

**BEFORE THE LAND USE BOARD OF APPEALS  
OF THE STATE OF OREGON**

## TRUTH IN SITE COALITION,

## TRUTH IN SITE, LLC,

SCOTT MORGAN, MARIE R. MATTHEWS,

JOHN B. MATTHEWS and JUDY HECK,

*Petitioners,*

VS.

## CITY OF BEND,

*Respondent,*

and

## OREGON STATE UNIVERSITY – CASCADES,

### *Intervenor-Respondent.*

LUBA No. 2014-098

## Appeal from City of Bend.

Jeffrey L. Kleinman, Portland, filed the petition for review and argued on behalf of petitioners.

Mary Winters, City Attorney, Bend, filed a response brief and argued on behalf of respondent. With her on the brief was Gary Firestone.

Liz Fancher, Bend, and Stephen T. Janik, Portland, filed a response brief and argued on behalf of intervenor-respondent.

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

AFFIRMED

06/08/2015

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

## Opinion by Ryan.

## **NATURE OF THE DECISION**

Petitioners appeal a city decision approving a site plan and design review application for a university campus.

## FACTS

Intervenor-respondent Oregon State University (OSU) applied for site plan and design review approval for a new undergraduate college campus on a 10.44-acre parcel zoned Limited Commercial (CL). The proposed campus includes student housing, a dining hall, several academic buildings, and a parking lot on the north part of the property.

The subject property is located within the platted Century Washington Center Subdivision and is bounded by SW Chandler Avenue on the south and SW Century Drive on the east. A former surface mine is adjacent to the subject property on the west, and OSU is a party to a purchase agreement to purchase the former surface mine for possible expansion of the campus. A closed landfill is adjacent to the subject property on the north. Properties located directly to the south of the subject property are located in the Century Washington Center Subdivision. The property located across SW Century Drive to the east is developed with a hotel and restaurant.

The subject property is currently accessed from SW Chandler Avenue. As part of its proposal, OSU proposes to add a second access point at SW Century Drive, and to create a new private street on the northeastern edge of the property that will connect SW Century Drive and SW Chandler Avenue. A layout of the proposed development is appended to the opinion.

The hearings officer held hearings on the applications and approved the applications. Petitioners and others appealed the decision to the city council.

1      The city council affirmed the hearings officer's decision with conditions. This  
2      appeal followed.

3      **REPLY BRIEF**

4           Petitioners move for permission to file a reply brief to respond to new  
5      matters raised in the response brief. OSU objects to the reply brief.

6           In its response brief, OSU alleges that several of the issues that  
7      petitioners raise in the petition for review were not raised below either during  
8      the evidentiary hearings or in petitioners' notice of appeal to the city council,  
9      and are therefore waived. OSU also responds that LUBA's standard of review  
10     for the challenged decision is not the standard of review identified in the  
11     petition for review. We agree with petitioners that the reply brief is warranted  
12     to address these new matters, and the reply brief is allowed.

13      **FIRST ASSIGNMENT OF ERROR**

14           As explained above, OSU proposes to add a second access point to the  
15     subject property from SW Century Drive, and to create a new private street on  
16     the northern edge of the property and the northern edge of the parking lot. The  
17     new private street will connect SW Century Drive and SW Chandler Avenue.  
18     As part of the approval, OSU is required to grant a public access easement over  
19     the private street.

20           Bend Development Code (BDC) Chapter 3.4 provides requirements for  
21     design and construction of public and private transportation facilities. BDC  
22     3.4.200 sets out transportation improvement standards and provides in relevant  
23     part:

24           "C. Creation of Rights-of-Way for Streets and Related Purposes.  
25           Streets shall be created through the approval and recording  
26           of a final subdivision or partition plat; except the City may  
27           approve the creation of a Public Right-Of-Way by

1 acceptance of a deed, where no plat will be recorded; and  
2 provided, that the street is deemed essential for the purpose  
3 of implementing the Bend Urban Area Transportation  
4 System Plan, and the deeded right-of-way conforms to this  
5 code. All deeds of dedication shall be in a form prescribed  
6 by the City and shall name ‘the public’ as grantee.

7 “D. Creation of Vehicular Access Easements. The City may  
8 require a vehicular access easement established by deed  
9 when the easement is necessary to provide for vehicular  
10 access and circulation \*\*\*.”

11 In their first assignment of error, petitioners argue that BDC 3.4.200(C)  
12 requires that the new private street can only be created through the approval  
13 and recording of a final subdivision or partition plat, necessitating an  
14 amendment of the recorded plat of Century Washington Center Subdivision.

15 In responding to petitioners’ argument below, the city interpreted the  
16 first part of the first sentence of BDC 3.4.200(C) to apply when a public street  
17 or right of way is being created as part of a development that is also required to  
18 be platted as a subdivision or partition. The city council concluded that the  
19 second part of the first sentence of BDC 3.4.200(C) applies to OSU’s proposed  
20 creation of a private street without subdividing or partitioning the property, but  
21 with a public access easement created by a deed. The city council found  
22 support for that interpretation in another BDC provision, 3.1.200(D)(4), which  
23 requires private streets to contain a public access easement if required to satisfy  
24 block length and perimeter standards.<sup>1</sup>

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<sup>1</sup> The city council found:

“It is a routine practice for commercial or institutional development to go through development review utilizing the Site Plan Review process without needing to divide the land via a

1           As relevant here, under ORS 197.829(1)(a), the city council's  
2 interpretation of the relevant provisions of the BDC is reversible only if it "is

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subdivision or partition. If the property is to remain under one ownership there is no reason to formally divide the property; the property remains a single property even if a street runs through it. In these cases, public and private streets are created through separate documents and not with the recording of a plat, which is what is occurring with the construction of the new middle school on Skyliners Road for the extensions of Northwest Crossing Drive and Skyline Ranch Road. This is why the Code expressly allows the dedication of right of way via a deed and similarly allows the creation of access easements. The emphasized section of the above-cited Code recognizes that in some instances there is no plat to record, but a road must be created to serve the development. OSU-Cascades' proposal meets this Code provision because there is no new plat, and the creation of the private street is essential to meet the minimum block length and perimeter requirements of the Code.

"Another Code section that authorizes the creation of a private street with a public access easement is Section 3.1.200(7)(D)(4), which states: ' ... private streets, where authorized by this code, shall be constructed to public standards and contain a public access easement along the length and width of the private facility if required to satisfy the block length and perimeter standards.' Again, the Code requires private streets with public access easements be created when necessary to meet the block length and perimeter standards, which is the case with the new private street proposed by OSU- Cascades.

#### "Specific Finding

"The Bend City Council interprets 3.4.200(C) and 3.1.200(D)(4) to allow for the creation of a private street with a public access easement through recorded deed or easement document, and not necessarily through the recording of a subdivision or partition plat." Record 85 (emphases omitted).

1 inconsistent with the express language of the comprehensive plan or land use  
2 regulation[.]” Under *Siporen v. City of Medford*, 349 Or 247, 261, 243 P3d  
3 776 (2010), LUBA’s standard of review under ORS 197.829(1) is highly  
4 deferential, and LUBA must defer to the city council’s interpretations unless  
5 they are implausible. Petitioners focus on the express language in the first part  
6 of the first sentence of BDC 3.4.200(C) to the exclusion of all of the other  
7 express language that the city council relied on in interpreting the relevant  
8 provisions, and argue that the city council’s interpretation is implausible.  
9 Petitioners have not demonstrated that the city council’s interpretation is  
10 “inconsistent with” the express language of all of the relevant BDC provisions,  
11 and the city’s interpretation under ORS 197.829(1)(a) easily qualifies as  
12 plausible.

13 The first assignment of error is denied.

14 **SECOND ASSIGNMENT OF ERROR**

15 As explained above, in the challenged decision the city council approved  
16 an additional access point to the subject property from SW Century Drive. The  
17 recorded plat of Century Washington Center Subdivision, of which the subject  
18 property is a part, shows a “No Vehicle Access” strip over the parcels that are  
19 adjacent to SW Century Drive. Record 3273. In their second assignment of  
20 error, we understand petitioners to argue that the No Vehicle Access strip  
21 prohibits the city from approving the new access.<sup>2</sup>

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<sup>2</sup> BDC 3.1.400 allows the city to approve new access points in connection with a proposed development:

“C. Approval of Access Required. Proposals for new access shall comply with the following procedures:

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“1. Permission to access City streets shall be subject to review and approval by the City based on the standards contained in this chapter and the provisions of BDC Chapter 3.4, Public Improvement Standards. Access will be evaluated and determined as a component of the development review process.

“\* \* \* \* \*

“F. Access Management Requirements. Access to the street system shall meet the following standards:

“1. Except as authorized under subsection (F)(4) of this section, lots and parcels in all zones and all uses shall have one access point. \* \* \*

“\* \* \* \* \*

“4. Additional Access Points. An additional access point may be allowed when it is demonstrated that the additional access improves on-site circulation, and does not adversely impact the operations of the transportation system. If the second access point is only available to an arterial or collector roadway, the City may require one or more of these conditions of approval:

“a. Locating the access the maximum distance achievable from an intersection or from the closest driveway(s) on the same side of the street;

“b. Installation of turn restrictions limiting access to right-in and right-out when the new access would be located within 200 feet of an existing or planned traffic signal or roundabout and no left turn lane exists to accommodate left turn storage on the arterial or collector;

1           **A.     Exhaustion Waiver**

2           ORS 197.825(2)(a) limits LUBA's jurisdiction "to those cases in which  
3       the petitioner has exhausted all remedies available by right before petitioning  
4       the board for review[.]" In *Miles v. City of Florence*, 190 Or App 500, 79 P3d  
5       382 (2003), the Court of Appeals held that when the local appeal ordinance  
6       requires an appealing party to specify the issues for appeal, and the local  
7       ordinance expressly or impliedly limits the appeal body to the issues so  
8       specified, the appeal body's review is generally limited to the specified issues.  
9       190 Or App at 509-10. The Court of Appeals further held that ORS  
10      197.825(2)(a) also limits LUBA's review to those issues that are raised on local  
11      appeal. *Id.*

12          BDC 4.1.1120(A)(3) requires in relevant part that the specific criteria  
13       relied on as the basis for an appeal must be set out in the notice of appeal with  
14       a sufficient explanation of why the decision does not comply with the criteria,  
15       so as to afford the city council the opportunity to respond to each issue.<sup>3</sup> OSU

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“c. Establishing a shared access with an adjoining property when possible; and/or

“d. Establishing a cross access easement with an adjoining property when possible.”

<sup>3</sup> BDC 4.1.1120(A)(3) provides that the appeal statement must contain:

“A description of the issues sought to be raised by the appeal; and a statement that the issues were raised during the proceeding that produced the decision being appealed. This description must include the specific criteria relied upon as the basis for the appeal, and an explanation of why the decision has not complied with the standards or requirements of the criteria. The issues raised by the appeal must be stated with sufficient specificity to afford the reviewing authority an opportunity to resolve each issue raised.”

1 responds, initially, that petitioners are precluded from raising the issue raised in  
2 the second assignment of error because petitioners' appeal statement fails to  
3 include "the specific criteria relied upon as the basis for the appeal[.]"

4 Petitioners respond that the issue presented in the second assignment of  
5 error was raised at Record 739-40 with the specificity required by the BDC.  
6 We have reviewed the cited pages from the Notice of Appeal and we agree with  
7 petitioners that the issue was raised in the notice of appeal in a manner that  
8 complies with BDC 4.1.1120(A)(3).

9       **B. "No Vehicle Access" Strip**

10      In response to petitioners' assignment of error arguing that the No  
11 Vehicle Access strip precludes the city from approving the application, OSU  
12 and the city (together, respondents) respond that the plat is not a "land use  
13 regulation" as defined in ORS 197.015(11). Respondents contend therefore  
14 that under ORS 197.828(2)(b), petitioners' arguments under the second  
15 assignment of error provide no basis for reversal or remand of the decision.<sup>4</sup>

16      We agree with respondents. As explained below, ORS 197.828(2) sets  
17 out our standard of review for limited land use decisions such as the site plan  
18 review approval challenged in this appeal.<sup>5</sup> ORS 197.828(2)(b) authorizes  
19 LUBA to reverse or remand a limited land use decision that "does not comply  
20 with applicable provisions of the land use regulations[.]" In our discussion of

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<sup>4</sup> ORS 197.015(11) defines "land use regulation" to mean "any local government zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance establishing standards for implementing a comprehensive plan."

<sup>5</sup> We set out and discuss in more detail ORS 197.828(2) in our resolution of the fourth assignment of error.

1 the fourth assignment of error below, we conclude that the decision before us  
2 in this appeal is a limited land use decision as defined in ORS 197.015(12). If  
3 the decision that is before us for review was a land use decision, rather than a  
4 limited land use decision, our analysis and conclusion under the second  
5 assignment of error might well have been different. That is because once  
6 LUBA has jurisdiction to review a land use decision, LUBA’s scope of review  
7 in reviewing land use decisions under ORS 197.835 includes authority to  
8 reverse or remand a decision that “[i]mproperly construes applicable law[.]”  
9 ORS 197.835(9)(a)(D). We have construed the phrase “applicable law” as used  
10 in ORS 197.835(9)(a)(D) to be broader than land use laws. *Cogan v. City of*  
11 *Beaverton*, 57 Or LUBA 217, 225-26 (2008), *aff’d* 226 Or App 381, 203 P3d  
12 303 (2009).

13 The plat is not a land use regulation and is not a part of BDC 3.1 or 3.4,  
14 and petitioners have cited to nothing in BDC Chapter 3.1 or 3.4 that prohibits  
15 the city from approving the access. Accordingly, petitioners’ arguments  
16 provide no basis for reversal or remand of the decision.

17 The second assignment of error is denied.

18 **THIRD ASSIGNMENT OF ERROR**

19 As explained above, OSU is a party to an agreement to purchase the  
20 adjacent 46-acre former mine site zoned Surface Mining (SM) from its current  
21 owner, for potential expansion of the campus. During the proceedings below,  
22 OSU presented informational concept plans for a potentially expanded campus  
23 onto the adjacent 46-acre site. Record 2477-85. In their third assignment of  
24 error, petitioners argue that in light of OSU’s presentations included in the  
25 record regarding the potentially expanded campus, the city improperly failed to

1 apply two of the provisions of BDC Chapter 4.5, Master Planning and  
2 Development Alternatives, to the applications.

3           **A. BDC 4.5.300 Master Planned Development**

4           The first provision of BDC 4.5 that is relevant to the third assignment of  
5 error, BDC 4.5.300, provides as relevant here:

6           “The Master Planned Development designation may be applied  
7 over any of the City’s land use districts for any property or  
8 combination of properties three acres or greater in size. For  
9 projects consisting of one or more properties totaling 20 acres or  
10 larger at the date of adoption of this code, a Master Neighborhood  
11 Development Plan shall be required in conformance with BDC  
12 4.5.400, Master Planned Neighborhood Development.”

13          The remainder of BDC 4.5.300 sets out review procedures and criteria for a  
14 Master Planned Development. Master Planned Development approval requires  
15 submission and approval of a concept development plan, a tentative  
16 development plan, and a preliminary subdivision plat or a site design review  
17 application. After all approvals are obtained, the property is designated as  
18 master planned on a city map and a new provision is added to BDC Chapter 2.7  
19 to reflect the new master planned district.

20          In general, then, the first sentence of BDC 4.5.300 provides an option for  
21 an applicant to seek a Master Planned Development designation on any  
22 property or combination of properties three acres or greater in size. The second  
23 sentence of BDC 4.5.300 *requires* “projects consisting of one or more  
24 properties totaling 20 acres or larger” to receive approval of a “Master  
25 Neighborhood Development Plan” under BDC 4.5.400. We set out and  
26 discuss BDC 4.5.400 below.

27          The word “project” is not defined in the BDC. The city council found  
28 that the adjacent 46 acres zoned SM is not part of the “project” within the

1 meaning of BDC 4.5.300(A), because OSU does not own or control that  
2 property. The city council interpreted the word “project” by looking at the  
3 context provided by the phrase “one or more properties” in the same BDC  
4 provision and the BDC requirement that a property owner must sign an  
5 application to mean the proposal for which an applicant has the authority to  
6 apply, either through ownership of a property or through the signature of a  
7 property owner who is not the applicant. Record 25-31. OSU does not own  
8 the adjacent property and the property’s owner did not sign the application for  
9 site plan and design review. Accordingly, the city found that “the ‘project’ is  
10 the 10.44 acre project \* \* \*.” Record 26. The city imposed a condition of  
11 approval that requires OSU to comply with the provisions of BDC Chapter 4.5  
12 if OSU seeks to develop the 46 acres. Record 28.

13 A portion of petitioners’ third assignment of error argues that the second  
14 sentence of BDC 4.5.300(A) requires OSU to seek Master Neighborhood  
15 Development Plan approval because OSU’s own submissions to the record  
16 demonstrate that OSU plans to develop a 56-acre campus, beginning with the  
17 subject 10.44-acre property, and then expanding onto the adjacent 46-acre  
18 property that it currently has an agreement to purchase. Therefore, according  
19 to petitioners, OSU is proposing a “project[] consisting of one or more  
20 properties totaling 20 acres or larger” under BDC 4.5.300(A). Petitioners  
21 argue that the city’s interpretation of BDC 4.5.300 is inconsistent with (1) the  
22 plain meaning of the word “project” as defined in *Webster’s Third New Int’l*  
23 *Dictionary* (unabridged 2002), and (2) the purpose of BDC Chapter 4.5 set out  
24 at BDC 4.5.100(A)(1)-(7).<sup>6</sup> Petition for Review 26-30.

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<sup>6</sup> BDC 4.5.100 provides:

1        Respondents respond that the city's interpretation of BDC 4.5.300(A) is  
2        not inconsistent with the dictionary definition of "project" as "1: a specific plan  
3        or design[]" given that the only specific plan and design is for a 10.44 acre  
4        college campus.<sup>7</sup> Respondents also respond that the city's interpretation is not  
5        inconsistent with the stated purpose of the master planning provisions because

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"A. Purpose. The purpose of this section is to:

- "1. Encourage innovative planning that results in complete neighborhoods, more mixed-use development, improved protection of open spaces, transportation options, and site phasing of development;
- "2. Encourage developments that recognize the relationship between buildings, their use, open space, and transportation options, providing varied opportunities for innovative and diversified employment environments;
- "3. Facilitate the efficient use of land;
- "4. Promote an economic arrangement of land use, buildings, circulation systems, open space, and utilities;
- "5. Preserve to the greatest extent possible the existing landscape features and amenities that may not otherwise be protected through conventional development;
- "6. Encourage energy conservation and improved air and water quality; and
- "7. Assist the City in planning infrastructure improvements."

<sup>7</sup> Webster's Third New Int'l Dictionary 1813 (unabridged ed 2002).

1 the purpose statement is a general statement of purpose and that purpose is  
2 implemented in the more specific provisions of BDC Chapter 4.5.

3 LUBA is required to affirm the city council's interpretation of BDC  
4 4.5.300 unless that interpretation is "inconsistent with" the express language of  
5 the BDC or inconsistent with the purpose of the BDC. ORS 197.829(1)(a) and  
6 (b). While there is evidence in the record that supports a conclusion that OSU  
7 eventually plans to develop a larger campus than the 10.44-acre proposal, we  
8 agree with respondents that the city's interpretation of the word "project" as  
9 used in BDC 4.5.300(A) in context with the phrase "one or more properties" in  
10 the same code section as limiting the "project" to the property that an applicant  
11 controls is not inconsistent with the operative language of BDC 4.5.300 or  
12 inconsistent with the purpose of BDC Chapter 4.5. The city's interpretation of  
13 BDC 4.5.300(A) is affirmed. ORS 197.829(1).

14 **B. BDC 4.5.400 Master Planned Neighborhood Development**

15 The second provision of BDC Chapter 4.5 that is relevant to the third  
16 assignment of error, BDC 4.5.400, Master Planned Neighborhood  
17 Development, provides in relevant part:

18 "The purpose of this section is to ensure the development of fully  
19 integrated, mixed-use, pedestrian-oriented neighborhoods. The  
20 intent is to minimize traffic congestion, urban and suburban  
21 sprawl, infrastructure costs, and environmental degradation,  
22 particularly as new development takes place on large parcels of  
23 land.

24 "A. Applicability. This section applies to all properties  
25 comprised of one or more lots, parcels, and/or tracts, in any  
26 zoning district which totals 40 acres or larger at the date of  
27 this code adoption.

28 "B. Master Plan Required. Prior to land division approval, a  
29 master plan shall be prepared for all properties, lots, parcels

1 and/or sites meeting the criteria in subsection (A) of this  
2 section. Master plans shall follow the procedures in BDC  
3 4.5.300, Master Planned Developments. A master plan may  
4 not be required if a Special Planned District has been  
5 adopted for the subject area. \* \* \*

6 BDC 4.5.400(A) thus provides that the Master Neighborhood Development  
7 Plan provisions apply “to all properties comprised of one or more lots, parcels,  
8 and/or tracts, in any zoning district which totals 40 acres or larger[.]” The  
9 remainder of BDC 4.5.400 not quoted above sets out land use and design  
10 standards for the Master Neighborhood Development Plan.

11 The city council found that BDC 4.5.400 does not apply to the  
12 application because no land division is proposed as part of the development:

13 “Two sections of the [BDC] regulate when a master plan is  
14 required. The first is Section 4.5.400(B), which requires master  
15 plan approval for properties over 40 acres ‘[p]rior to land division  
16 approval.’ Regardless of the size of the property subject to this  
17 site plan review application, or the sizes of the properties adjacent  
18 to it, there is no application for land division approval pending  
19 before the City, which would be a subdivision or partition  
20 application. Therefore, this master plan code provision does not  
21 apply.” Record 25.

22 Petitioners argue that the city’s interpretation is inconsistent with the express  
23 language of BDC 4.5.400(A). Petitioners argue that OSU’s property is located  
24 in the CL zoning district and the adjacent property is located within the SM  
25 zoning district, both of which contain more than 40 acres designated as such.  
26 Accordingly, petitioners argue, the express language of BDC 4.5.400(A)  
27 requires approval of a Master Neighborhood Development Plan. Petitioners  
28 argue that the words “which totals 40 acres or larger” modify the noun  
29 “district,” and that both the CL and the SM zoning districts are larger than 40  
30 acres. Accordingly, petitioners argue, BDC 4.5.400(A) makes the provisions

1 of BDC 4.5.400 applicable to OSU’s proposal. Respondents respond that the  
2 city correctly read the “applicability” section in BDC 4.5.400(A) together with  
3 BDC 4.5.400(B) and the purpose statement contained in BDC 4.5.400 and  
4 concluded that BDC 4.5.400 applies only when a proposal includes a land  
5 division.

6 Petitioners do not address the city council’s interpretation that the  
7 requirement for a Master Neighborhood Development Plan applies only when a  
8 proposal includes a land division. We agree with respondents that the city  
9 council’s interpretation of all of the relevant provisions of BDC 4.5.400 to  
10 make the provision apply only when a proposal includes a land division is not  
11 inconsistent with all of the relevant text of BDC 4.5.400. The city council’s  
12 interpretation is affirmed. ORS 197.829(1).

13 The third assignment of error is denied.

14 **FOURTH ASSIGNMENT OF ERROR**

15 Petitioners’ fourth assignment of error challenges the parking proposed  
16 for the campus.

17 **A. BDC 3.3.300 Parking Management Plan**

18 BDC 3.3.300 sets out the minimum off-street parking requirements for  
19 various uses listed in Table 3.3.300. “Schools (public and private) – college  
20 and university campuses and trade schools” are not required to provide a  
21 specific number of spaces, and no formula for calculating a required number of  
22 spaces is set out in the BDC. Rather, university campuses must provide for  
23 “[p]arking needs based on a Parking Management Plan [(PMP)] for all uses  
24 contemplated for the entire campus[.]” Table 3.3.300. Thus, the only  
25 requirement in the BDC for off-street parking for college campuses is to  
26 provide a PMP to the city that accounts for parking for “all uses contemplated

1 for the entire campus.” Stated differently, in adopting BDC 3.3.300 and Table  
2 3.3.300 as they regulate parking on a college or university campus, the city has  
3 apparently chosen not to require precise numerical standards or develop a  
4 formula for calculating off-street parking for that particular type of  
5 development, but rather to rely on the information provided by an applicant in a  
6 parking management plan.

7 OSU submitted a PMP prepared by a transportation engineering firm,  
8 Kittleson, that concluded that OSU should be required to provide 310 parking  
9 spaces.<sup>8</sup> Record 51, 3022. The PMP based its conclusions on physical seating  
10 capacity of spaces within campus buildings, users of the campus and modes of  
11 travel, requirements of comparable cities where parking requirements for  
12 colleges are determined by a formula, and comparison to the parking  
13 management plan for Southern Oregon University. OSU also proposed to  
14 employ transportation demand management measures, including requiring  
15 students and faculty to register vehicles with the university. OSU’s  
16 transportation engineers later updated the initial PMP to provide responses to  
17 project opponents’ criticisms of the PMP’s assumptions. Record 1371-78.  
18 Based on the PMP submitted by OSU, the city found that the BDC 3.3.300 and  
19 Table 3.3.300 requirement to provide a PMP that provides for parking needs  
20 for all uses contemplated for the campus was satisfied. Record 50-51. The city  
21 found that petitioners’ challenges to the PMP did not call into question the  
22 conclusions of the PMP. Record 51.

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<sup>8</sup> OSU’s site plan proposes 322 parking spaces, some of which are on-street.

1           **B. Assignment of Error**

2           In their fourth assignment of error, petitioners argue that the city's  
3 finding that BDC 3.3.300 and Table 3.3.300 are satisfied is not supported by  
4 substantial evidence in the record. Petitioners point to testimony submitted by  
5 project opponents that questioned the assumptions in the PMP regarding the  
6 uses and users of the campus, the proximity of the campus to student, faculty  
7 and staff housing, modes of travel, census data, and requirements of other  
8 colleges and universities. Petitioners argue that the opponents' evidence called  
9 into question the conclusions set forth in the PMP and the city should not have  
10 relied on the PMP to determine that BDC 3.3.300 is satisfied. Stated  
11 differently, we understand petitioners to argue that the PMP is not *substantial*  
12 evidence because petitioners' arguments undermined that evidence, such that  
13 no reasonable person would rely on the PMP to conclude that the parking  
14 requirements are met.

15          In the petition for review, petitioners take the position that LUBA's  
16 standard of review of the challenged decision is set out at ORS  
17 197.835(9)(a)(C), which provides in relevant part:

18           “[T]he board shall reverse or remand the land use decision under  
19 review if the board finds:

20           “(a) The local government \* \* \*:

21           “\* \* \* \* \*

22           “(C) Made a decision not supported by substantial  
23 evidence in the whole record; [or]

24           “(D) Improperly construed the applicable law[.]”

25          Respondents respond by citing the standard of review at ORS 197.828(2) for a  
26 limited land use decision:

1           “(1) The Land Use Board of Appeals shall either reverse, remand  
2           or affirm a limited land use decision on review.

3           “(2) The board shall reverse or remand a limited land use  
4           decision if:

5               “(a) The decision is not supported by substantial evidence  
6               in the record. The existence of evidence in the record  
7               supporting a different decision shall not be grounds  
8               for reversal or remand if there is evidence in the  
9               record to support the final decision;

10             “(b) The decision does not comply with applicable  
11              provisions of the land use regulations;

12             “(c) The decision is:

13                “(A) Outside the scope of authority of the decision  
14                maker; or

15                “(B) Unconstitutional; or

16                “(d) The local government committed a procedural error  
17                which prejudiced the substantial rights of the  
18                petitioner.”

19     According to respondents, LUBA’s scope of review of an evidentiary challenge  
20     set out at ORS 197.828(2)(a) applies. Respondents argue that standard of  
21     review is different from the standard of review of an evidentiary challenge to a  
22     land use decision.

23     Petitioners respond that the city’s decision is a “land use decision” as  
24     defined in ORS 197.015(10)(a) and is not a “limited land use decision” as  
25     defined in ORS 197.015(12) because (1) the city’s decision was processed  
26     according to the ORS 197.763 hearing procedures, and (2) the issues raised by  
27     petitioners broadened the scope of the decision to make it a land use decision.

28     Reply Brief 1.

1 ORS 197.015(12) provides in relevant part:

2 “(12) ‘Limited land use decision’:

3       “(a) Means a final decision or determination made by a local  
4           government pertaining to a site within an urban growth  
5           boundary that concerns:

6           “\* \* \* \* \*

7       “(B) The approval or denial of an application based on  
8           discretionary standards designed to regulate the  
9           physical characteristics of a use permitted outright,  
10           including but not limited to site review and design  
11           review. \* \* \*”

12 We agree with respondents that the challenged decision is a “limited land use  
13 decision.” The decision approves OSU’s application for site plan and design  
14 review and falls squarely within the definition at ORS 197.015(12)(a)(B). The  
15 fact that the city applied the procedural protections of ORS 197.763 to the  
16 hearings on the applications does not somehow convert the challenged decision  
17 into something other than a limited land use decision. We also disagree with  
18 petitioners that the issues raised by petitioners during the proceedings on the  
19 application converted the decision into something other than a limited land use  
20 decision.

21 We further agree with respondents that LUBA’s standard of review of  
22 evidentiary challenges to a limited land use decision is not the same as the  
23 standard of review of a land use decision. The language of ORS 197.828(2)(a),  
24 as compared to ORS 197.835(9)(a)(C), does not include the phrase “substantial  
25 evidence in the whole record.” For limited land use decisions, LUBA may not  
26 reverse or remand a limited land use decision unless “the decision is not  
27 supported by substantial evidence in the record.” Under ORS 197.828(2)(a), in

1 determining whether the decision is “supported by substantial evidence in the  
2 record,” LUBA may not remand a decision on the basis that there exists  
3 evidence in the record supporting a different decision.

4 The legislative history of the bill that was eventually codified at ORS  
5 197.828 also supports the conclusion that the legislature intended LUBA’s  
6 standard of review of evidentiary challenges to limited land use decisions to be  
7 different from, and likely less rigorous than, the standard of review of  
8 challenges to land use decisions. But the express language of ORS  
9 197.828(2)(a) and the legislative history we have reviewed do not articulate  
10 how substantial evidence review under ORS 197.828(2)(a) differs from  
11 substantial evidence review under ORS 197.835(9)(a)(C). OSU does not posit  
12 a theory for how the two reviews differ, but merely quotes the relevant  
13 provisions of each statute and takes the position that substantial evidence  
14 review of a limited land use decision is less rigorous than review of a land use  
15 decision.

16 In the circumstances presented here, we need not define the precise  
17 nature of substantial evidence review of a limited land use decision under ORS  
18 197.828(2)(a). That is so because even under what we and the parties agree is  
19 a more rigorous standard of review at ORS 197.835(9)(a)(C), a reasonable  
20 decision maker could conclude based on the PMP that OSU has satisfied the  
21 requirement to provide a PMP that accounts for parking for “all uses  
22 contemplated for the entire campus.” OSU’s transportation engineer responded  
23 to petitioners’ criticisms of the PMP’s assumptions and provided an updated  
24 PMP, and the PMP and the update are evidence that a reasonable decision  
25 maker would rely on, even under the more rigorous ORS 197.835(9)(a)(C)  
26 “substantial evidence in the whole record” standard of review. Record 1371-86.

1           The fourth assignment of error is denied.

2       **FIFTH ASSIGNMENT OF ERROR**

3           In their fifth assignment of error, petitioners challenge two conditions of  
4 approval, conditions 26 and 27, which require OSU to monitor and report  
5 parking conditions within one-quarter mile of the campus and, if a problem is  
6 found to exist in the future, submit a revised PMP and provide additional  
7 parking. Record 95-97. In the fifth assignment of error, petitioners challenge  
8 those conditions, arguing that the monitoring radius is too small, there is no  
9 feasible enforcement mechanism, and additional parking facilities cannot be  
10 provided.

11          The city adopted findings that conditions 26 and 27 were not adopted to  
12 defer a finding of compliance with BDC 3.3.300 or to ensure compliance with  
13 BDC 3.3.300, and petitioners do not challenge that finding or otherwise argue  
14 that conditions 26 and 27 are related to any applicable BDC provision. Record  
15 56. Because conditions 26 and 27 do not appear to function to ensure  
16 compliance with any approval criterion, any inadequacy in those conditions to  
17 achieve their intended purpose is harmless error and does not provide a basis  
18 for reversal or remand of the decision.

19          The fifth assignment of error is denied.

20       **SIXTH ASSIGNMENT OF ERROR**

21          As explained above and shown in the layout for the site included in the  
22 Appendix, the new private street is located entirely on-site, and access from the  
23 new private street to the public streets is proposed over a public easement.  
24 Circulation through the parking area and to the private street is over internal  
25 driveways, two of which run north to south and intersect with the private street.

1           **A.     Sight Distance**

2       Petitioners' sixth assignment of error is exceedingly difficult to follow.  
3       In a portion of the sixth assignment of error, we understand petitioners to argue  
4       that the city's conclusion that intersection sight distances at the internal  
5       intersections of the north-south driveways (located in the parking lot) with the  
6       new private street meet the requirements of BDC 4.7.300 is not supported by  
7       substantial evidence in the record.<sup>9</sup> Petition for Review 53.

8       Respondents respond, initially, that petitioners are precluded from  
9       raising any of the issues raised in the sixth assignment of error under the  
10      doctrine of exhaustion waiver. ORS 197.825(2); *Miles*. Petitioners respond  
11      that the issues were raised in the notice of appeal at Record 737-39. We agree

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<sup>9</sup> BDC 4.7.300(B)(1) provides:

"The analysis methodology described herein shall apply to all required transportation impact analysis including Transportation Impact Studies and Trip Generation Letters.

"\* \* \* \* \*

**"B.     Required Information.**

"1.     Sight Distance Measurements. For all driveways, study area intersections, and new intersections created by the development (with the exception of single-family residential driveways), an intersection sight distance measurement shall be provided that shows compliance with City of Bend Standards and Specifications for the posted or eighty-fifth percentile speed (whichever is greater). Field measurements shall be used wherever possible, and plan measurements from civil drawings provided for planned intersections or driveways."

1 with petitioners that the issues raised in the sixth assignment of error regarding  
2 *sight distance* and *capacity* were raised in the notice of appeal at Record 737-  
3 39. As we explain below, we disagree that the issues regarding *clear vision*  
4 *areas* were raised in the notice of appeal.

5 The city council found that “[s]ight distance information per AASHTO  
6 standards was provided on Sheet C2.0 and compliance is included as a  
7 condition of approval. \* \* \* The sight distance provided meets the standards  
8 for the required design speeds as defined in BDC 4.7.300(B)(1).” Record 59.  
9 The findings conclude that the sight distance for the intersection of the private  
10 street and SW Chandler Avenue and the intersection of the private street and  
11 SW Century Drive meet the AASHTO sight distance criteria. Record 59-60.

12 The city council also incorporated the hearings officer’s findings.  
13 Record 76. The hearings officer relied on evidence in the record from OSU’s  
14 traffic engineer that (1) low speeds and traffic volumes at the internal  
15 intersections of the driveways at the west and east ends of the parking area with  
16 the private street make meaningful analysis of those intersections difficult and  
17 (2) the intersections will “meet City performance requirements” to conclude  
18 that the intersections meet any applicable standards of the BDC. Record 80.

19 Although the findings could be clearer, we understand the city to have  
20 concluded that the internal intersections of the driveways and the new private  
21 street will meet applicable city standards when constructed. That conclusion is  
22 supported by substantial evidence in the record. Record 80, 1381-83.

23       **B. Capacity**

24 BDC 4.2.200(F)(5) requires a finding that “[a]ll required public facilities  
25 have adequate capacity as determined by the City, to serve the proposed use[.]”  
26 Also in the sixth assignment of error, we understand petitioners to argue that

1 the city's conclusion that BDC 4.2.200(F)(5) is satisfied with respect to the  
2 internal driveway intersections with the new private street is not supported by  
3 substantial evidence in the record. Respondents respond, and we agree, that  
4 BDC 4.2.200(F)(5) applies to public facilities and petitioners have not  
5 demonstrated that the internal driveway intersections with the private street are  
6 "public facilities" within the meaning of BDC 4.2.200(F)(5). Absent that  
7 demonstration, petitioners' arguments provide no basis for reversal or remand  
8 of the decision.

9           **C. Clear Vision Areas**

10          Finally in the sixth assignment of error, petitioners argue that the city's  
11 decision that BDC 3.1.500's requirement for "clear vision areas" is met is not  
12 supported by substantial evidence in the record.<sup>10</sup> Respondents respond that

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<sup>10</sup> BDC 3.1.500 provides:

- “A. Purpose. Clear vision areas are established to ensure that obstructions do not infringe on the sight lines needed by motorists, pedestrians, bicyclists and others approaching potential conflict points at intersections.
- “B. Applicability. In all zones, clear vision areas as described below and illustrated in Figures 3.1.500.A and 3.1.500.B shall be established at the intersection of two streets, an alley and a street, a driveway and a street or a street and a railroad right-of-way in order to provide adequate vision of conflicting traffic movements as well as street signs. These standards are applicable to public and private streets, alleys and mid-block lanes, and driveways.
- “C. Standards. The clear vision areas extend across the corner of private property from one street to another. The two legs of the clear vision triangle defining the private property portion of the triangle are each measured 20 feet back from

1 petitioners are precluded from raising the issues raised in the sixth assignment  
2 of error under the doctrine of exhaustion waiver. ORS 197.825(2); *Miles*. We  
3 understand petitioners to respond that the issues were raised in the notice of  
4 appeal at Record 737-39. Reply Brief 4-5. We have reviewed the cited record  
5 pages and we disagree with petitioners that the cited pages from the appeal  
6 statement are sufficient to raise the issue raised in the sixth assignment of error  
7 regarding the BDC 3.1.500 “clear vision area” requirements. Petitioners do not  
8 cite to anything in the notice of appeal that references either the term “clear  
9 vision areas” or BDC 3.1.500(A), or uses any of the operative language found  
10 in BDC 3.1.500. Petitioners failed to raise the issue in their notice of appeal as  
11 required by BDC 4.1.1120(A)(3) and they are precluded from raising the issue  
12 before LUBA. ORS 197.825(2)(a); *Miles*.

13 The sixth assignment of error is denied.

14 **SEVENTH ASSIGNMENT OF ERROR**

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the point of intersection of the two corner lot lines, special setback line or access easement line (where lot lines have rounded corners, the lot lines are extended in a straight line to a point of intersection). Additional clear vision area may be required at intersections, particularly those intersections with acute angles, as directed by the City Engineer, upon finding that additional sight distance is required (i.e., due to roadway alignment, etc.).

There shall be no fence, wall, vehicular parking, landscaping, building, structure, or any other obstruction to vision other than a street sign post, pole (e.g., power, signal, or luminaire pole) or tree trunk (clear of branches or foliage) within the clear vision area between the height of two feet and eight feet above the level of the curb. In cut sections, embankments shall be graded to comply with these requirements.”

1           BDC 3.4.200 sets out improvement standards for public and private  
2 streets.

3           **A. Sidewalks**

4           BDC 3.4.200(F), Table D requires 5-foot wide sidewalks on both sides  
5 of the new private street. BDC 3.4.150 allows the city to waive improvement  
6 standards if certain criteria are met.<sup>11</sup> The city council approved OSU's  
7 application to construct the sidewalk on the south side of the parking area  
8 rather than on the south side of the private street. The hearings officer found  
9 that in order to construct a 5-foot wide sidewalk on the south side of the new

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<sup>11</sup> BDC 3.4.150 provides in relevant part:

- “A. Authority to Grant Waiver or Modification. Waivers and/or modifications of the standards of this chapter and/or the City of Bend Standards and Specifications may be granted as part of a development approval only if the criteria of subsection (B) of this section are met.
- “B. Criteria. The Review Authority, after considering the recommendation of the City Engineer, may waive or modify the standards of this title and the City of Bend Standards and Specifications based on a determination that (1) the waiver or modification will not harm or will be beneficial to the public in general; (2) the waiver and modification are not inconsistent with the general purpose of ensuring adequate public facilities; and (3) one or more of the following conditions are met:
  - “1. The modification or waiver is necessary to eliminate or reduce impacts on existing drainage patterns or natural features such as riparian areas, significant trees or vegetation, or steep slopes.”

1 private street the parking lot would be required to be shifted approximately 30  
2 feet to the south, to be able to provide the required drive aisle width (24 feet)  
3 and curb width (6 feet). The hearings officer concluded that shifting the  
4 parking lot to the south would require removal of significant trees.  
5 Accordingly, the hearings officer concluded that a waiver was justified under  
6 BDC 3.4.150(B)(1). Record 822, 1303. The city council adopted the hearings  
7 officer's findings. Record 23, 60-61, 69.

8 In their seventh assignment of error, petitioners first argue that the city's  
9 approval of the sidewalk waiver is not supported by substantial evidence in the  
10 record. ORS 197.828(2)(a). Respondents respond by pointing to evidence in  
11 the record that demonstrates the effect of constructing the sidewalk without the  
12 waiver. Record 1303, 2897. We agree with respondents that substantial  
13 evidence in the record supports the city's decision to waive the sidewalk  
14 requirements.

15 Petitioners also argue that the city's finding that the sidewalk waiver is  
16 "necessary \* \* \* to eliminate or reduce impacts on \* \* \* natural features such  
17 as \* \* \* significant trees" improperly construes BDC 3.4.150(B)(1).  
18 Respondents respond that petitioners failed to raise any issue regarding  
19 whether the waiver is "necessary" within the meaning of BDC 3.4.150(B)(1)  
20 before the close of the evidentiary hearing before the hearings officer, as  
21 required by ORS 197.763(1), and are precluded from raising it for the first time  
22 at LUBA. ORS 197.835(3). In their reply brief, petitioners respond by citing  
23 portions of their appeal statement at Record 735-36, and also cite to a transcript  
24 of the appeal hearing before the city council at Petition for Review Appendix E  
25 50-51.

1        We agree with respondents that the issue was not raised prior to the close  
2        of the evidentiary hearing and petitioners are precluded from raising it for the  
3        first time at LUBA.<sup>12</sup> Accordingly, the issue of whether the city's findings are  
4        adequate to explain why the waiver is "necessary" within the meaning of BDC  
5        3.4.150(B)(1) is waived.

6            **B. Planter Strips**

7        BDC 3.4.200(F) Table B requires 5-foot wide planter strips for  
8        "dedicated public roadways in commercial zones[.]" In another portion of their  
9        seventh assignment of error, petitioners argue that the city improperly  
10      construed BDC 3.4.200(F), Table B as not requiring planter strips on both sides  
11      of the new private street. Table D sets out "Improvement Standards for Private  
12      Streets" and does not require planter strips on private streets. Footnote 3 to  
13      Table D provides "[p]rivate streets shall meet local street standards for  
14      dedicated public roadways (Tables A through C) *except as modified by Table*  
15      *D.*" (Emphasis added.) Accordingly, the hearings officer and the city council  
16      correctly concluded that BDC 3.4.200(F), Table D does not require planter  
17      strips for the new private street. Record 23, 69, 1302.

18        The seventh assignment of error is denied.

19        The city's decision is affirmed.

20

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<sup>12</sup> ORS 197.763(1) requires that issues in an appeal to LUBA must have been raised prior to the close of the evidentiary hearing. However, we also do not see where the issue was raised in petitioners' appeal statement or during the on-the-record appeal hearing before the city council.

## APPENDIX

