

1 BEFORE THE LAND USE BOARD OF APPEALS  
2 OF THE STATE OF OREGON  
3

4 JEFFREY E. BOLY, ARLINGTON HEIGHTS  
5 NEIGHBORHOOD ASSOCIATION,  
6 NEIGHBORS WEST/NORTHWEST DISTRICT  
7 COALITION, SHELLY BIGLEY, ANDREW  
8 BIGLEY, ELIZABETH CALLISON,  
9 WEST HILLS STREAMS, MIKE DOWD  
10 and VICTOR D. STIBOLT,  
11 *Petitioners,*  
12

13 vs.  
14

15 CITY OF PORTLAND,  
16 *Respondent.*  
17

18 LUBA No. 2001-071  
19

20 FINAL OPINION  
21 AND ORDER  
22

23 Appeal from City of Portland.  
24

25 Andrew H. Stamp, Portland, filed the petition for review and argued on behalf of  
26 petitioners. With him on the brief was Martin, Bischoff, Templeton, Langslet and Hoffman.  
27

28 Frank Hudson, Deputy City Attorney, Portland, filed the response brief and argued on  
29 behalf of respondent.  
30

31 HOLSTUN, Board Member; BRIGGS, Board Chair; BASSHAM, Board Member,  
32 participated in the decision.  
33

34 REMANDED

10/31/2001  
35

36 You are entitled to judicial review of this Order. Judicial review is governed by the  
37 provisions of ORS 197.850.  
38

**NATURE OF THE DECISION**

Petitioners appeal a city council decision that approves an Oregon Zoo Master Plan (Zoo Master Plan) amendment that converts an existing improved temporary parking lot into a permanent parking lot. The parking lot is located in the city’s Open Space (OS) zone.

**FACTS**

In 1993, the city hearings officer approved Zoo Master Plan amendments. Under the 1993 amendments, a 129-space temporary parking lot was authorized. The 1993 decision provided that if the temporary parking lot were converted to a permanent parking lot in the future, a landscaping plan would have to be submitted and approved through a Type II procedure.<sup>1</sup>

In 1997, following public hearings before the city hearings officer and the city council, the city council approved additional Zoo Master Plan amendments. Included in the 1997 approved Zoo Master Plan amendments was a proposal to convert the temporary parking lot to a 125-space permanent parking lot.

On May 25, 1999, long after the 21-day deadline established by ORS 197.830(8) for appealing the 1997 decision to LUBA had expired, four of the current petitioners filed an appeal of that decision with LUBA.<sup>2</sup> We dismissed the appeal as untimely filed. In doing so we rejected petitioners’ arguments that the deadline for filing that appeal was tolled by ORS 197.830(3).<sup>3</sup> *Bigley v. City of Portland*, 37 Or LUBA 544 (2000), *rev’d and rem’d* 168 Or

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<sup>1</sup>Under the city’s Type II procedure, the city renders an administrative decision with notice to adjoining property owners and others and provides an opportunity for local appeal of the administrative decision. Portland City Code (PCC) 33.730.020.

<sup>2</sup>Petitioners Bigley, Callison and West Hill Streams were petitioners in that appeal. The remaining petitioners in this appeal were not parties to that prior appeal.

<sup>3</sup>ORS 197.830(3) provides:

1 App 508, 4 P3d 741. In reversing our decision, the Court of Appeals held that the tolling  
2 provision in ORS 197.830(3) did apply, because the city’s notice of the April 22, 1997 public  
3 hearing in that matter did not reasonably describe the city’s final action with regard to the  
4 parking lot. The Court of Appeals explained its decision as follows:

5 “\* \* \* There is simply no way that a notice [of hearing] that made no mention  
6 of the proposed action concerning the parking lot, but did specifically  
7 enumerate a myriad of other actions that were embodied in the same proposal,  
8 can be said to have ‘reasonably describe[d]’ the ‘final action’ affecting the  
9 parking lot.” 168 Or App at 514.

10 Following issuance of the appellate judgment in that appeal, the parties entered a stipulation  
11 that the 1997 decision should be remanded to the city.<sup>4</sup> Based on the parties’ stipulation in  
12 that appeal, we remanded the city’s decision.

13 Following our remand, the city conducted a public hearing on March 7, 2001. The  
14 city council adopted the challenged decision on April 4, 2001, and this appeal followed.

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“If a local government makes a land use decision \* \* \* that is different from the proposal described in the notice of hearing to such a degree that the notice of the proposed action did not reasonably describe the local government’s final actions, a person adversely affected by the decision may appeal the decision to [LUBA] 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.”

<sup>4</sup>The stipulation provides, in part:

“\* \* \* The parties have agreed that *the hearing on remand will be expressly limited to deciding whether conversion of the 129-space temporary parking lot to a permanent parking lot complies with the PCC criteria for conditional use permits*. All matters relevant to the conditional use permit approval criteria for the conversion of the temporary parking lot will be considered. *Other aspects of the original approval will not be at issue*. \* \* \*

“In addition, Respondents agree to send notice of the hearing on remand to all addresses within the original notice area for the 1997 Master Plan decision, and will not limit standing on remand to those persons who appeared in the original proceeding.” Record 154 (emphases added).

1 **INTRODUCTION TO ASSIGNMENTS OF ERROR**

2 **A. Permanent On-Site Parking**

3 Prior to construction of the zoo light rail station, the parking lot that adjoins the zoo,  
4 Children’s Museum, Western Forestry Center, Vietnam War Memorial and Arboretum  
5 included 1097 spaces.<sup>5</sup> Construction of the light rail facility reduced the total number of on-  
6 site parking spaces to 840. The temporary parking lot has been used to supplement on-site  
7 parking at times when large numbers of people visit the zoo. When large numbers of visitors  
8 are attracted to the zoo by special events or on weekends, the zoo also utilizes two off-site  
9 parking lots, one with 225 parking spaces and one with 490 spaces. Visitors parking at the  
10 off-site lots are carried to and from the zoo by shuttle buses.

11 Petitioners’ central premise is that the existing on-site parking is adequate, or that  
12 steps other than approving the disputed parking lot can be taken to make the existing 840  
13 parking spaces adequate. Petitioners contend that because existing on-site parking is  
14 adequate, or could be made to be adequate, approval of the permanent parking lot is not  
15 permitted in the OS zone and violates city legislation that, among other things, calls for  
16 reducing automobile trips and increasing use of mass transit.

17 **B. Scope of Review**

18 Several of petitioners’ assignments of error include allegations that the challenged  
19 decision fails to demonstrate that the permanent parking lot is consistent with certain  
20 comprehensive plan requirements. As a general response to those allegations, the city  
21 contends that all of petitioners’ arguments that go beyond the conditional use criteria set out  
22 at Portland City Code (PCC) 33.815.100 are beyond the scope of the parties’ stipulation in  
23 the prior appeal and should not be considered by LUBA in this appeal.<sup>6</sup> The challenged

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<sup>5</sup>The building that is now occupied by the Children’s Museum was formerly occupied by the Oregon Museum of Science and Industry.

<sup>6</sup>Those conditional use approval criteria are set out below at n 9.

1 decision also takes the position that the stipulation barred participants in the remand  
2 proceedings from raising any issues concerning whether the proposal is consistent with the  
3 comprehensive plan, although the decision also includes findings addressing some of the  
4 comprehensive plan provisions that were raised during the hearing on remand.

5 As an initial matter, we do not agree with the city that the agreements that the parties  
6 reached in the stipulation were “approved by LUBA.” Respondent’s Brief 1. We simply  
7 granted the parties’ request that the 1997 decision be remanded. We did not review or  
8 “approve” the stipulation. *See Waibel v. Crook County*, 39 Or LUBA 749 (2000) (where all  
9 parties stipulate that appealed ordinances should be remanded to allow the local government  
10 to adopt specified ordinances in their place, LUBA does not review the proposed ordinances  
11 on the merits before granting the stipulated remand). We leave it to the parties to ensure that  
12 their stipulated remand will employ procedures that are adequate to accommodate the rights  
13 of any persons who may be entitled to participate in those remand proceedings.

14 We also note, however, that issues that are resolved in a prior land use proceeding, as  
15 well as issues that could have been raised in those prior proceedings but were not raised, are  
16 waived in subsequent local land use proceedings following a LUBA remand. *Beck v. City of*  
17 *Tillamook*, 313 Or 148, 153-54, 831 P2d 678 (1992). As the Supreme Court explained in  
18 *Beck*, this waiver principle applies to persons who were parties in the prior land use  
19 proceeding as well as persons who “had the opportunity to participate” in the prior  
20 proceedings but “chose not to participate.” 313 Or at 153 n 2.

21 Whether the city is relying on the stipulation itself or is relying on the stipulation in  
22 concert with the waiver principle that is articulated in *Beck*, not all of the petitioners in this  
23 appeal are limited to raising the issues concerning the conditional use approval criteria, as  
24 specified in the stipulation. Although we need not reach the issue, the petitioners in this  
25 appeal who were *also* parties to the stipulation in the prior appeal almost certainly would be  
26 limited to raising the issues that are specified in the stipulation. Those petitioners

1 affirmatively waived all other issues by entering the stipulation. *See Newcomer v.*  
2 *Clackamas County*, 92 Or App 174, 186, 758 P2d 369, *aff'd as modified* 94 Or App 33, 764  
3 P2d 927 (1988) (where petitioner concedes an issue during local hearing, the issue may not  
4 be raised in a subsequent LUBA appeal of the decision reached at the conclusion of the local  
5 hearing). Parties to the prior appeal would likely also be bound under the broader waiver  
6 principle that is articulated in *Beck*. However, several of the petitioners were not parties to  
7 the stipulation that led to our remand and, therefore, could not be bound by the stipulation  
8 itself. If those petitioners “had the opportunity to participate” in the prior 1997 proceedings  
9 but “chose not to participate,” they might be limited to the issues specified in the stipulation,  
10 by the waiver principle that is articulated in *Beck*. This would be true even though they were  
11 not parties to the stipulation.<sup>7</sup> However, the difficulty with applying *Beck* in this appeal is  
12 that the Court of Appeals has already determined that the notice that preceded the hearing in  
13 1997, where the city provided the local opportunity to participate, was defective because it  
14 did not specifically mention the parking lot conversion. We therefore cannot assume the  
15 petitioners in this appeal had the opportunity to raise their objections to the parking lot, either  
16 locally or in the appeal that was filed with LUBA, or that they chose not to act on those  
17 objections. The defective notice and the presence of those petitioners in this appeal suggests  
18 the reason those petitioners did not appear and voice their objections in 1997 is that they  
19 were unaware of the proposal to convert the parking lot to permanent status.

20 For the above reasons, we do not agree with the city that the stipulation either limited  
21 the scope of the proceedings on remand or limits the issues that may be raised in the petition  
22 for review in this appeal.<sup>8</sup>

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<sup>7</sup>In that circumstance, those petitioners would have had an opportunity to appear locally and would have had an opportunity to appeal the decision to LUBA, or intervene in the appeal that was filed, and object to the terms of the stipulation.

<sup>8</sup>One source of confusion in this appeal is the significance, if any, of findings that the city adopted in support of its 1997 decision that was ultimately remanded to the city. As far as we can tell only part of that

1           **C. Nature of the Decision on Review**

2           As agreed to by the parties, the only part of the Zoo Master Plan that is at issue is the  
3 proposal to convert the temporary parking lot to a permanent parking lot. The city’s decision  
4 is, therefore, a quasi-judicial land use decision. *See Strawberry Hill 4-Wheelers v. Benton*  
5 *Co. Bd. of Comm.*, 287 Or 591, 601 P2d 769 (1979) (establishing test for distinguishing  
6 between legislative and quasi-judicial decisions). As such, it must be supported by adequate  
7 findings to establish that it complies with all relevant approval criteria. *Sunnyside*  
8 *Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 20-21, 569 P2d 1063 (1977).

9           **FIRST ASSIGNMENT OF ERROR**

10           Petitioners contend that the permanent parking lot violates PCC 33.815.100(A)(1),  
11 which is one of the conditional use criteria set out at PCC 33.815.100.<sup>9</sup> The city’s decision

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1997 decision was included in the record in this appeal, and that part of the decision was included at the request of petitioners. The challenged decision purports to rely on findings from the 1997 decision, but does not attach those findings to the decision. Similarly, the city refers to those findings in its brief, but does not attach the findings it refers to as an appendix to its brief or identify where in the record we might locate those findings. In our decision we have reviewed the findings set out in the challenged decision at Record 9-24, but we have not conducted an unassisted search of this 1200-page record for findings or evidence that might lend support to the challenged decision. *Eckis v. Linn County*, 110 Or App 309, 313, 821 P2d 1127 (1991).

<sup>9</sup>As relevant, PCC 33.815.100 provides:

“These approval criteria apply to all conditional uses in the OS zone except those specifically listed in other sections below. The approval criteria allow for a range of uses and development which are not contrary to the purpose of the Open Space zone. The approval criteria are:

“**A. Character and impacts.**

- “1. The proposed use is consistent with the intended character of the specific OS zoned area and with the purpose of the OS zone;
- “2. Adequate open space is being maintained so that the purpose of the OS zone in that area and the open or natural character of the area is retained; and
- “3. City-designated environmental resources, such as views, landmarks, or habitat areas, are protected or enhanced.

“**B. Public services.**

- “1. The proposed use is in conformance with either the Arterial Streets Classification Policy or the Downtown Parking and Circulation Policy, depending upon location;

1 relies on an interpretation of PCC 33.815.100(A)(1), together with the purpose statement of  
2 the Open Space zone and a PCC definition of “Parks and Open Space.”<sup>10</sup> As relevant the

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“2. The transportation system is capable of safely supporting the proposed use in addition to the existing uses in the area. Evaluation factors include street capacity and level of service, access to arterials, transit availability, on-street parking impacts, access requirements, neighborhood impacts, and pedestrian safety;

“3. Public services for water supply, police and fire protection are capable of serving the proposed use, and proposed sanitary waste disposal and stormwater disposal systems are acceptable to the Bureau of Environmental Services.

“**C. Livability.** 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.

“**D. Area plans.** The proposal is consistent with any area plans adopted by the City Council such as neighborhood or urban renewal plans.”

<sup>10</sup>PCC 33.100.010 states the purpose of the OS zone as follows:

“The Open Space zone is intended to preserve and enhance public and private open, natural, and improved park and recreational areas identified in the Comprehensive Plan. These areas serve many functions including:

“• Providing opportunities for outdoor recreation;

“• Providing contrasts to the built environment;

“• Preserving scenic qualities;

“• Protecting sensitive or fragile environmental areas; and

“• Preserving the capacity and water quality of the stormwater drainage system.”

PCC 33.920.460 describes Parks and Open Space as follows:

“**A. Characteristics.** Parks and Open Areas are uses of land focusing on natural areas, large areas consisting mostly of vegetative landscaping or outdoor recreation, community gardens, or public squares. Lands tend to have few structures.

“**B. Accessory uses.** Accessory uses may include club houses, maintenance facilities, concessions, caretaker’s quarters, and parking.

“**C. Examples.** Examples include parks, golf courses, cemeteries, public squares, plazas, recreational trails, botanical gardens, boat launching areas, nature preserves, and land used for grazing that is not part of a farm or ranch.”

1 city's interpretation of these provisions is as follows:

2 "The OS Zone in the City of Portland contains a variety of recreational uses  
3 ranging from passive and pristine (Forest Park) to more intense uses (Portland  
4 International Racetrack) that are more recreational than pristine. The purpose  
5 of the open space area associated with the Oregon Zoo is to provide a pleasant  
6 park-like setting for a major destination facility. Providing *adequate*  
7 *transportation facilities, including parking*, is compatible with meeting this  
8 purpose." Record 9 (emphasis added).

9 Petitioners seize on the city's use of the word "adequate" in the above-quoted  
10 findings and argue that parking is only permissible in the OS zone if the city successfully  
11 demonstrates that the parking is actually needed to provide adequate parking. Because  
12 petitioners believe the existing parking lot provides adequate on-site parking, they contend  
13 approval of the permanent parking lot violates PCC 33.815.100(A)(1).

14 The city, on the other hand, seems to argue that whether the permanent parking lot is  
15 needed to provide adequate on-site parking is irrelevant. We understand the city to argue in  
16 its brief that it is sufficient that the proposed permanent parking lot be "accessory" to the  
17 zoo. We reach this understanding of the city's position, in large part, because it makes no  
18 response to petitioners' numerous arguments that the current parking lot is adequate and that  
19 the permanent parking lot is not needed to provide adequate parking.

20 We agree with petitioners' understanding of the interpretation of the relevant code  
21 provisions that the city articulated in its decision. While reference in the above-quoted  
22 findings to "adequate \* \* \* parking," standing alone, might not be enough to express an  
23 interpretation of those provisions to impose a requirement that the parking lot be needed to  
24 provide adequate parking, the findings that appear after those findings implicitly express that  
25 interpretation. *See Alliance for Responsible Land Use v. Deschutes Cty.*, 149 Or App 259,  
26 265, 942 P2d 836 (1997), *rev dismissed* 327 Or 555 (1998) (local government interpretation  
27 may be express or implied). Those findings identify why the city believes the disputed  
28 parking lot is needed to provide adequate parking. Among the reasons identified in the city's  
29 findings are (1) a need to accommodate bus parking, (2) difficulty in accommodating bus

1 parking in the existing lot, (3) parking needs associated with summer concerts at the zoo and  
2 other special events, (4) an inability to accommodate general parking requirements when zoo  
3 attendance exceeds 3,000 daily visitors, and (5) parking demands associated with the World  
4 Forestry Center. Record 10.

5 Petitioners devote nine pages of the petition for review to challenging the city's  
6 findings that the permanent parking lot is needed, as well as the evidentiary support for those  
7 findings.<sup>11</sup> The challenged findings themselves do not respond to most of those issues.  
8 Neither does respondent's brief provide any response to petitioners' challenge to the city's  
9 findings or the evidentiary support for those findings. Although there may be adequate  
10 responses to some or all of the arguments that petitioners advance in their petition for review,

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<sup>11</sup>While we do not attempt an exhaustive listing of petitioners' arguments, or decide their merits here, we summarize some of them below:

1. A separate lot for parking buses is not needed for bus passenger safety, because bus passengers are dropped off and collected at the zoo entrance.
2. Buses that arrive from within 50 miles of the zoo are expected to park off-site and return later to pick up passengers.
3. Current bus arrivals at the zoo vary dramatically from season to season, and the zoo can take steps to manage arrival and departure of buses.
4. The current parking lot can be designed to accommodate all bus parking needs.
5. The proposed permanent lot is now used for cars, making parking by buses unlikely.
6. The city accepted the zoo's position that existing parking lot capacity is exceeded when there are more than 3,000 daily visitors. Petitioners contend that evidence shows that existing parking lot capacity was not exceeded on days with 6,000 to 7,000 daily visitors.
7. The zoo cannot rely on parking demands generated by the zoo summer concerts, because those concerts are not authorized by the Zoo Master Plan.
8. Adequate parking is something less than a number of on-site parking spaces that is sufficient to meet all peak parking demand periods.
9. To the extent the city relied on parking demand associated with the Children's Museum and World Forestry Center, that is improper because they are not affiliates of the zoo or part of its conditional use master plan.

1 without some assistance in the decision itself or respondent’s brief, we are in no position to  
2 know what those responses might be.<sup>12</sup>

3 The first assignment of error is sustained.

4 **SECOND ASSIGNMENT OF ERROR**

5 Petitioners argue the city’s decision fails to demonstrate that the challenged decision  
6 is consistent with the Northwest District Objective and one of its policies and the Arterial  
7 Streets Classification Policy (ASCP). The Northwest District Objective and its policies are  
8 part of the ASCP and the ASCP is part of the city Comprehensive Plan Transportation  
9 Element.

10 **A. Northwest District Objective and Policies**

11 The Comprehensive Plan Transportation Element (CPTe) includes Policy 6.4, which  
12 provides:

13 “Coordinate land use planning with transportation planning. The  
14 Transportation Element of the Comprehensive Plan will guide the land use  
15 planning and transportation project development process. In reviewing land  
16 use requests done as \* \* \* Conditional Uses and Master Plans, the  
17 Transportation Goal and Policies 6.1 through 6.29, the District Policies, the  
18 Classification Descriptions, and the Maps are used as mandatory approval  
19 criteria.”

20 Petitioners contend that they argued below that adding the proposed parking lot as a  
21 permanent addition to the existing on-site parking facilities is not consistent with the  
22 Northwest District Objective and Policy 1.<sup>13</sup> In essence, petitioners argue that approving the

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<sup>12</sup>We specifically note that the city’s assumption that existing parking lot capacity is exceeded on days where daily zoo attendance exceeds 3,000 visitors seems particularly questionable. The supplemental record that the city agreed to submit in this matter (which includes evidence that apparently was not available to city council when it made its decision) raises serious questions about whether that position is supported by substantial evidence. We are not sure why the city agreed to add evidence to the record that was not placed before the city council before it adopted the challenged decision. However, now that it is part of the record, it must be considered on remand.

<sup>13</sup>The Northwest District Objective states:

1 proposed permanent parking lot, in close proximity to the zoo light rail station, will  
2 discourage rather than encourage transit use, with a resulting increase in vehicle trips, which  
3 is inconsistent with the cited objective and policy.

4 Again, there may be a response to petitioners’ arguments that demonstrates the cited  
5 objective and policy either do not apply here or are consistent with the challenged decision.<sup>14</sup>  
6 However, the challenged decision does not offer one. The decision simply concludes without  
7 explanation:

8 “\* \* \* Arterial Streets Classification Policies for the Northwest District (in  
9 which the site is located) have been reviewed. None of the policies apply to  
10 the site. \* \* \*” Record 22.

11 Similarly, the city’s brief offers no explanation for why the objective and policy cited by  
12 petitioners do not apply.

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- Reduce vehicle miles traveled and reliance upon the automobile. Route nonlocal and industrial traffic around the Northwest.

“The primary method to achieve this objective is through increased public transit use, transportation demand management, and improved pedestrian and bicycle access.”

Northwest District Policy 1 states, in part:

“\* \* \* Encourage increased transit use through parking restrictions and higher residential densities. \* \* \*

“Explanation

“Expanded transit service in Northwest is essential to reducing vehicle trips by local residents, industrial area workers and visitors coming into the district and to reducing congestion on neighborhood streets.

“Potential Actions

“\* \* \* \* \*

- Encourage increased transit use through transportation demand management, parking restrictions and higher residential densities.”

<sup>14</sup>One question we have is whether the cited “objective” applies here when CPTe Policy 6.4 only refers to District Policies. However, CPTe Policy 6.4 expressly makes “District Policies” “mandatory approval criteria” when reviewing “Conditional Uses and Master Plans.” Therefore, Northwest District Policy 1 would appear to apply.

1           As we have already noted, CPTE Policy 6.4 expressly provides that “District Policies  
2     \* \* \* are used as mandatory approval criteria” in reviewing conditional use master plans.  
3     The policy petitioners cite, is a “District Policy” and the cited objective might also be  
4     properly viewed as a “District Policy.” It is not obvious to us, based on the text of the policy  
5     and objective, why the city believes they are inapplicable. Therefore, because there is no  
6     explanation for the city’s position, either in its decision or its brief, we sustain this part of the  
7     second assignment of error.

8           **B.     Arterial Streets Classification Policy**

9           Under the conditional use criteria:

10          “The proposed use [must be] in conformance with either the Arterial Streets  
11          Classification Policy or the Downtown Parking and Circulation Policy,  
12          depending upon location[.]” PCC 33.815.100(B)(1).

13         The ASCP applies here. As we have already explained, the ASCP is part of the CPTE.  
14         Knight Boulevard provides access to the existing parking lot and the disputed permanent  
15         parking lot. Petitioners argued below that the ASCP designates Knight Boulevard as a  
16         “Local Service Street,” a “City Bikeway,” and a “City Walkway.” In their petition for  
17         review, petitioners reiterate the argument they made to the city.

18          “\* \* \* Auto-oriented land uses are to be discouraged from using Local Service  
19          Streets as their primary access. Since a parking lot encourages more thru-  
20          traffic and high intensity auto use in the vicinity of the zoo, it is inconsistent  
21          with the functional purpose of the street.” Record 82.

22         Although petitioners contend that Knight Boulevard is a “City Bikeway” and a “City  
23         Walkway,” they cite no CPTE provisions that they believe are violated by the proposal with  
24         regard to these aspects of Knight Boulevard. However, petitioners accurately state that the  
25         CPTE provides “Auto-oriented land use should be discouraged from using Local Service  
26         Streets as their primary access.” CPTE 27.

27         CPTE Policy 6.4 makes it clear that ASCP “Classification Descriptions \* \* \* are used  
28         as mandatory approval criteria” in reviewing conditional use master plans. However, we

1 note that the quoted CPTE language itself uses the words “should” and “discouraged” rather  
2 than the mandatory terms “shall” and “prohibited.” It is not clear to us that the CPTE  
3 language that petitioners cite necessarily has the mandatory and preclusive effect that  
4 petitioners argue it has. However, the challenged decision does not dismiss petitioners’  
5 argument on the basis that Knight Boulevard already serves a large existing parking lot and  
6 the cited CPTE provisions themselves are aspirational rather than mandatory. Rather, the  
7 challenged decision states:

8 “Knight [Boulevard], a park road not in a public right-of-way, is a Minor  
9 Transit Street (No. 63 Bus), City Bikeway and Pedestrianway. \* \* \* The  
10 proposed improvements will not affect the Arterial Streets Classification  
11 Policy. Knight [Boulevard] is a park road and it provides access to the lot.  
12 The criterion does not apply.” Record 22.

13 As petitioners correctly note, the city does not dispute that Knight Boulevard is a  
14 Local Service Street or that the CPTE limits auto-oriented land uses on such streets. The  
15 challenged decision simply points out that Knight Boulevard is “not in a public right-of-way”  
16 without explaining why that point, even if true, warrants overlooking the CPTE limits on  
17 auto-oriented development along such Local Service Streets. Similarly, the city’s brief offers  
18 no explanation for the city’s position. Accordingly, we sustain this part of the second  
19 assignment of error.

20 In summary, on remand, the city must explain its position that the cited CPTE  
21 provisions do not apply in this case, or apply those provisions and explain why it believes the  
22 proposed permanent parking lot is consistent with those provisions.

23 The second assignment of error is sustained.

24 **THIRD ASSIGNMENT OF ERROR**

25 Petitioners argue the challenged decision fails to show the transportation system is  
26 adequate to support the proposed use, as required by PCC 33.815.100(B)(2). *See* n 9.  
27 Petitioners also argue the challenged decision fails to address CPTE Policies 6.5 and 6.26,  
28 but petitioners do not develop an argument about why they believe the cited CPTE policies

1 add substantively to PCC 33.815.100(B)(2) or why those added substantive provisions are  
2 violated by the challenged decision.<sup>15</sup> Most of petitioners’ argument under this assignment  
3 of error faults the city for not addressing issues that they raised below.<sup>16</sup>

4 Our review of this assignment of error is complicated by the fact that petitioners’  
5 challenge to the city’s findings is directed solely a the brief findings the city adopted to  
6 respond to their argument concerning CPTE Policy 6.5. Petitioners make no attempt to  
7 challenge the several pages of single-spaced findings that the city adopted to address PCC  
8 33.815.100(B)(2). Petitioners’ arguments are inadequate to explain why those findings are  
9 insufficient to respond to the issues they raised below, or why the evidence in the record does  
10 not support those findings.

11 The third assignment of error is denied.

12 **FOURTH ASSIGNMENT OF ERROR**

13 CPTE Policy 6.7 requires that the city “[d]evelop transit as the preferred form of

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<sup>15</sup>CPTE Policies 6.5 and 6.26 provide as follows:

**“Policy 6.5 Neighborhood Collector and Local Service Street Traffic Management**

“Manage traffic on Neighborhood Collectors and Local Service Streets according to the hierarchy established in Chapter 3 of the Transportation Element, Arterial Streets Classifications and Policies, and the land uses they serve. Measures taken by the Bureau of Traffic Management, within the criteria of both the Collector Recovery and Neighborhood Traffic Management Programs, to manage traffic on Neighborhood Collectors and Local Service Streets should encourage non-local traffic to use streets with higher traffic classifications and should not significantly divert traffic to other nearby streets of the same or lower classification.”

**“Policy 6.26 Adequacy of Transportation Facilities**

“Ensure that amendments to the Comprehensive Plan or land use regulations which change allowed land uses, including goal exceptions, map amendments, zone changes, conditional uses, and master plans, and which significantly affect a transportation facility, are consistent with the identified function, capacity, and level of service of the facility.”

<sup>16</sup>We have explained that “[w]here there is focused testimony raising legitimate concerns about compliance with a relevant approval criterion, the [local government’s] findings must address such concerns.” *See Neighbors for Livability v. City of Beaverton*, 37 Or LUBA 408, 429-30 (1999) (citing *Norvell v. Portland Area LGBC*, 43 Or App 849, 853, 604 P2d 896 (1979) and *White v. City of Oregon City*, 20 Or LUBA 470, 477 (1991)).

1 person trips to and from the Central City, all regional and town centers, and light rail  
2 stations.”<sup>17</sup> The city’s findings addressing this policy are as follows:

3           “*Comment:* Presence of a major light rail transit stop near the site  
4 demonstrates the region’s commitment to providing transit services to major  
5 regional attractors such as this campus. The Zoo was a major contributor to  
6 the construction of the Light Rail station and supports expanding its use and  
7 promoting the benefits of arriving by light rail to the Zoo. A specific  
8 transportation demand management program administered by the Zoo has, as  
9 noted previously in this report and recommendation, resulted in greater use of  
10 mass transit and carpooling than originally expected.” Record 19.

11           Currently most visitors to the zoo travel to the zoo by automobile. Much of  
12 petitioners’ argument under the fourth assignment of error challenges representations made  
13 below on behalf of the proposal regarding existing levels of light rail ridership and whether  
14 Metro is successfully implementing its Transportation Demand Management (TDM)  
15 program. Resolution of these issues may be necessary to respond adequately to petitioners’  
16 central thesis regarding application of CPTE Policy 6.7 to the proposed permanent parking  
17 lot, but those issues are only indirectly related. Petitioners’ central thesis is that:

18           “[T]he city has failed to demonstrate how allowing additional surface parking  
19 is consistent with making transit the preferred form of person trips to the  
20 [zoo], especially when light rail usage is currently achieving less usage than  
21 the 20% goal. Obviously, adding more free surface automobile parking  
22 reduces the incentive to use transit to visit the zoo or neighboring uses. This  
23 concept was best captured by the applicant’s consultant who stated ‘there’s a  
24 correlation between the number of easily accessible free parking spaces and

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<sup>17</sup>CPTE Policy 6.7 provides:

**“Policy 6.7 Public Transit**

“Develop transit as the preferred form of person trips to and from the Central City, all regional and town centers, and light rail stations. Enhance access to transit along main streets and transit corridors. Transit shall not be viewed simply as a method of reducing peak-hour, work-trip congestion on the automobile network, but shall serve all trip types. Reduce transit travel times on the primary transit network, in the Central City, and in regional and town centers, to achieve reasonable travel times and levels of reliability, including taking measures to allow the priority movement of transit on certain transit streets. Support a public transit system that addresses the special needs of the transportation disadvantaged.”

1           whether or not you’re going to make the decision to jump on light rail to come  
2           to the zoo.” Petition for Review 20 (record citation omitted).

3           Again, while the city may well be able to explain why adding the proposed parking  
4           spaces to the currently available permanent on-site parking spaces is consistent with CPTE  
5           Policy 6.7, the findings that it adopted to respond to CPTE Policy 6.7 do not do so.

6           The fourth assignment of error is sustained.

7           **FIFTH ASSIGNMENT OF ERROR**

8           Petitioners argue the city’s findings are inadequate to demonstrate the approved  
9           permanent parking lot is consistent with CPTE Policies 6.13 and 6.14, which concern  
10          transportation demand management and parking management.<sup>18</sup> Summarizing the city’s  
11          findings addressing these policies, the city believes the permanent parking lot is needed to  
12          (1) accommodate bus parking to alleviate safety issues associated with such bus parking in  
13          the existing lot, (2) accommodate peak attendance when on-site parking lots are full and off-  
14          site lots are in use and (3) alleviate problems with spillover parking in adjacent  
15          neighborhoods.<sup>19</sup>

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<sup>18</sup>CPTE Policies 6.13 and 6.14 are as follows:

**“Policy 6.13 Transportation Demand Management**

“Require the use of transportation demand management techniques such as carpooling, ridesharing, flexible work hours, telecommuting, parking management, and employer-subsidized transit passes to mitigate the impact of development-generated traffic in land use reviews. Require a percentage of employee parking spaces to be set aside for preferential carpool/vanpool parking.”

**“Policy 6.14 Parking Management**

“To achieve environmental and transportation policy objectives, the parking supply shall be managed to take into account both transportation capacity and parking demand. Implement measures to achieve Portland’s share of the mandated 10 percent reduction (per the Transportation Rule) in parking spaces per capita within the metropolitan area over the next 20 years. Through the land use process, these measures should include restrictions on the development of new spaces and the redevelopment of existing parking spaces for other uses.”

<sup>19</sup>The city’s findings are as follows:

1 We agree with petitioners that the city’s findings are inadequate. The need to  
2 accommodate bus parking is challenged in the first assignment of error, and we have already  
3 concluded that, in view of the issues petitioners have raised, the city has not demonstrated  
4 that the permanent parking lot is needed to accommodate bus parking or peak zoo attendance  
5 parking needs. Moreover, the core issue that petitioners raise under this assignment of error  
6 is that the record shows that the percentage of light rail ridership for zoo visitors is related to  
7 the lack of readily available free parking spaces at the zoo. The city’s findings acknowledge  
8 as much (“light rail ridership is as high as 35 percent during peak use times”) but dismiss the  
9 impact of the disputed parking lot (“it is difficult to state conclusively that converting the  
10 subject lot has any substantial detrimental impact on building light rail ridership to the Zoo”).  
11 See n 19.

12 Although the city appears to acknowledge that there is an inverse relationship

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“Parking has been reduced 1097 to 840 spaces as part of light rail construction. As a result, the net reduction to 840 parking spaces does not allow the Zoo and surrounding activities to meet special needs parking for school buses and over-sized vehicles nor does it allow the Zoo to meet expected parking demand, even with the aggressive mode split and continuing use of the temporary parking lot (subject of this review).

“\* \* \* Approving the conversion to permanent status may appear to be contrary to building ridership on the light rail line, but need for the lot is not only for automobile parking. [T]he parking [lot’s] primary function is to provide for bus and oversized vehicle parking. Providing for separate bus and oversize vehicle parking conserves the parking efficiency of the main lot and promotes safety by keeping buses and large vehicles from mixing with pedestrians in the main parking lot.

“The parking lot will also provide another source for overflow parking during peak times. It will not be open to general parking unless it is needed for overflow parking. The Zoo has shown through its gate surveys that light rail ridership is as high as 35 percent during peak use times when the main parking lot is full, the temporary lot is used, and satellite parking lots \* \* \* are in use \* \* \*. Given the high mode split for light rail use during these peak times, it is difficult to state conclusively that converting the subject lot has any substantial detrimental impact on building light rail ridership to the Zoo.

“However, the parking lot has a direct impact on potential spillover effects of on-street parking in adjacent neighborhoods. Without the lot, another 125 cars would be looking for a place to park during peak events. Although the Zoo has an aggressive and ongoing policing program to reduce neighborhood parking infiltration, the concern is a real and on-going one that will not be aided by disallowing the permanent parking lot.” Record 21-22.

1 between the ready availability of on-site free parking spaces and the percentage of visitors  
2 using light rail, it dismisses the impact of adding 125 parking spaces. If that is because the  
3 city believes the impact of the added parking spaces will not affect the city's ability to  
4 comply with the traffic and parking reduction goals stated in CPTE Policies 6.13 and 6.14, it  
5 does not explain that position. Moreover, we cannot tell whether the record supports such a  
6 position.<sup>20</sup> Finally, the city's reference to spillover parking in adjacent neighborhoods is not  
7 quantified in any way and there is no effort to reconcile or compare the significance of that  
8 concern with the affirmative policies stated in CPTE Policies 6.13 and 6.14 to reduce traffic  
9 and parking. The city must explain in its findings how it strikes that balance before it can  
10 provide a reason to add 125 additional permanent parking spaces notwithstanding CPTE  
11 Policies 6.13 and 6.14.

12 The fifth assignment of error is sustained.

13 **SIXTH ASSIGNMENT OF ERROR**

14 In April 1999, the city hearings officer approved an adjustment from landscaping  
15 requirements for the permanent parking lot.<sup>21</sup> Although that adjustment was separately  
16 appealed to LUBA, the appeal was dismissed. During the local proceedings petitioners and  
17 Metro disputed whether the adjustment decision remains valid. The city found that because  
18 the appeal of the adjustment decision was dismissed, the adjustment remains valid.  
19 Petitioners contend it is a nullity because the 1997 decision converting the parking lot to a  
20 permanent lot was remanded.

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<sup>20</sup>Petitioners argue that adding the disputed parking spaces violates the cited policies as a matter of law. We do not agree that the cited policies necessarily impose as absolute an obligation as petitioners believe they do. However, in view of petitioners' arguments that any need for additional parking could be avoided by better implementation of the zoo's TDM plan, which is mandated by CPTE Policy 6.13, we agree that the city has not adequately explained why adding the disputed parking spaces is consistent with CPTE Policies 6.13 and 6.14.

<sup>21</sup>As we noted earlier in our discussion of the facts, the hearings officer in approving the 1993 amendments specifically provided that conversion of the temporary parking lot to a permanent parking lot would necessitate approval of a landscaping plan through a Type II review procedure. *See* n 1 and related text.

1 We are not sure we understand the parties' dispute under this assignment of error. To  
2 the extent petitioners argue the 1999 adjustment decision became a nullity or has no  
3 continuing effect, simply because the permanent parking lot that is the subject of that  
4 adjustment is no longer authorized, they are wrong. Petitioners cite no authority that the  
5 approval of the parking lot necessarily must precede a decision granting adjustments to  
6 landscaping requirements, and we are aware of no such general requirement.<sup>22</sup> *See Willhoft*  
7 *v. City of Gold Beach*, 39 Or LUBA 353, 358 (2001) (conditional use approval to expand a  
8 use need not precede a floodplain permit for fill needed to construct the use).

9 However, to the extent the city believes the adjustment decision could be acted on or  
10 have any practical effect in the absence of a valid decision to convert the temporary parking  
11 lot to a permanent parking lot, it is also wrong. If the city is ultimately able to approve the  
12 permanent parking lot for which an adjustment was granted in 1999, we see no reason why  
13 the adjustment decision would need to be repeated. However, absent such reauthorization of  
14 the permanent parking lot, the adjustment is inchoate and without practical effect.

15 With the above clarification of our understanding of the status of the 1999 adjustment  
16 decision, the sixth assignment of error is denied.<sup>23</sup>

## 17 **SEVENTH ASSIGNMENT OF ERROR**

18 Petitioners argue under this assignment of error that the city misapplied PCC  
19 33.100.200(B)(2) and 33.266. The challenged decision and respondent's brief explain that  
20 petitioners misread those provisions and that required parking is to be determined through  
21 conditional use review rather than by applying the standard that petitioners cite. We agree

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<sup>22</sup>The cases that petitioners cite in support of their argument concern annexations and simply provide that a local government must have jurisdiction over a property before adopting land use decisions concerning the property. They have no bearing here and do not establish the general principle petitioners say they do.

<sup>23</sup>The parties also disputed below the current status of the 1997 Zoo Master Plan elements other than the disputed parking lot. However, petitioners do not assign error based on the position the city took in the challenged decision concerning that dispute.

1 with the city.

2           Petitioners also claim that the way the city interprets and applies these PCC  
3 provisions is inconsistent with a prior decision of the city. However, we agree with the city  
4 that petitioners do not make any attempt to demonstrate the factual predicates that would be  
5 necessary to determine whether the current and prior decisions are in fact inconsistent.

6           The seventh assignment of error is denied.

7           The city's decision is remanded.