BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WILSON PARK NEIGHBORHOOD ASSOCIATION, WESLEY RISHER, FRIENDS OF TERWILLIGER, INC., CASCADE GEOGRAPHIC SOCIETY, INC., MULTNOMAH NEIGHBORHOOD ASSOCIATION, and CHRIS RYCEWICZ, Petitioners, vs. CITY OF PORTLAND, Respondent, and THE HOUSING AUTHORITY OF PORTLAND, Intervenor-Respondent.	LUBA No. 92-042 FINAL OPINION AND ORDER

Appeal from City of Portland.

Robert S. Simon, Lake Oswego, filed the petition for review and argued on behalf of petitioners.

Peter A. Kasting, Portland, filed a response brief and argued on behalf of respondent.

Richard J. Brownstein and Jonathan R. Gilbert, Portland, filed a response brief on behalf of intervenor-respondent. With them on the brief was Brownstein, Rask, Sweeney, Kerr, Grim & DeSylvia. Richard J. Brownstein argued on behalf of intervenor-respondent.

SHERTON, Chief Referee; HOLSTUN, Referee, participated in the decision.

REMANDED 10/06/92

You are entitled to judicial review of this Order.

Judicial review is governed by the provisions of ORS 197.850.

Opinion by Sherton.

NATURE OF THE DECISION

Petitioners appeal a city council order approving a conditional use application for a development providing short-term housing and support services for homeless families.

MOTION TO INTERVENE

The Housing Authority of Portland, the applicant below, moves to intervene in this proceeding on the side of respondent. There is no opposition to the motion, and it is allowed.

JURISDICTION

During the proceedings below, only petitioner Wilson Park Neighborhood Association appealed the decision of the city hearings officer to the city council.[1] Respondent and intervenor-respondent (respondents) argue this Board lacks jurisdiction to hear the appeal of petitioners other than Wilson Park Neighborhood Association, because the other petitioners did not appeal the hearings officer's decision to the city council. According to respondents, this means the other petitioners failed to exhaust their administrative remedies, as required by ORS 197.825(2)(a).

ORS 197.825(2)(a) requires that petitioners exhaust available administrative remedies before appealing a

[1]The city's rejection of the local appeal filed by petitioner Rycewicz is addressed under the eleventh assignment of error, infra.

decision to this Board. However, as we explained in McConnell v. City of West Linn, 17 Or LUBA 502, 507 (1989), this statutory requirement that administrative remedies be exhausted is satisfied if at least one petitioner exhausts all available administrative remedies, and that occurred in this case. Goose Hollow Foothills League v. City of Portland, ___ Or LUBA ___ (LUBA No. 92-087, September 28, 1992), slip op 3.

Accordingly, this Board has jurisdiction to hear the appeal of all petitioners.

STANDING

Respondents contend petitioners Friends of Terwilliger, Inc. and Cascade Geographic Society, Inc. lack standing because they failed to appear in the proceedings below, as required by ORS 197.830(2)(b).

ORS 197.830(2)(b) provides that in order to petition this board for review of a land use decision, a person must have "[a]ppeared before the local government * * * orally or in writing." As far as we can determine from the citations to the record provided in the petition for review, petitioners Friends of Terwilliger, Inc. and Cascade Geographic Society, Inc. did not appear below, and for that reason lack standing in this appeal.

FACTS

The subject 1.79 acre unimproved property is owned by intervenor and is zoned Residential 7,000 (R7), a single

family residential zone with a 7,000 square foot minimum lot size. The subject property is generally at a lower elevation than the adjoining properties, and is heavily vegetated. A creek runs from north to south through the western portion of the property. Approximately the western third of the property, including the creek and adjoining wetlands, is subject to a regional storm water detention easement owned by the city.

With one exception, the surrounding properties are also zoned R7.[2] SW Bertha Blvd. adjoins the subject property to the east. Across SW Bertha Blvd. are single family dwellings. Adjoining the property to the south is the unimproved right of way for SW Nevada Ct., on the other side of which is a vacant parcel. Adjoining the property to the west are single family dwellings and duplexes fronting on SW Capitol Hwy. To the north is a nonconforming bus parking area.

Intervenor applied to the city for approval of a development (Turning Point) to provide transitional short-term housing and other services to homeless families. The proposal includes a two-story apartment style structure with 30 furnished studio units, including living space, kitchen and bath, that can accommodate a family of four. The design provides for access between some units, to accommodate

[2]One of the parcels adjoining the subject property to the west is zoned Residential 2,000 (R2), a multi-family residential zone.

larger families. The proposal includes a multi-purpose structure located at the south end of the residential building which will include a manager's apartment, storage space, laundry, counseling room and a multi-purpose room for meetings, cooperative babysitting and recreation. A covered outdoor play area will adjoin the multi-purpose building.

The structures are proposed to be located on the eastern portion of the property. There will be a single access point from SW Bertha Blvd. Parking spaces for residents and staff will be located to the west and north of the proposed structures.

Intervenor's application states that homeless families will be referred to Turning Point after initial screening by Multnomah County social service providers at sites throughout the Portland area. Families who reside in Turning Point will sign a contract requiring them to follow a case management plan. Most activities related to case management, such as job training, health services and counseling will occur off-site. The average length of stay will be less than 60 days.[3] In no case will families reside at Turning Point for more than six months.

After several public hearings, the hearings officer

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[3]The original proposal stated the average length of stay is expected to be 60 days. Record 593. However, intervenor subsequently testified that the actual average length of stay will be less than 60 days. Record 513. Also, a condition of approval requires that the average length of stay be less than 60 days. Record 272.

issued a decision approving intervenor's application. The hearings officer's decision was appealed by petitioner Wilson Park Neighborhood Association. In addition, petitioner Rycewicz attempted to appeal the hearings officer's decision. However, a city planning staff member refused to accept petitioner Rycewicz's appeal because petitioner Rycewicz declined to pay the $500 filing fee required by the city. After an additional public hearing, the city council affirmed the hearings officer's decision and approved the proposed development. This appeal followed.

ELEVENTH ASSIGNMENT OF ERROR

Petitioners contend the city planning staff member who rejected petitioner Rycewicz's appeal erred because under the proper interpretation of applicable Portland City Code (PCC) provisions, (1) no appeal fee was required, and (2) payment of the appeal fee is not jurisdictional. Petitioners also contend the $500 appeal fee requested by the city violates the requirement of ORS 227.180(1)(c) that fees for an appeal from a hearings officer's decision be reasonable and no more than the average cost of such appeals or the actual cost of the appeal. Petitioners argue that because of the city's error, petitioner Rycewicz was denied his substantial right to appeal the hearings officer's decision. According to petitioners, this resulted in petitioner Rycewicz being allowed only two minutes of oral

testimony during the hearing before the city council, rather than the ten minutes afforded to appellants.[4]

Respondents argue that under ORS 197.015(10)(a), the city's refusal to accept the Rycewicz appeal was a land use decision because it concerned the application of a land use regulation, i.e. the PCC provisions applicable to the filing of appeals and payment of appeal fees. Respondents further argue this land use decision became final on October 25, 1991, the date the city planner rejected petitioner Rycewicz's appeal, because there is no local process available for review of this decision. According to respondents, because no notice of intent to appeal this land use decision was filed within 21 days after October 25, 1991, as required by ORS 197.830(8), this Board lacks jurisdiction to review the city's decision to reject the Rycewicz appeal.

Respondents also argue, in the alternative, that if the city's decision to reject the Rycewicz appeal was not a separate, final land use decision, then this Board is precluded from considering issues concerning the rejection of the Rycewicz appeal because those issues were not raised before the close of the final evidentiary hearing in the city proceedings, as required by ORS 197.763(1) and

[4]Petitioners concede that petitioner Rycewicz's ability to submit written testimony to the city council was not affected by the city's refusal to accept his appeal.

197.835(2). Respondents point out that petitioner Rycewicz testified at the January 8, 1992 appeal hearing before the city council. Respondents also argue that at any time between the rejection of his appeal on October 25, 1991 and the January 8, 1992 hearing, petitioner Rycewicz could have submitted written materials to the city council raising issues concerning the rejection of his appeal.

We agree with respondents.[5] The city's rejection of the Rycewicz appeal was either (1) a separate, final land use decision, or (2) part of the ongoing city proceedings on intervenor's application that culminated in the decision challenged in this appeal. If it is the former, we do not have jurisdiction to review the city planner's decision to reject the Rycewicz appeal, because no notice of intent to appeal was timely filed. If it is the latter, we cannot consider issues concerning the rejection of the Rycewicz appeal, because they were not raised before the city council prior to the close of the final evidentiary hearing. In either case, the eleventh assignment of error must be denied.

FIRST ASSIGNMENT OF ERROR

A. PCC 33.730.030(H)(6)

PCC 33.730.030(H)(6)(a) provides that when the city

[5]Respondents also argue that the decision to reject the Rycewicz appeal for nonpayment of a $500 appeal fee properly interprets the PCC and does not violate ORS 227.180(1)(c). Because we deny this assignment of error on other grounds, we do not reach this issue.

council modifies a report and decision of the hearings officer, "an amended report with findings supporting the decision must be prepared as provided in paragraph (b)." PCC 33.730.030(H)(6)(b) provides that if the prevailing party is represented by an attorney, "the prevailing party must provide findings and conclusions to support the Council's decision."

Petitioners contend intervenor's attorney did not prepare "an amended report with findings supporting the decision," with the content required by PCC 33.730.030(H)(6).

After the city council made a tentative oral decision to modify the hearings officer's decision, intervenor's attorney submitted a proposed order and findings. Record 19-25. We fail to see any way in which intervenor's proposed order and findings does not satisfy the requirements of PCC 33.730.030(H)(6).[6]

This subassignment of error is denied.

B. Effect of City Council Findings

The city council's findings state:

> "The Report and Decision of the Hearings Officer, issued October 11, 1991, is hereby adopted as findings and conclusions of the City Council,

[6]The general issue raised by petitioner concerning the effect of the findings adopted by the city council is addressed under the following subassignment of error. Petitioners' challenges to the adequacy of the city's findings to demonstrate compliance with particular approval criteria are addressed under individual assignments of error, infra.

> except to the extent the Report and Decision of the Hearings Officer is modified by the findings set out below."[7] (Emphasis added.) Record 19.

The above statement is followed by a number of findings which address some, but not all, of the PCC approval criteria applicable to the subject proposal.

Under several of their assignments of error, petitioners contend that for each approval criterion specifically addressed in the city council's findings, the hearings officer's finding on that criterion has been "modified," and therefore superseded, by the city council's finding. Petitioners argue that if it is not assumed that a city council finding on a particular criterion supersedes the hearings officer's finding on the same criterion, this board would have to compare the two findings and guess which portions of the hearings officer's finding the city council intended to "modify" and which it intended to retain. Petitioners further argue that for this Board to perform such an exercise would be contrary to the requirement of PCC 33.730.030(H)(6)(a) that an "amended report" be prepared when the city council modifies a hearings officer's decision.

Findings of fact must state what the decision maker

[7]For clarity, we hereafter refer to the findings document adopted by the city council (Record 19-26) as the "city council's findings" and to the Report and Decision of the Hearings Officer (Record 245-76) as the "hearings officer's findings."

believes to be true, although no particular form is required. Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 21, 569 P2d 1063 (1977); Eckis v. Linn County, 19 Or LUBA 15, 22 (1990). We have previously stated that local government decisions may incorporate by reference portions of other documents as findings. DLCD v. Klamath County, 16 Or LUBA 817, 824-25 (1988); Astoria Thunderbird v. City of Astoria, 13 Or LUBA 154, 162 (1985). However, where a decision maker does not clearly identify the portions of a document that it intends to adopt by reference, it runs a risk that this Board will not be able to identify and review any portion of such document as findings of the decision maker. See DLCD v. Douglas County, 17 Or LUBA 466, 471 n 6 (1989) (decision maker's adoption of findings in staff report that are "consistent with our decision").

In this case, the city council's findings state it relies on the hearings officer's findings "except to the extent [they are] modified by" the city council's findings. Record 19. For approval criteria addressed in both the city council's findings and the hearings officer's findings, two possibilities exist. One is that the city council intended to add to the hearings officer's findings, without modifying them. The other is that the city council intended to modify, and therefore supersede, the hearings officer's findings. If the former intent is apparent from the language and context of the findings on a particular

approval criterion, we will give it effect. However, if such an intent is not apparent, and there are differences between the findings and conclusions reached by the city council and the hearings officer, we will assume it is the city council's findings, rather than the hearings officer's findings, that represent what the decision maker believed to be true.

This subassignment of error is denied.

The first assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

A. Essential Services Provider

The proposed development was approved as an "Essential Services Provider" (ESP). With an exception not applicable here, PCC Table 110-1 establishes that ESPs are a conditional use in the R7 zone. The "use categories" listed in PCC Table 110-1 are described in PCC chapter 33.920 (Descriptions of the Use Categories). PCC 33.920.440 describes ESPs as follows:

> "**A. Characteristics.** [ESP uses] are primarily engaged in providing on-site food or shelter beds, for free or at significantly below market rates.
>
> "**B. Accessory Uses.** Accessory uses include offices, counseling, and facilities for recreation, restrooms, bathing and washing of clothes.
>
> "**C. Examples**. Examples include temporary or permanent emergency shelters, night time shelters, rescue missions, soup kitchens, and surplus food-distribution centers.

"* * * * *"

Petitioners contend the proposed development is actually nothing more than a multi-family apartment building, which is not allowed in the R7 zone. Petitioners argue the findings do not demonstrate that the proposed use has the characteristics of an ESP or is similar to the listed examples of an ESP, as set out in PCC 33.920.440(A) and (C) above. According to petitioners, providing dwelling units with kitchens is not the same as providing "on-site food or shelter beds." Petitioners further argue that the examples of ESPs listed in PCC 33.920.440(C) are distinguishable from the proposed use, because traditional emergency shelters and food distribution centers do not allow clients to stay an average of 60 days or cook in their own rooms. Petitioners also contend there is no evidence in the record that intervenor will charge below market rates for the proposed apartment units or that the proposed use is in any way different from a government subsidized apartment building. Finally, petitioners argue that under PCC 33.700.070(C), if the proposed use does not fit into an existing use category, it is prohibited.

The city's decision states:

> "The proposed use has the characteristics of an ESP because it will primarily provide a dwelling unit * * * which will include a bed or beds for family members and a private cooking facility where food can be provided and prepared on-site, within each unit. These opportunities will be provided for free or significantly below market

rates.

> "The examples provided in [PCC 33.920.440(C)] are not exclusive. This list must be read in conjunction with [PCC 33.920.440(A)] which defines the characteristics of the use. * * * The proposed use is similar to the examples described in that it provides temporary * * * shelter and allows its clients to prepare food in each unit. This use has the characteristics of an ESP and is similar to the ESP examples set out in the [PCC]. The proposed use therefore qualifies as an ESP under [PCC] 33.920.440." Record 253.

The first paragraph of the findings quoted above explains that the basis for the city's classification of the proposed use as an ESP is that the proposed use will primarily provide both on-site food and shelter beds, for free or at significantly below market rates.[8] PCC 33.910.030 defines "shelter beds" as "[t]ransient lodging provided for free or at substantially below market rates." "Transient" is not defined in the PCC, so its ordinary dictionary meaning applies. PCC 33.910.010. Webster's Third New International Dictionary 2428 (1981) defines "transient" as "passing away in time * * * impermanent, transitory, short-lived." The record indicates the average stay at the proposed facility will be less than

[8]Petitioners also argue that under PCC 33.920.440(A), an ESP may only provide either on-site food or on-site shelter beds. However, as respondent points out, PCC 33.700.070(D)(3)(b) provides that "'or' indicates that the connected items or provisions may apply singly or in combination." Therefore, the city's interpretation of PCC 33.930.440(A) as allowing an ESP to provide both on-site food and shelter beds is consistent with the language of the ordinance.

60 days, and that no residence will exceed six months. Record 513, 593. This is a sufficient basis for concluding the proposed use will provide primarily "transient lodging" or "shelter beds."[9] The evidence in the record cited by the parties also constitutes substantial evidence that such lodging will be provided at significantly below market rates. Record 591, 598. Therefore, we conclude the city properly determined the proposed use has the characteristics of an ESP, as set out in PCC 33.920.440(A).[10]

This subassignment of error is denied.

B. PCC 33.232.030(A)

PCC 33.232.030(A) provides that "[a]ll functions associated with the ESP must take place within the building proposed to house the ESP, except outdoor waiting." Petitioners contend the challenged decision approves an

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[9]We also note that this is consistent with the PCC's descriptions of its two residential use categories, both of which provide that lodging where the average length of stay is less than 60 days is not considered a residential use. PCC 33.920.100(A) and 33.920.110(A).

[10]PCC 33.920.030.D provides that uses listed in the "examples" subsection of a use category are uses that "are included in the use category." Therefore, the uses listed as examples in PCC 33.930.440(C) are by definition ESPs, without further consideration of their characteristics. Hollywood Neigh. Assoc. v. City of Portland, ___ Or LUBA ___ (LUBA No. 91-100, Order on Motion to Dismiss, September 26, 1991), slip op 7. However, the list of examples of ESPs set out in PCC 33.920.440(C) is not exclusive. If a proposed use is not one of the listed examples, as is the case here, whether it is an ESP is ultimately determined by whether it has the characteristics described in PCC 33.920.440(C), not by its similarity to the uses listed as examples in PCC 33.920.440(C). Nevertheless, we agree with respondents that the second paragraph of the city's findings quoted in the text, supra, adequately explains why the proposed use is similar to those listed as examples in PCC 33.920.440(C).

"outdoor play area" that is not "within the building," as required by PCC 33.232.030(A).[11] Petitioners argue that the play area is "within the building" only if it is completely enclosed by four walls and a roof.

PCC 33.910.030 defines "building" as a "structure that has a roof and is enclosed on at least 50% of the area of its sides." The "floor area" of a building includes "roofed porches, exterior balconies, or other similar areas" which are "enclosed by walls that are more than 42 inches in height, for 50 percent or more of their perimeter." Id.

The approved play area will adjoin the south side of the multi-purpose building. The challenged decision imposes the following condition:

> "The proposed 'outdoor play area' shall be designed so that the area is completely roofed and enclosed by walls that are more than 42 inches in height for 50 percent or more of [its] perimeter." Record 24.

The city's decision provides that under the above quoted condition, the play area will be part of the total floor area of the multi-purpose building and, therefore, functionally "within the building," as required by

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[11]Petitioners also argue that a second "covered play area," located between the residential and multi-purpose buildings, was improperly approved. One of three site plans submitted by intervenor does label the triangular area between the two buildings as "covered play." Record Ex. 8L. However, the challenged decision states that the second play area will be located within the multi-purpose building itself. Record 264. We conclude the challenged decision does not approve a play area in the triangular area between the two buildings.

PCC 33.232.030(A). Record 265.

The city's interpretation of the relevant PCC provisions is not inconsistent with the express, language, purpose or policy of its code and, therefore, must be affirmed. Clark v. Jackson County, 313 Or 508, 515, ___ P2d ___ (1992).

This subassignment of error is denied.

C. PCC 33.232.050

PCC 33.232.050 (ESP Review Approval Criteria) applies to an ESP use only when it is listed as a "limited use" in the primary use table of the base zone, in this case PCC Table 110-1. PCC 33.232.020. The hearings officer's findings conclude the proposed ESP is not listed as a limited use in PCC Table 110-1 and, therefore, PCC 33.232.050 is inapplicable. Record 264. The city council's findings conclude, in the alternative, that the approval criteria of PCC 33.232.050 are satisfied. Record 21-22.

Petitioners contend the hearings officer's conclusion that PCC 33.232.050 does not apply is erroneous because PCC Table 110-1 lists ESPs as both conditional and limited uses in the R7 zone. Petitioners further argue the city council's findings of compliance with PCC 33.232.050 are inadequate and not supported by substantial evidence.

For the R7 zone, PCC Table 110-1 list ESPs as

"L/CU[1]."[12] The city argues that PCC 33.110.100 (Primary Uses) establishes four mutually exclusive categories of uses -- allowed uses, limited uses, conditional uses and prohibited uses. According to the city, the notation "L/CU[1]" indicates that an ESP may be either a limited use or a conditional use in the R7 zone, but not both. The city maintains that PCC 33.110.100(B) describes the circumstances in which an ESP qualifies as a limited use in the R7 zone:

> "**Limited Uses.** Uses allowed that are subject to limitations listed in Table 110-1 with an 'L.' These uses are allowed only if they comply with the limitations listed below and the development standards and other regulations of this Title. * * * The paragraphs listed below contain the limitations and correspond with the footnote numbers from Table 110-1.
>
> "1. Essential Service Providers. This regulation applies to all parts of Table 110-1 that have note [1]. Essential Service Providers that exclusively serve victims of sexual or domestic violence are allowed by right if they meet the size limitations for Household Living Uses.
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> "* * * * *"

According to the city, because the proposed development will not exclusively serve victims of sexual or domestic violence, it does not comply with the limitation of PCC 33.110.100(B)(1) and, therefore, is not a limited use in the R7 zone, but rather is a conditional use.

The city's interpretation of the "L/CU[1]" notation is

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[12]"L" and "CU" stand for limited use and conditional use, respectively.

reasonable and not inconsistent with the language or context of the relevant PCC provisions. There is no dispute that the proposed use does not satisfy PCC 33.110.100(B)(1) and that the ESP approval criteria of PCC 33.232.050 are applicable only if the proposed use is a limited use. Accordingly, we agree with the determination in the hearings officer's findings that PCC 33.232.050 is not applicable.

This subassignment of error is denied.

The fifth assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioners challenge the city's determination of compliance with PCC 33.815.105(A), which establishes the following criterion for approval of a non Household Living conditional use in the R7 zone:

> **"Proportion of Household Living uses**. The overall residential appearance and function of the area will not be significantly lessened due to the increased proportion of uses not in the Household Living category in the residential area. Consideration includes the proposal by itself and in combination with other uses in the area not in the Household Living category and is specifically based on:
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> "1. The number, size, and location of other uses not in the Household Living category in the residential area; and
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> "2. The intensity and scale of the proposed use and of existing Household Living uses and other uses."

The challenged decision states the term "residential area" in PCC 33.815.015(A) should be interpreted broadly,

"to include the Wilson Park/Multnomah neighborhoods' boundary." Record 257. The decision also includes the following findings under PCC 33.815.015(A)(1) and (2):

> "Although it is true that at least three churches and their parking lots, a regional park, two public schools, and several water towers exist in the [residential area,] there is nothing unusual about the concentration of these nonhousehold related facilities in this residential area. [C]hurches, parks, schools and water towers exist in most if not all neighborhoods in the City and are the usual nonresidential components of any neighborhood. These nonresidential uses, along with the Raz bus facility do not significantly reduce the residential appearance and function of the area due to the number, size and location of other uses not in the household living category in the residential area. The proposed use will not significantly impact the overall residential appearance and function of the area.
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> "* * * * *
>
> "* * * The intensity and scale of this project is similar to nearby multifamily developments. the density proposed is less than that of nearby multifamily developments. The size, height, configuration, materials, and landscaping will all be residential in character. This criteri[on] is met." (Emphasis in original.) Record 258-59.

Petitioners contend the above quoted findings are inadequate for several reasons. Petitioners argue the findings fail to identify the "number, size and location of" other non Household Living uses in the area, as required by PCC 33.815.105(A)(1).[13] Petitioners also argue the findings

[13]Petitioners also contend the findings improperly omit reference to certain non household living uses within the Wilson Park and Multnomah neighborhood boundaries, including two community centers, one park, one

fail to identify the "intensity and scale of" the proposed use and existing uses in the area, other than to state the proposed use is similar to nearby multi-family developments. Petitioners contend such reference is meaningless because neither the nearby multi-family developments nor their scale and intensity are identified. Petitioners further argue the findings are inadequate because they fail to describe the "overall residential appearance and function of the area." According to petitioners, a determination of whether the "overall residential appearance and function of the area" will be "lessened," as required by PCC 33.815.105(A), cannot be made without such a description.

PCC 33.815.015(A) initially requires the identification of the "residential area" to which this standard applies. Petitioners do not contest the city's identification of the "Wilson Park/Multnomah neighborhoods' boundary" as the relevant residential area. Record 257. Under PCC 33.815.105(A), the city must base its determination of whether the "overall residential appearance and function of [this residential] area will * * * be significantly lessened" on the facts required by PCC 33.815.105(A)(1) and (2). PCC 33.815.015(A)(1) requires that the "number, size, and location of" non Household Living uses in the residential area be identified. While the findings identify

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nursing home, three shopping complexes and several offices. Petition for Review 8-9.

the number of some such uses, they do not identify their size and location.[14] Additionally, the findings fail to identify the "intensity and scale of" the existing Household Living uses and other uses in the residential area, as required by PCC 33.815.105(A)(2). Finally, the findings fail to describe the overall residential appearance and function of the area. Without this information, the city is not in a position to determine compliance with PCC 33.815.105(A).[15]

The second assignment of error is sustained.[16]

THIRD ASSIGNMENT OF ERROR

Petitioners challenge the city's determination of compliance with PCC 33.815.105(B), which establishes the following alternative criteria for approval of a non

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[14]We also note that without any identification in the findings or the record of the location of these non Household Living uses, or identification of the boundaries of the residential area itself, it is impossible for us to determine whether the city erred by failing to consider additional non Household Living uses, as argued by petitioners.

[15]Intervenor argues that under ORS 197.835(9)(b), even if the findings are inadequate, this portion of the city's decision must be affirmed because the evidence "cited below" clearly supports a determination of compliance. However, where findings are inadequate, ORS 197.835(9)(b) requires us to affirm that portion of the challenged decision only if "the parties identify relevant evidence in the record which clearly supports the decision." Here, no party cites any evidence in the record to support this portion of the city's decision.

[16]Because the findings are inadequate, no purpose would be served by addressing petitioners' challenges to the evidentiary support for those findings. Schellenberg v. Polk County, 21 Or LUBA 425, 443 (1991); Benjamin v. City of Ashland, 20 Or LUBA 265, 276 (1990); DLCD v. Columbia County, 16 Or LUBA 467 (1988).

Household Living conditional use in the R7 zone:

> "**Physical compatibility.**
>
> "* * * * *
>
> "2. The proposal will be compatible with adjacent residential developments based on characteristics such as the site size, building scale and style, setbacks, and landscaping; or
>
> "3. The proposal will mitigate differences in appearance or scale through such means as setbacks, screening, landscaping and other design features." (Emphasis added.)

A. PCC 33.185.105(B)(2)

The hearings officer's findings state that the term "adjacent residential developments" in PCC 33.815.105(B)(2) "limits the examination to continuous [sic contiguous] or abutting residential developments." Record 257. The hearings officer's findings on PCC 33.815.105(B)(2) conclude that given the site size, and scale and style of the proposed development, it is not compatible with adjacent residential developments. Record 259. However, the city council's findings on PCC 33.815.105(B)(2) state:

> "[I]n the context of the immediate area, which includes several similar multi-family residences and a commercial use adjacent to the site, the proposed development is compatible with adjacent residential developments based on building scale, style, setbacks, and landscaping. * * *" (Emphasis added.) Record 20.

Petitioners argue that because the city council reached a different conclusion on compliance with

PCC 33.815.105(B)(2) than did the hearings officer, the above quoted city council finding modifies, and therefore supersedes, those of the hearings officer. Petitioners contend the city council's finding improperly considers multi-family residences in the "immediate area," rather than limiting its consideration to "adjacent residential developments," as required by PCC 33.815.105(B)(2). Petitioners also argue the city council's finding is impermissibly conclusory, as it merely repeats the approval criterion. Eckis v. Linn County, supra.

Respondent argues that the city council's finding on PCC 33.815.105(B)(2) does not specifically modify anything in the hearings officer's findings on this criterion and, therefore, the hearings officer's findings are part of the challenged decision.[17] Intervenor argues that the city council's finding is adequate, because it explains the existence of several similar multi-family residences in the area and an adjacent commercial use are the bases for the city's determination of compatibility with adjacent residential developments. Intervenor also argues that even if the city council's finding is inadequate, the evidence in the record clearly supports a determination of compliance and, therefore, this portion of the decision must be

[17]Intervenor, however, concedes that the city council finding of compliance with PCC 33.815.105(B)(2) supersedes the hearings officer's findings of noncompliance.

affirmed under ORS 197.835(9)(b).

The city council and the hearings officer reached opposite conclusions on the compliance of the proposed development with PCC 33.815.105(B)(2). In this circumstance, and in the absence of identification by the city council of particular hearings officer findings which it incorporated into its decision, we must assume that the city council intended its finding to supersede those of the hearings officer.

PCC 33.815.105(B)(2) requires (1) the identification of "adjacent residential developments," and (2) an explanation of why the proposed development will be compatible with such adjacent residential developments, considering specific characteristics such as site size, building scale and style, setbacks, etc. With regard to the second requirement, we agree with petitioners that the city council's finding provides no such explanation of why the proposed development will be compatible with adjacent residential developments.

With regard to the first requirement, the city council apparently rejected the hearings officer's interpretation of adjacent in this context to mean contiguous or abutting, and rather interpreted the term to allow consideration of some indefinite larger area constituting the "immediate vicinity." Record 20. It is the city's responsibility to interpret the terms of its own enactments in the first instance. Fifth Avenue Corp. v. Washington Co., 282 Or 591,

599, 581 P2d 50 (1984); J.C. Reeves Corp. v. Clackamas County, ___ Or LUBA ___ (LUBA No. 91-072, November 20, 1991), slip op 10-11, aff'd 111 Or App 452 (1992); Mental Health Division v. Lake County, 17 Or LUBA 1165, 1176 (1989). Here, the city council's finding does not explain how it interprets "adjacent residential developments" or what constitutes the "immediate vicinity."

We conclude the city's findings are inadequate to demonstrate compliance with PCC 33.815.105(B)(2).[18] However, this would not provide a sufficient basis for reversal or remand, if the challenged decision properly determines compliance with PCC 33.815.105(B)(3).

B. PCC 33.815.105(B)(3)

The hearings officer's findings determine compliance with the alternative criterion of PCC 33.815.105(B)(3), on the ground that proposed landscaping and buffering will mitigate the differences in physical appearance and scale found by the hearings officer. Record 259-60. The city council's findings addressing PCC 33.815.105(B)(3) state:

> "* * * Any potential incompatibility of the proposed development with adjacent residential

[18]We have also reviewed the evidence in the record cited by the parties concerning physical compatibility of the proposed development with surrounding residential development. That evidence is either conflicting or provides a reasonable basis for different conclusions and, therefore, does not "clearly support" a determination of compliance with PCC 33.815.105(B)(2), as is required by ORS 197.835(9)(b). Forster v. Polk County, ___ Or LUBA ___ (LUBA No. 91-108, December 2, 1991), slip op 6; Blosser v. Yamhill County, 18 Or LUBA 253, 364 (1989).

> developments will be mitigated by existing topography and vegetation and proposed setbacks and landscaping as reflected in the site photographs, topographical plans of the site, building and landscape plans, and testimony in the record." Record 20.

Petitioners argue the city cannot rely on the hearings officer's findings of compliance with PCC 33.815.105(B)(3), because those findings rely on a site visit conducted by the hearings officer without providing proper notice and opportunity for rebuttal to the parties. Petitioners further argue the city council's finding, of itself, is impermissibly conclusory in that it does not describe the incompatibility of the proposed development with adjacent residential developments or explain how that incompatibility will be mitigated.

Petitioners previously moved for an evidentiary hearing to determine the extent of the hearings officer's reliance on his site visit and to establish prejudice to petitioners' substantial right to rebut evidence obtained from the site visit. In response to petitioners' motion, respondents did not dispute that a site visit had been improperly conducted by the hearings officer without prior notice and an opportunity for rebuttal, but rather contended there was no basis for an evidentiary hearing because the city council's final decision did not rely on the site visit by the hearings officer. In denying petitioners' motion, we stated:

> "We have determined that a site visit by the local decision maker, conducted without prior notice to the parties and without an opportunity for the parties to rebut the observations made and relied on by the local decision maker, prejudices petitioners' substantial rights to rebut evidence and provides a sufficient basis for remand of the challenged decision. Waker Associates, Inc. v. Clackamas County, ___ Or LUBA ___ (LUBA No. 91-016, October 25, 1991), slip op 18, aff'd 111 Or App 189 (1992); Angel v. City of Portland, 21 Or LUBA 1, 8 (1991); Jessel v. Lincoln County, 14 Or LUBA 108, 124 (1985). However, in these cases, it was the final local decision maker that conducted the site visit improperly.
>
> "We have also determined that de novo review by a higher level local decision maker may cure procedural errors that occurred in the proceedings before a lower level local decision maker. Burk v. Umatilla County, 20 Or LUBA 54, 58 (1990); Murphey v. City of Ashland, 19 Or LUBA 182, 189-90, aff'd 103 Or App 238 (1990); Slatter v. Wallowa County, 16 Or LUBA 611, 617 (1988); Fedde v. City of Portland, [8 Or LUBA 220, 223 (1983), aff'd 67 Or App 801 (1984)]. Even if the hearings officer committed procedural error by conducting a site visit without providing prior notice to the parties, disclosing his observations and providing an opportunity to rebut such observations, we fail to see how petitioners' substantial rights were prejudiced when the final decision on the subject application was made by the city council, after a de novo review." Wilson Park Neigh. Assoc. v. City of Portland, ___ Or LUBA ___ (LUBA No. 92-042, Order on Motion for Extension of Time and Motion for Evidentiary Hearing, July 14, 1992), slip op 7-8.

We also noted that:

> "[P]etitioners identify nothing in the city council's decision indicating that it relied in any way on the hearings officer's site visit. * * * The city council adopted its own finding of compliance with the 'physical compatibility' criterion (with regard to which the hearings

> officer's findings mention his site visit). * * * Record 20." Id., slip op at 8 n 6.

There is no dispute that in this case the hearings officer improperly conducted a site visit without providing prior notice and an opportunity for rebuttal, and that the hearings officer's findings addressing PCC 33.815.105(B)(3) rely on that site visit. In these circumstances, for the challenged decision to rely on the hearings officer's findings would provide a basis for reversal or remand. On the other hand, if the challenged decision relies only on the city council's finding of compliance with PCC 33.815.105(B)(3), we agree with petitioners that the city council's finding is impermissibly conclusory.

Because the challenged decision does not properly determine compliance with either PCC 33.815.105(B)(2) or (3), the third assignment of error is sustained.

FOURTH ASSIGNMENT OF ERROR

A. PCC 33.815.105(C)

Petitioners challenge the city's determination of compliance with PCC 33.815.105(C), which establishes the following criteria for approval of a non Household Living conditional use in the R7 zone:

> "**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."

The city council's findings address PCC 33.815.105(C), but only with regard to the safety-related issue of soil stability. Petitioners contend this means the challenged decision does not incorporate the hearings officer's findings and, therefore, does not address PCC 33.815.105(C)(1), or PCC 33.815.105(C)(2) with regard to privacy.

The hearings officer's findings address both PCC 33.815.105(C)(1) and (2). Record 260-61. However, they do not address soil stability. We agree with respondents that the city council's finding on soil stability was adopted to add to, rather than modify, the hearings officer's findings. Therefore, the city did not fail to address non-safety related aspects of PCC 33.815.105(C) in its findings.

1. Noise

Petitioners contend the city erroneously found ORS 197.020 precluded it from considering all aspects of the noise issue because the proposed development involves children.[19] Petitioners also argue the hearings officer's finding that the proposed development will make no more noise than any other residential use is not supported by substantial evidence.

PCC 33.815.105(C)(1) requires the city to find the

[19]ORS 197.020 provides that "[a]ge, gender or physical disability shall not be an adverse consideration in making a land use decision * * *."

proposed development "will not have significant adverse impacts on the livability of nearby residential zoned lands" due to noise. The findings conclude:

> "Generally, there will be no noise from this development other then that generated by any residential use. * * *
>
> "[Although] some additional noise could be noticeable because of the play area, given the fact that this area will be inside a heavily-wooded drainage basin, well below any nearby residential zones, the evidence in the whole record indicates that this noise will not have a significant adverse impact on the liveability of nearby residentially-zoned lands. * * *" Record 260-61.

The findings go on to mention ORS 197.020. However, it does not appear the city's consideration of the impacts of noise from the proposed development was limited because of ORS 197.020.

Additionally, the findings explain that noise from the proposed development will not have a significant adverse impact on the livability of nearby residentially zoned land because the proposed development will be inside a heavily wooded drainage basin, lower in elevation than the surrounding property. Thus, the finding that the proposed development will produce no noise other than that generated by other residential uses is surplusage. Lack of evidentiary support for a finding provides a basis for reversal or remand only if the finding is essential to the decision. Griffith v. City of Milwaukie, 19 Or LUBA 300,

304 (1990); Cann v. City of Portland, 14 Or LUBA 254, 257, aff'd 80 Or App 246 (1986).

This subassignment of error is denied.

2. Soil Stability

The city council's finding on soil stability states:

> "Opponents to the proposed development contend that the soil stability in the storm water detention area will be decreased due to the proposed development. We find, based on the testimony of the representative from the Bureau of Environmental Services [BES], that the soil stability in the storm water detention area will not be impacted by the proposed development." Record 20-21.

Petitioners contend the above finding is not supported by substantial evidence in the record. Petitioners argue their geological consultant testified that the proposed parking area fill and retaining wall within the storm water detention area could increase erosion of the steeper western slope of the detention area below the existing residences to the west of the proposed development. Record 413-14; Petition for Review Appendix J. Petitioners also argue the BES representative did not say anything regarding soil stability. Petition for Review, Appendix I.

Substantial evidence is evidence upon which a reasonable person would rely to support a decision. City of Portland v. Bureau of Labor and Ind., 298 Or 104, 119, 690 P2d 475 (1984); Bay v. State Board of Education, 233 Or 601, 605, 378 P2d 558 (1963); Carsey v. Deschutes County, 21 Or LUBA 118, 123, aff'd 108 Or App 339 (1991).

We have reviewed the evidence cited by the parties. The site plan does show portions of the parking area located on fill within the storm water detention easement area. Record Exhibit 8N. The geologist's letter expresses concern about the effects of the proposed excavation and fill on soil erosion and slope stability. Record 413-14. Neither the BES representative's testimony nor the portion of the application cited by respondents addresses this issue. Record 725-26; Petition for Review Appendix I. This does not constitute substantial evidence in support of the challenged finding.

This subassignment of error is sustained.

B. PCC 33.815.105(D)(2)

Petitioners challenge the city's determination of compliance with PCC 33.815.105(D)(2), which establishes the following criteria for approval of a non Household Living conditional use in the R7 zone:

"**Public services.**

"* * * * *

"2. The transportation system is capable of safely supporting the proposed use in addition to the existing uses in the area. Evaluation factors include * * * pedestrian safety."

The challenged decision finds:

"Pedestrian safety is a potential problem in this area because of an inadequate sidewalk system. However, this site has already been developed with curbs and sidewalks during the recent

> reconstruction of S.W. Bertha. * * * The existing informal pedestrian system is capable of safely supporting 31 additional units, although safety will be greatly improved if and when connected sidewalks are completed." (Emphasis in original.) Record 262.

Petitioners contend the city's conclusion that the existing pedestrian system is capable of safely supporting the proposed development is not supported by substantial evidence in the record.

We have reviewed the evidence in the record cited by the parties. There is evidence that the newly constructed sidewalks adjoining the subject property on SW Bertha Blvd. provide safe pedestrian access to transit stops and adjacent neighborhood commercial centers. Record 722. There is also evidence that pedestrian access to the nearest park requires walking along SW Capitol Hwy., which has no sidewalks or designated walkway. Record 634.

Where different reasonable conclusions could be drawn from the evidence in the record, the choice between the different reasonable conclusions belongs to the local government. Garre v. Clackamas County, 18 Or LUBA 877, 881 (1990); Stefan v. Yamhill County, 18 Or LUBA 820, 838 (1990). Based on the evidence in the record, we believe the city could reasonably conclude that the existing transportation system is capable of safely supporting the proposed use, with regard to pedestrian safety, as required by PCC 33.815.105(D)(2).

This subassignment of error is denied.

The fourth assignment of error is sustained, in part.

SIXTH ASSIGNMENT OF ERROR

PCC chapter 33.262 (Off-Site Impacts) protects uses in residential zones from "certain objectionable off-site impacts associated with nonresidential uses." PCC 33.262.010. Nonresidential uses in all zones which cause off-site impacts on uses in the R zones are required to meet the standards of PCC chapter 33.262.[20] PCC 33.262.020. These include standards for noise and odor in PCC 33.262.050 and 33.262.070, respectively.

Petitioners contend the city's findings addressing the noise standard are inadequate. Petitioners also contend the city's findings addressing the odor standard are not supported by substantial evidence in the whole record.

Respondent argues that the off-site impact standards in PCC chapter 33.262, which apply only to noise, odor, glare and vibration, are performance standards, not approval criteria for conditional use permits. Respondent explains that PCC 33.262.100 (Documentation in Advance) recognizes that advance documentation of compliance with these standards is not generally required. Rather, it provides a special procedure for situations "where the Director is empowered to require documentation in advance that a

[20]An ESP is considered an institutional use, rather than a residential use. PCC Table 110-1.

proposed use will conform with these standards." In such cases, documentation is required prior to building permit approval. PCC 33.262.100.

We agree with respondent that the standards of PCC chapter 33.262 are written as performance standards, rather than prior approval standards. Precise provisions are included for measuring compliance with these standards after the use is in effect. PCC 33.262.090. Only in special circumstances, which do not exist here, is documentation of compliance required in advance. PCC 33.262.100. Accordingly, the city's findings regarding PCC 33.262.050 and 33.262.070 are not essential to its decision to grant conditional use approval to the proposed use.

The sixth assignment of error is denied.

SEVENTH ASSIGNMENT OF ERROR

With certain exceptions not relevant here, PCC 33.455.030 provides that an interim resource protection review is required "for all new development * * * in areas with an 'sec' map symbol, and areas within 25 feet of the centerline of a water feature." The city zoning map shows a water feature running north to south across the western portion of the subject property.

The city council's findings state:

> "The proposed development will not occur in an area with a 'sec' map symbol. As a condition of approval, no development shall occur within 25 feet of the centerline of the water feature. Therefore, the Interim Resource Protection

criteria are not applicable to the proposed development. * * *"[21] Record 23.

The conditions of approval include:

"(1) No new development shall occur within 25 feet of the centerline of the water feature (the IR zone boundary). Prior to the issuance of building permits the location of the 25-foot contour shall be staked and its location shall be reviewed and approved by the Bureau of Planning.

"(2) Thirty-four parking spaces shall be provided on-site. The parking lot may be redesigned as indicated by the [site plan] submitted at the October 1, 1991, hearing, so long as no new development takes place within the 25-foot contour.

"* * * * *" Record 277.

Petitioners contend the city's determination that the Interim Resource Protection criteria are not applicable is in error because the word "centerline" in PCC 33.455.030 must be a typographical error. According to petitioners, the purpose and context of the Interim Resource Protection provisions requires that the word "outerline" be used in place of the word "centerline."

Petitioners also argue the above quoted finding and conditions are not adequate to insure that no new

[21]The city also found, in the alternative, that the proposed development complies with the Interim Resource Protection review approval criteria of PCC 33.455.060. Record 267-68. Petitioners challenge the evidentiary support for these findings. However, because we agree with respondent that the Interim Resource Protection review criteria are not applicable to the proposed development, we do not consider petitioners' evidentiary challenge further.

development will take place within 25 feet of the centerline of the water feature. Petitioners argue the city should have determined whether the "water feature" is the creek, wetland, floodplain or the storm water detention easement itself. We understand petitioners to contend the city cannot possibly determine that no construction will occur within 25 feet of the centerline of the water feature unless it knows where that centerline is located.

We agree with respondent that the use of the term "centerline" in PCC 33.455.030 is clear and unambiguous.[22] There is no basis for concluding the use of this term is the result of a typographical error.

We have frequently stated that a local government may demonstrate compliance with an applicable standard by (1) determining that the proposal can comply with the standard, and (2) imposing conditions to ensure compliance with the standard. Eckis v. Linn County, supra, 19 Or LUBA at 35; Kenton Neighborhood Assoc. v. City of Portland, 17 Or LUBA 784, 804 (1989). Here, the city determined the proposed use can be allowed consistent with the requirements of the IRP zone because it can be built without placing any new construction within 25 feet of the centerline of the designated water feature, and has imposed conditions to

[22]The city also explains that larger bodies of water such as lakes, are not left unprotected because they receive the "sec" zoning map symbol, while streams and drainage ways are indicated on the zoning map with the water feature symbol. PCC 33.455.020(B).

ensure this.

We disagree with petitioners' contention that the city has no basis for making this determination because it has not determined the location of the centerline of the water feature. The revised site plans submitted by intervenor at the August 13, 1991 and October 1, 1991 hearings (Record Ex. 8L and 8N) include a dashed line showing the centerline of the stream and dashed lines or a shaded area indicating the area within 25 feet of that centerline. Additionally, the revised site plan submitted on October 1, 1991 shows a design for a 34 space parking lot which does not impinge on the 25 foot boundary. These site plans provide an adequate evidentiary basis for the city's decision that the Interim Resource Protection review criteria are not applicable.

The seventh assignment of error is denied.

EIGHTH ASSIGNMENT OF ERROR

With certain exceptions not relevant here, PCC chapter 33.830 (Excavations and Fills) establishes a review process that applies where excavations and fills of over 1,000 cubic yards are proposed in an R zone. PCC 33.830.020(A). The hearings officer's findings state:

> "[Although] Bureau of Planning Staff and the applicant have made inconsistent statements regarding the amount of excavation and fill required, 150 cubic yards and 300 cubic yards respectively, both estimates are well below the threshold necessary to trigger the excavation and fill criteria in this case. The evidence indicates that, at this point, the excavation and fill criteria do not apply." Record 255.

Petitioners argue the city's determination that the excavation and fill criteria do not apply is not supported by substantial evidence in the record. According to petitioners, the only evidence in the record on this point relates to the original site plan. Since the original site plan was submitted, the design of the parking lot has been changed. Petitioners contend there is no evidence in the record of how much excavation and fill will be required by the new parking lot design.

Respondents argue that it can easily be determined from the topographic maps of the site in the record that the revised parking lot design will not cause the amount of excavation and fill required by the proposed development to exceed 1,000 cubic yards.

There is no dispute there is evidence in the record that the original proposal would require between 150 and 300 cubic yards of excavation and fill. When the original site plan is compared to the revised site plan submitted at the October 1, 1991 hearing (Record Ex. 8N), it can be seen that of eleven parking spaces originally located to the west of the proposed structures, within the storm water detention easement, nine have been relocated to an area north of the proposed structures, outside the storm water detention easement, and two have been relocated to the south end of the parking area, still within the storm water detention easement. The topographic contours on these site plans

demonstrate that the slopes of the areas where these eleven parking spaces are proposed to be located by the original and revised site plans are similar. Based on this evidence, we believe a reasonable person could conclude that the revised proposal will not require more than 1,000 cubic yards of excavation and fill.

The eighth assignment of error is denied.

NINTH ASSIGNMENT OF ERROR

PCC Table 110-3 displays "Development Standards in Single-Dwelling Zones." The "Maximum Density" listed for the R7 zone is "6.2 units per acre." Petitioners contend the proposed development would place 31 units on the subject 1.79 acre site and, therefore, would exceed the maximum density allowed in the R7 zone.

The city council found:

> "* * * The proposed development is an Essential Service Provider, a type of Institutional use, and not a residential use. Therefore, the development standards set out in [PCC] 33.110.200 [and Table 110-3] do not apply to this application because it is not a residential use." Record 22-23.

The Maximum Density standard in PCC Table 110-3 references PCC 33.110.205 (Density). PCC 33.110.205(A) provides that the purpose of the maximum density standard in PCC Table 110-3 is to "match <u>housing</u> density with the availability of public services and with the carrying capacity of the land." (Emphasis added.) PCC 33.110.210 through 33.110.235 correspond to the other categories of

development standards displayed in PCC Table 110-3 and also generally refer to houses and housing. These sections are followed by PCC 33.110.245 (Institutional Development Standards). PCC 33.110.245 provides in relevant part:

> "**A. Purpose.** The general base zone development standards are designed for residential buildings. Different development standards are needed for institutional uses which may be allowed in single-dwelling zones. * * *
>
> "**B. Use categories to which these standards apply.** The standards in this section apply to uses in the institutional group of use categories, whether allowed by right, allowed with limitations, or subject to a conditional use review. * * *
>
> "* * * * *"

Under the fifth assignment of error, supra, we conclude the city properly determined that the proposed use is an ESP. ESP is an Institutional use category, not a Residential use category. PCC 33.110.245 clearly states that it is the development standards of that section which apply to institutional uses in a single-dwelling zone such as the R7 zone.[23] Additionally, PCC 33.110.205 through 33.110.235 refer only to houses and housing. We therefore agree with the city that the development standards of PCC Table 110-3, including Maximum Density, apply only to residential uses.

[23]We note the city determined the proposed use complies with the development standards of PCC 33.110.245. Record 266.

The ninth assignment of error is denied.

TENTH ASSIGNMENT OF ERROR

PCC Table 266-2 provides that the minimum required parking for an ESP is "1 [space] per 500 sq. ft. of floor area." Petitioners contend that because the enclosure of the covered play area makes it part of the floor area of the proposed ESP building (see subsection B of the Fifth Assignment of Error, supra), under PCC Table 266-2, that additional floor area requires additional parking spaces for the proposed ESP use.

The city council's findings state:

> "* * * Pursuant to [PCC] 33.266.110(B)(2), the number of required parking spaces is computed based on the primary use of the site. [T]he play area is an accessory use and not a primary use of the site. Therefore, the increase in floor area as a result of the enclosure of the play area does not require an increase in the number of parking spaces because it is not part of the primary use of the facility." Record 23.

PCC 33.266.110(B)(2) provides:

> "When computing parking spaces based on floor area, [t]he number of parking spaces is computed based on the primary use of the site * * *." (Emphasis added.)

PCC 33.910.030 defines "primary use" and "accessory use:"

> "**Primary Use.** An activity or combination of activities of chief importance on the site. One of the main purposes for which the land or structure [is] intended, designed, or ordinarily used. A site may have more than one primary use."

> "**Accessory Use.** A use or activity which is a subordinate part of a primary use and which is

clearly incidental to a primary use on a site."

Finally, PCC 33.920.440(B) provides that for an ESP use, accessory uses include "facilities for recreation."

We agree with respondents that under the above quoted PCC provisions, the enclosed play area is an accessory use of the site and, therefore, is not considered when computing the number of parking spaces required for the proposed ESP pursuant to PCC 33.266.110(B).

The tenth assignment of error is denied.

The city's decision is remanded.