. The three tax lots together total over 25 acres.[1] The city treated this 25-acre area consisting of the three tax lots as the "site" for purposes of city code provisions that require notice of hearing to be mailed to landowners within 400 feet of the "site." The 25-acre area is bordered on the north and west by a residential area, and the city mailed written notices to over 100 property owners in that residential area. In addition, the city posted notice on SW Kingston Street, the only public street fronting the 25-acre site. Petitioner Mackenzie received the notice of hearing and appeared at the June 4, 2014 hearing before the hearings officer. Petitioners Ames, Ashcraft and Spangler live in a residential area west of the Garden, more than 400 feet from the 25-acre area, but within 100 feet of other portions of Washington Park. They did not receive mailed notice, and did not appear at the June 4, 2014 hearing.

On July 10, 2014, the hearings officer issued his decision approving the application. Petitioner Mackenzie and the neighborhood association both filed separate local appeals, but the neighborhood association subsequently withdrew its appeal. On August 28, 2014, the city council held a hearing on Mackenzie's appeal. Petitioners Ames, Ashcraft and Spangler did not appear before the city at any point in the proceedings below. On September 18, 2014, the city council issued its final decision approving the application with conditions. On October 8, 2014, petitioner Mackenzie timely appealed the city council's decision to LUBA. On November 3, 2014, Ames, Ashcraft and

[1] The application was subsequently modified to withdraw proposed use of tax lot 5800, a small lot developed with a single-family dwelling, known as the Kingston House.

Spangler filed their appeal of the city council decision. LUBA consolidated the two appeals for review.

MOTION TO TAKE EVIDENCE

Petitioners move to take evidence outside the record pursuant to OAR 661-010-0045, to establish an element of standing, namely that petitioners Ames, Ashcraft and Spangler own property within approximately 1,600 feet of the Japanese Garden, and within sight and sound of the Garden, and are presumptively "adversely affected" by the city's decision for purposes of ORS 197.830(3). *See* n 2. The extra-record evidence consists of affidavits from each petitioner, and maps showing the location of each petitioner's property in relation to the Garden. No party opposes the motion.

The motion is granted, and LUBA will consider the extra-record evidence as necessary for the proffered purpose.

JURISDICTION IN LUBA No. 2014-099

In their response briefs, the city and both intervenors-respondents argue that LUBA lacks jurisdiction over LUBA No. 2014-099, the appeal filed by petitioners Ames, Ashcraft and Spangler, because that appeal was filed more than 21 days after September 18, 2014, the date the city council's decision became final. In relevant part, ORS 197.830(9) provides that an appeal to LUBA must be filed within 21 days of the date the challenged land use decision becomes final.

Petitioners argue that LUBA No. 2014-099 was timely filed pursuant to ORS 197.830(3), which in certain circumstances provides an alternative deadline to appeal a land use decision to LUBA.[2] As relevant here, ORS

---

[2] ORS 197.830(3) provides, in relevant part:

197.830(3) allows a person who is adversely affected by a land use decision to appeal the decision to LUBA within 21 days of either (1) the date of actual notice of the decision or (2) the date the person knew or should have known of the decision. Among the circumstances where ORS 197.830(3) potentially applies is where a local government fails to provide notice of a hearing to a property owner who is entitled to that notice under ORS 197.763(2)(a).[3] *Aleali v. City of Sherwood*, 262 Or App 59, 75-77, 325 P3d 747 (2014). In that circumstance, the local government has failed to "provide" a hearing as to that person. *Id*. However, failure to provide notice of hearing to persons entitled to notice required only under a *local* ordinance is not a circumstance that triggers application of ORS 197.830(3). *Id*.[4]

> "If a local government makes a land use decision without providing a hearing, * * * a person adversely affected by the decision may appeal the decision to the board under this section:
>
> "(a) Within 21 days of actual notice where notice is required; or
>
> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

[3] As relevant here, ORS 197.763(2)(a) provides:

> "Notice of the hearings governed by this section shall be provided to the applicant and to owners of record of property on the most recent property tax assessment roll where such property is located:
>
> "(A) Within 100 feet of the property which is the subject of the notice where the subject property is wholly or in part within an urban growth boundary[.]"

[4] As noted, Portland City Code (PCC) 33.730.070 requires in relevant part that the city provide notice of the hearing to "all property owners within 400 feet of the site" rather than the 100 feet required by ORS 197.763(2)(a). The

As relevant here, ORS 197.763(2)(a) requires local governments to provide notice of hearings to "owners of record of property on the most recent property tax assessment roll" that is located "[w]ithin 100 feet of the property which is the subject of the notice where the subject property is wholly or in part within an urban growth boundary[.]" Petitioners argue that in the present case the relevant "property" or "subject property" for purposes of ORS 197.763(2)(a) is the entire 400-acre Washington Park, not the 25-acre "site" used by the city to provide notice. Petitioners contend that because all of Washington Park is owned by the city, it constitutes a single "property" for purposes of ORS 197.763(2)(a) and corresponding code provisions. Because Ames, Ashcraft and Spangler own property within 100 feet of the boundaries of Washington Park, petitioners argue that they were entitled to notice of the

---

city's notice requirements are thus more expansive than ORS 197.763(2)(a), assuming that the notice area is measured from the same boundaries. PCC 33.910.030 defines "site" broadly to include an entire "ownership" of contiguous lots owned by the same person, with three exceptions that can narrow the "site" to something less than an entire "ownership." In the present case, the city council concluded that one of those exceptions applies, and that the relevant "site" for purposes of PCC 33.730.070 is the 12.56-acre portion of the three tax lots that intervenor proposed for development, not the city's entire "ownership" of contiguous lots and parcels, which in the present case might include the entire 400-acre Washington Park and perhaps beyond. Record 79. Although petitioners challenge the city council's findings regarding PCC 33.730.070, we need not address those challenges or findings in order to resolve the jurisdictional question before us. Under *Aleali*, the pertinent question for purposes of ORS 197.830(3) is whether petitioners were entitled to notice of the hearing under ORS 197.763(2)(a), *i.e.*, owned property within 100 feet of the "property which is the subject of the notice." *See* n 3. Whether petitioners own property within the expanded notice area potentially available under the city's code has no bearing on the jurisdictional question. Accordingly, we focus the jurisdictional analysis on whether petitioners were entitled to notice under ORS 197.763(2)(a).

hearing under ORS 197.763(2)(a), and therefore the city's failure to provide them notice of the hearing allows them to appeal the city's decision to LUBA within 21 days of the date that they learned of the decision, pursuant to ORS 197.830(3)(a) or (b).

Relatedly, under the first assignment of error, petitioners argue that the city committed procedural error by failing to provide Ames, Ashcraft and Spangler with notice of the June 4, 2014 hearing, and thereby prejudiced their substantial rights to appear and participate in the hearing. Thus, the question of whether LUBA No. 2014-099 was timely filed under ORS 197.830(3) is intertwined with the merits of the first assignment of error.

Respondents argue, and we agree, that petitioners have not demonstrated that Ames, Ashcraft and Spangler own property within 100 feet of the "property which is the subject of the notice," and thus have not demonstrated they were entitled to mailed notice of the hearing under ORS 197.763(2)(a).

The legal question presented is what constitutes "property which is the subject of the notice" as that phrase is used in ORS 197.763(2)(a). The meaning of that phrase is a matter of statutory construction, determined by examination of the text, context, and available legislative history. *See PGE v. Bureau of Labor and Industries*, 317 Or 606, 610-612, 859 P2d 1143 (1993), *as modified by State v. Gaines*, 346 Or 160, 172, 206 P3d 1042 (2009) (to determine legislative intent, a court first examines a statute's text and context, and may consider legislative history to the extent it deems appropriate. If the legislature's intent is still unclear, the court may resort to general maxims of statutory construction).

The phrase "property which is the subject of the notice" and its constituent terms are undefined in the statute, and we agree with the parties that

the phrase is ambiguous. Few cases have addressed the meaning of that language. In *Warrick v. Josephine County*, 36 Or LUBA 81, 87 (1999), the applicant proposed to subdivide a 120-acre parcel into 22 rural residential lots, served by a new dedicated easement located on an adjoining BLM parcel. We held that the scope of "property which is the subject of the notice" included both the subject 120-acre parcel and the adjoining BLM parcel, for purposes of providing notice to nearby property owners. *Shrader v. Deschutes County*, 39 Or LUBA 782 (1999), involved nearly identical circumstances and result, except that the access road for the proposed development was via a permit over a BLM parcel rather than an easement. However, we clarified that while the "property" included the access road across the BLM parcel, it did not include the entire BLM parcel, for purposes of providing notice to property owners within the specified distance from the "property." *Id*. at 787. Finally, in *Plaid Pantries, Inc. v. City of Tigard*, 60 Or LUBA 441 (2010), we held that the "property which is the subject of the notice" did not include off-site transportation improvements to a state highway, required in order to mitigate the traffic impacts of the proposed development, because the applicant acquired no property interest in the off-site area. *Id.* at 447.

Together, these cases suggest that the "property which is the subject of the notice" for purposes of ORS 197.763(2)(a) includes at a minimum the lots or parcels that the applicant owns or controls and on which development is proposed, plus any additional off-site areas to be developed, if the applicant acquires a property or similar interest in the off-site development.

In its response brief, the city presents two alternative interpretations of the phrase "property which is the subject of the notice." First, the city argues that the phrase could refer only to the physical area of a "property" that is

proposed for development. Under that view, the city argues that the relevant "property" in the present case would include only the 12.56-acre Garden site itself.

Because the 12.56-acre Garden development area is delineated only by a license to be granted by the city, and does not correspond to any species of "property," we tend to disagree with the city that the 12.56-acre Garden development area can be viewed as the "property which is the subject of the notice" for purposes of ORS 197.763(2)(a). However, we need not resolve that issue. As noted above, the city determined the notice area based not on the 12.56-acre development area, but rather on the exterior boundaries of three tax lots that are collectively 25 acres in size. The relevant question is whether a notice area based on that 25-acre "property" is sufficient to comply with the statute.

The city next argues that the 25-acre area formed by the three tax lots that include the 12.56-acre development area constitutes the "property" for purposes of ORS 197.763(2)(a). According to the city, because the city provided notice to owners of property within 400 feet of that 25-acre area, and petitioners Ames, Ashcraft and Spangler do not own property within that expanded notice area, much less the 100-foot notice area required by ORS 197.763(2)(a), those petitioners were not entitled to notice of hearing.

On this point, we understand petitioners to make three contentions. The first is that the entire 400-acre Washington Park is "a single parcel owned by the City of Portland." Petition for Review 21. However, petitioners offer no support for the claim that the 400-acre park is a single "parcel," and it seems highly unlikely. Intervenor-respondent Alterman (Alterman) argues that Washington Park is made up of many separate units of land that accumulated in

city ownership over time. The legal description of the subject property used in the city's decision appears to support that view. Tax lot 5800, developed with the Kingston House, is described with lot and block numbers for the Arlington Heights plat and replat, suggesting that tax lot 5800 was created as part of a subdivision. The other two larger tax lots are not described with lot and block numbers, or with reference to any partition or subdivision plat, suggesting that they were probably created by deed originally and transferred to the city at some point. Record 24. In addition, the zoning maps in the record appear to show multiple property lines within the Park areas in the vicinity of the Garden, corresponding to the three tax lots that the city treated as the "property" for purposes of providing notice of hearing. Record 247. Finally, we note that the extra-record maps that petitioners submitted to demonstrate where their properties are located in relation to the Garden appear to show the same internal property lines within the Park as the zoning maps in the record.

At oral argument, petitioners noted, correctly, that tax lot boundaries are do not necessarily correspond to lot or parcel boundaries, and argued that the city has not demonstrated that the boundaries of the three tax lots comprising the 25-acre "property" that the city used to determine the notice area represent lot or parcel boundaries. We understand petitioners to argue that it is the city's obligation during the proceedings below to demonstrate in the record that the ORS 197.763(2)(a) notice area was measured from property boundaries, and that the city cannot rely on mere tax lot boundaries. Petitioners contend that remand is necessary for the city to make that demonstration.

In our view, it is reasonable for a local government to rely on tax lot boundaries for purposes of determining the exterior boundaries of the lots or parcels make up the "property which is the subject of the notice," and hence the

notice area, under ORS 197.763(2)(a), absent some reason to believe that tax lot boundaries do not correspond to the relevant lot or parcel boundaries. In the present case, petitioners offer no reason to believe that the tax lot boundaries the city relied upon to establish the notice area do not accurately reflect the relevant property boundaries for purposes of ORS 197.763(2)(a).

Finally, petitioners argue repeatedly that the appropriate "property which is the subject of the notice" in the present case is the entire 400-acre Washington Park owned by the city, because all of that property is in common ownership. As noted, the city's code provides for an expanded notice area based on the boundaries of all properties within an "ownership," that is, contiguous lots or parcels in single ownership, with certain exceptions. As explained, however, the jurisdictional question turns on the notice area required by ORS 197.763(2)(a), not the expanded notice area required by the city's code. While petitioners' arguments regarding "ownership" are based on the city's code, it is possible that petitioners mean to also contend that the 100-foot notice area required by ORS 197.763(2)(a) should be measured from the boundaries of an "ownership," that is, contiguous lots in single ownership, not limited to the boundaries of the lots or parcels that are proposed for development. If that is petitioners' contention, we reject it. As *Warrick* and *Shrader* indicate, there may be circumstances where it is necessary to measure the notice area from points beyond the boundaries of the lots or parcels on which the applicant proposes development, where part of the approved development is to be located beyond the boundaries of those lots or parcels, in order to provide the effective notice to nearby property owners that ORS 197.763(2)(a) is intended to provide. However, nothing cited to us in the text or context of the statute *requires* local governments to use the boundaries of all

lots or parcels in common "ownership" as the basis to determine the notice area, in circumstances where the proposed development does not involve all contiguous lots or parcels under common ownership.

In sum, petitioners in LUBA No. 2014-099 have not demonstrated that they own property within 100 feet of the "property which is the subject of the notice" for purposes of ORS 197.763(2)(a), *i.e.*, the 25-acre area comprised of the three tax lots that include the area intervenor proposes for development. The petitioners in LUBA No. 2014-099 were not entitled to notice of the hearing under ORS 197.763(2)(a), and therefore are not entitled to appeal the city's decision to LUBA under the alternative deadlines set out at ORS 197.830(3). The applicable deadline is thus provided by ORS 197.830(9)—21 days after the date the city's decision became final—and there is no dispute that petitioners' appeal was untimely filed under that statute. Therefore, we must dismiss LUBA No. 2014-099.

LUBA No. 2014-099 is dismissed.

FIRST ASSIGNMENT OF ERROR

The first assignment of error contends that the city committed procedural error prejudicial to the petitioners in LUBA No. 2014-099, by failing to provide them with notice of the hearing. However, as explained, LUBA lacks jurisdiction over their appeal, and petitioner Mackenzie, the petitioner in LUBA No. 2014-089, does not contend that any procedural error the city committed prejudiced her substantial rights. Under ORS 197.835(9)(a)(B), LUBA may reverse or remand for procedural error, only if the petitioner demonstrates that the error prejudiced the substantial rights of the *petitioner*. Accordingly, Mackenzie's arguments under the first assignment of error do not demonstrate a basis for reversal or remand.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In six sub-assignments of error, petitioner Mackenzie argues that the city's findings of compliance with conditional use permit and environmental review standards are inadequate or not supported by substantial evidence. Most of petitioner's arguments concern the proposal to expand the Garden's perimeter fence and thus eliminate the spur trail that hikers use as a shortcut.

A. First Sub-Assignment of Error: Consistent with the Purpose of the OS zone

PCC 33.815.100(A) is a conditional use permit standard that requires a finding that "[t]he proposed use is consistent with the intended character of the specific OS zoned area and with the purpose of the OS zone[.]" Among the listed purposes of the OS zone are to provide "pedestrian and bicycle transportation connections." PCC 33.100.010.

Petitioner argued below that the spur trail along the Garden's existing service road is signed and depicted as a trail on various park maps, that it functions as a connector to the Wildwood Trail, and that its loss would be inconsistent with the purpose of the OS zone to provide "pedestrian and bicycle transportation connections." The city council adopted the following findings rejecting that argument:

> "The Hearings Officer finds that the Washington Park Trail map * * * is not a legally binding document. The Hearings Officer finds the trail connection from the Garden access road to the Wildwood Trail * * * is not an official pedestrian connection that must be improved and/or maintained. The Hearings Officer finds that at least one alternative connection from SW Fairview Boulevard to the Wildwood Trail exists and provides adequate connectivity (perhaps not subjectively as good a route as perceived

by persons providing testimony/written comments in opposition)." Record 37.

On appeal, petitioner argues that even if the spur trail is not an "official" pedestrian connection or part of the Wildwood Trail, the city must still consider whether its loss is consistent with the OS zone purpose to provide pedestrian connections.

Intervenor and Alterman respond, and we agree, that the hearings officer adequately considered whether loss of the spur trail is consistent with the OS zone purpose to provide pedestrian connections, in finding that adequate alternative connections exist. Petitioner does not challenge that finding or explain why it is insufficient to demonstrate that loss of the spur trail does not violate PCC 33.815.100(A). The first sub-assignment of error is denied.

A. Second Sub-Assignment of Error: Significant Adverse Impacts on Livability

PCC 33.815.100(C) is a conditional use permit standard requiring a finding that the proposal "will not have significant adverse impacts on the livability of nearby residential-zoned lands due to" (1) noise, glare from lights, late-night operations, odors and litter, and (2) privacy and safety issues.

Petitioner argues that the city council failed to address testimony from nearby residents that elimination of the spur trail would significantly impact the neighbors' enjoyment of the area. However, as far as we can tell or petitioner has established, none of the cited testimony identifies any significant adverse impact arising from eliminating public use of the informal spur trail on the livability to nearby residential lands that is due to noise, glare from lights, late-night operations, odors and litter, or privacy and safety issues. It is difficult to understand how eliminating a spur trail could cause those types of impacts.

Petitioner also argues briefly that expanding the Garden will increase the volume of visitors, which will increase noise, glare, traffic, congestion and odors, and that the city's findings fail to adequately address such impacts.[5] However, petitioner does not challenge, or even acknowledge, the city's findings of compliance with PCC 33.815.100(C) at Record 57. Absent a more developed challenge to the city's findings, petitioner's arguments under this sub-assignment of error do not provide a basis for reversal or remand.

The second sub-assignment of error is denied.

B. Third Sub-Assignment of Error: Minimizes the Loss of Resources

PCC 33.430.250(E)(1) is an environmental review standard requiring a finding that proposed development within the environmental sub-zone "minimizes the loss of resources and functional values, consistent with allowing those uses generally permitted or allowed in the base zone without a land use review[.]"

Petitioner contends first that the new buildings approved under the decision will be visible from the Wildwood Trail, but does not explain why the visibility of buildings from the Wildwood Trail has anything to do with

---

[5] Intervenor argues that this issue of the impacts of the expanded Garden on the livability of the residential neighborhood was not raised below and is thus waived, pursuant to ORS 197.763(1). *See* n 6. At oral argument, petitioner pointed to record citations at Petition for Review 27-28, where petitioner asserts the issue of impacts of the expanded Garden on livability was adequately raised below. We agree with petitioner that issues were raised below, albeit with some generality, that the expanded Garden would impact livability of the residential neighborhood, sufficient to allow petitioner to challenge the adequacy of the city's findings of compliance with PCC 33.815.100(C). However, as explained, petitioner has not demonstrated that the city's findings of compliance with PCC 33.815.100(C) are inadequate.

minimizing the loss of resources and functional values in the conservation sub-zone on the property affected by the development.

Petitioner next argues that PCC 33.430.250(E)(1) requires the city to compare the loss of resources and functional values caused by the proposed development, against the loss of resources and functional values caused by uses permitted or allowed in the base OS zone, but that the city failed to conduct such a comparison. Intervenor responds that the issue of whether the proposed conditional uses' impacts on environmental resources must be compared to the uses permitted in the base OS zone was not raised below, and is waived. ORS 197.763(1).[6]

OAR 661-010-0030(4)(d) requires that each assignment of error "demonstrate that the issue raised in the assignment of error was preserved during the proceedings below." Neither the second assignment of error, nor any of its sub-assignments, includes the required demonstration, at least labeled as such. That failure might be viewed as a "technical violation" of OAR 661-010-0030(4)(d), and pursuant to OAR 661-010-0005 constitute a violation that need not interfere with our review proceeding, if preservation is addressed elsewhere in the petition for review, a reply brief, or at oral argument. However, as far as we can tell nothing in the petition for review or anything

---

[6] ORS 197.763(1) provides:

> "An issue which may be the basis for an appeal to [LUBA] shall be raised not later than the close of the record at or following the final evidentiary hearing on the proposal before the local government. Such issues shall be raised and accompanied by statements or evidence sufficient to afford the governing body, planning commission, hearings body or hearings officer, and the parties an adequate opportunity to respond to each issue."

stated at oral argument attempts to demonstrate that the issue raised under third sub-assignment of error was preserved below, with respect to PCC 33.430.250(E)(1). Accordingly, the issue of whether the city failed to adequately conduct the comparison required by PCC 33.430.250(E)(1) is waived.

Finally, petitioner argues that the city failed to evaluate the loss of resources and functional values caused by future construction of a new trail to replace the informal spur trail. However, as intervenor argues, the possibility of a replacement trail was discussed during the proceedings below, but the challenged decision does not approve a replacement trail or rely on a replacement trail in order to approve the proposed Garden expansion. Accordingly, petitioner has not established that the city was required to evaluate a replacement trail under PCC 33.430.250(E)(1).

The third sub-assignment of error is denied.

C. Fourth Sub-Assignment of Error: Least Significant Detrimental Impact

PCC 33.430.250(A)(1)(a) and PCC 33.430.250(E)(2) are environmental review criteria requiring, in similar terms, a finding that the "proposed development locations, designs, and construction methods have the least significant detrimental impact to identified resources and functional values of other practicable and significantly different alternatives including alternatives outside the resource area of the environmental zone[.]"

Petitioner argues that the city failed to evaluate the impacts of a replacement spur trail on other parts of Washington Park. Intervenor responds, and we agree, that the city did not approve a replacement spur trail, or rely on the construction of a replacement spur trail to find compliance with any

approval criterion. Petitioner's arguments under this assignment of error therefore do not provide a basis for reversal or remand.

The fourth sub-assignment of error is denied.

D. Fifth Sub-Assignment of Error: Transportation Impacts

The fifth sub-assignment of error is as follows:

> "The City Council misapplied and misconstrued the applicable criteria and failed to adopt adequate findings, supported by substantial evidence when it allowed this development in the City's OS zone when it promises significant adverse impacts on public services and the livability of nearby residentially zoned lands. PCC 33.815.100(B)(2) & (C)."

PCC 33.815.100(B)(2) requires a finding that the "transportation system is capable of supporting the proposed use in addition to the existing uses in the area." PCC 33.815.100(B)(C), quoted above, requires a finding that the proposed use will not have significant adverse impacts on the livability of nearby residential-zoned lands due to noise, glare from lights, etc.

However, the only argument under the fifth sub-assignment of error consists of the statement that "[t]he Adversely Affected Petitioners incorporate herein by this reference the appeal issues raised in the Arlington Heights Neighborhood Association's appeal of the hearings officer's decision to the city council, which was later withdrawn * * *." Petition for Review 31. "Adversely Affected Petitioners" apparently refers to Ames, Ashcraft and Spangler, petitioners in LUBA No. 2013-099. That is the extent of the argument supporting this sub-assignment of error.

Petitioner's argument fails for two reasons.[7] The first is that, as explained above, LUBA has no jurisdiction over LUBA No. 2014-099 and that appeal is dismissed. The petitioners in LUBA No. 2014-099 are not parties to LUBA No. 2014-089, and cannot advance any arguments in that appeal. The fifth sub-assignment of error does not purport to advance any arguments on behalf of Mackenzie, the only petitioner in LUBA No. 2014-089.

Second, even if the fifth sub-assignment of error is intended to advance an argument on behalf of Mackenzie, the transportation impact issues raised by the Arlington Heights Neighborhood Association as part of its local appeal were expressly withdrawn, and consequently the city council expressly chose not to adopt findings regarding those transportation impact appeal issues. Record 78. The only appeal then pending before the city council was Mackenzie's, and petitioner does not assert that she raised any issues regarding transportation impacts. Nor does petitioner assert that during the proceedings below she incorporated the neighborhood association's appeal issues into her own appeal. The city council was thus led to believe that such issues need not be addressed. In withdrawing its local appeal, the neighborhood association

---

[7] In addition, we observe that it is poor practice to advance an assignment of error in the petition for review that consists entirely of an incorporation of arguments made below, without setting out those arguments in the Petition for Review. LUBA's rules contemplate that the assignment of error and supporting argument will be provided in the petition for review itself, which is subject to page limits and other restrictions. Parties who incorporate arguments from the record or other pleadings as assignments of error risk summary rejection of those arguments, if such incorporation would cause the petition for review to exceed page limits or other restrictions. Even where that is not the case, incorporation of arguments made below as assignments of error may hamper LUBA's review. Board Members frequently do not have ready access to the record when reading briefs.

"affirmatively waived" the issues presented in its local appeal, such that if the neighborhood association had appealed to LUBA, it could not have advanced those issues to LUBA. *Newcomer v. Clackamas County*, 92 Or App 174, 186, 758 P2d 369, *modified* 94 Or App 33, 764 P2d 927 (1988). Under these circumstances, we do not believe a *different* party can advance such affirmatively waived issues before LUBA, absent a demonstration that the party incorporated or asserted the affirmatively waived issues below in a manner that informed the local government and the other parties that the issues remain live issues that need to be addressed. Petitioner offers no such demonstration.

The fifth sub-assignment of error is denied.

F. Sixth Sub-Assignment of Error: Square Footage

Intervenor proposed, and the hearings officer approved, new buildings with an 11,430 square feet area of building area. Petitioner argues, however, that that 11,430 square feet figure reflects only the footprint of the new buildings, and that some of the new buildings have two or three stories. Petitioner argues that, based on her calculations of the square footage of elevations in the record, the proposed new development actually represents over 25,000 square feet of building area. Because the hearings officer approved only 11,430 square feet of building area, petitioner argues, there is a conflict between the elevation plans showing the larger building area and the city's decision, which approves only the smaller building area. Petitioner contends that because the development's impacts were predicated on the smaller building area, remand is necessary to either prohibit development in excess of 11,430 square feet or re-evaluate those impacts under the larger figure.

Intervenor responds that its architects correctly calculated the net square footage of the proposed new buildings, and that the calculations of petitioner's attorney based on drawings in the record do not demonstrate that the new development exceeds the 11,430 square feet in building area that the hearings officer approved. Intervenor also notes that the city council's findings consider the issue, reject petitioner's arguments for a larger figure than 11,430 net square feet, and expressly limit development to the 11,430 net square feet approved in the hearings officer's decision.[8] Petitioner does not challenge those city council findings, or even acknowledge them. We agree with intervenor that petitioner has not demonstrated that there is any inconsistency in the city's decision or that remand is necessary to address impacts under the larger square footage figure calculated by petitioner.

The sixth sub-assignment of error is denied.

The second assignment of error is denied.

The city's decision is affirmed.

---

[8] The city council findings state, in relevant part:

> "As part of the Conditional Use review, the Applicant is required to document the maximum total square footage of net new development requested. In this case, the Applicant requested and the Hearings Officer approved a maximum expansion of 11,430 net square feet; this includes a total of up to 13,850 gross square feet of new development less the demolition of an existing 2,510-gsf building. * * * It is to this maximum square footage that the Applicant has calculated all potential off-site impacts, including parking and traffic impacts, and to which it will be held in the building permit process. No credible evidence has been provided by [Petitioner] or other supporters of the appeal that this number is incorrect." Record 81-82.