

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

DORIS CARLSEN,
Petitioner,
vs.
CITY OF PORTLAND,
Respondent,
and
OREGON HOLOCAUST MEMORIAL
COALITION,
Intervenor-Respondent.

LUBA Nos. 98-184 and 98-185

FINAL OPINION
AND ORDER

ARLINGTON HEIGHTS NEIGHBORHOOD
ASSOCIATION,
Petitioner,
vs.
CITY OF PORTLAND,
Respondent,
and
OREGON HOLOCAUST MEMORIAL
COALITION,
Intervenor-Respondent.

Appeal from City of Portland.

E. Michael Connors and Steven F. Hill, Portland, filed the petition for review on behalf of petitioners. With them on the brief were Davis Wright Tremaine and Miller Nash Wiener Hager & Carlsen. Gregory S. Hathaway and Phillip E. Grillo, Portland, argued on behalf of petitioners.

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Kathryn S. Beaumont, Senior Deputy City Attorney, and Steven A. Moskowitz, Portland, filed the response brief on behalf of respondent and intervenor-respondent. With them on the brief was Moskowitz and Thomas. Kathryn S. Beaumont argued on behalf of respondent.

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

REMANDED 09/08/99

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

1 Opinion by Bassham.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the city's decision approving the location and design of a Holocaust
4 Memorial within a city park.

5 **MOTION TO INTERVENE**

6 The Oregon Holocaust Memorial Coalition (intervenor) moves to intervene on the
7 side of respondent. There is no opposition to the motion, and it is allowed.

8 **MOTION TO FILE A REPLY BRIEF**

9 Pursuant to OAR 661-010-0039, petitioners move for permission to file a reply to an
10 alleged "new matter" raised in the response brief. Petitioners argue that on page 11 of the
11 response brief the city and intervenor take the position that the proposed memorial will not
12 materially change the use or appearance of the site and thus is not "development" as that term
13 is used in ORS 227.215. Petitioners contend that respondents' position raises a "new matter"
14 within the meaning of OAR 661-010-0039 because the challenged decision did not address
15 whether the challenged memorial constituted "development" under ORS 227.215.¹

16 The city responds that the challenged decision includes findings regarding whether
17 the proposed memorial constituted "development" for purposes of ORS 227.215 and, further,
18 that the petition for review discusses whether the proposed memorial will materially change
19 the use or appearance of the site, and thus constitutes development. We agree with the city
20 that the response brief merely responds to an issue raised in the petition for review, and does
21 not raise a "new matter" within the meaning of OAR 661-010-0039. Accordingly, a reply
22 brief is unwarranted.

23 Petitioners' motion to file a reply brief is denied.

¹OAR 661-010-0039 provides in relevant part:

"A reply brief may not be filed unless permission is obtained from the Board. * * * A reply
brief shall be confined solely to new matters raised in the respondent's brief. * * *"

1 **FACTS**

2 In 1995, the intervenor approached the city seeking permission to place within a city
3 park a memorial to victims of the Holocaust. After considering three possible sites, the city's
4 Bureau of Parks and Recreation (Park Bureau) selected a site within Washington Park and
5 asked the city council to adopt a resolution regarding use of that site for the proposed
6 memorial. On August 9, 1995, the city council adopted a resolution that reserved a location
7 in Washington Park for the proposed memorial, which the resolution described as a
8 "contemplative memorial garden." The selected site is a 23,850-square foot clearing within
9 the park that is zoned Open Space (OS). The site is currently used for picnicking and casual
10 recreation uses. The site is adjacent to SW Wright Avenue and a residential neighborhood.
11 Petitioners learned of the city's resolution shortly after it was made but did not appeal that
12 decision.

13 The proposed memorial will occupy approximately 3,500 square feet, and will feature
14 a nine-foot high rock wall with a circumference of 50 feet, surrounded by a smaller wall,
15 connected with walkways and landscaped areas. The site lies 220 feet from the nearest
16 residential property line. The memorial is designed to be a "self-guided sequential story told
17 in words, bronze objects, granite, plants, and other stone materials." Supp Record 18. The
18 memorial is anticipated to draw approximately 14,200 visitors per year, and will include
19 guided group visits such as school tours.

20 In 1989, the city adopted a memorial siting policy (siting policy), that provides a
21 review process for seven different types of memorials. Approval or denial of a proposed
22 memorial is based on specified criteria.² For memorial gardens, the siting policy prescribes a

²The siting policy provides:

"APPROVAL CRITERIA:

1 particular review process requiring review by Park Bureau planning staff, the Metropolitan
2 Art Commission, the Design Review Commission, and Park Bureau Managers. The Park
3 Bureau director is the ultimate decision-maker.³ The director's decision can be appealed by

"As the seven basic types [of memorials] vary greatly in the impact they have upon a park, the review and process for allowing them to occur within a park should reflect those differences.

"All memorials, however, should be judged for appropriateness according to the following criteria. These criteria are intended to serve as guidelines for the reviewing body:

"[1] The person or event being memorialized is deemed significant enough to merit such an honor. The person so honored shall have been deceased for a minimum of two years.

"[2] The memorial represents broad community values.

"[3] The memorial has timeless qualities and makes a statement of significance to future generations.

"[4] The location under consideration is an appropriate setting for the memorial; in general,* there should be some specific geographic justification for the memorial being located in that spot.

"[5] The location of the memorial will not interfere with existing and proposed circulation and use patterns of the park.

"[6] The memorial is compatible with the park's current or historic master plan, if existing. (If there is no current or historic master plan, the Park Bureau shall prepare a 'statement of character.')

The location and design of the memorial is consistent with the character and design intentions of the park. For example, a memorial being proposed for Forest Park should be consistent with the forested character of Forest Park.

"[7] The quality, scale, and character of the memorial is at a level commensurate with the particular park setting.

"[8] The memorial contributes to the park setting from a functional or design standpoint." Record 1044-45.

The asterisk in the above-quoted provisions refers to a footnote that provides "As used in this policy, 'in general' is intended to mean that exceptions are possible for special circumstances."

³The siting policy provides with respect to Memorial Gardens and Plazas:

"These types of installations can be truly monumental in scale, and can change the character of a park. Other impacts may include maintenance, traffic, and circulation. For these reasons, the review procedure must be more extensive and careful. As these proposals are more complex, and can be more expensive, the donor is required to go through the entire

1 either the donor or citizens opposed to the project, first to the city council member in charge
2 of the Park Bureau, and then to the city council.

3 Although the siting policy has been in effect since 1989, the city has never had
4 occasion to apply it until the present case. The city's consideration of the proposed memorial
5 leading up to the 1995 resolution did not follow the requirements of the siting policy. After
6 opposition to the proposed location emerged following the city's 1995 resolution, the city
7 initiated the process prescribed in the siting policy. After conducting the required reviews
8 and providing for two additional public meetings not required by the policy, the Park Bureau
9 director approved the proposed memorial on April 23, 1998, based on findings of consistency
10 with the siting policy and the Washington Park master plan. After appeals to the city council

process twice: once at a conceptual level and again when the design is developed. Steps must include the following:

- "1. The intention to install a memorial garden should be submitted in writing to the [Park Bureau]. The proposal should include as much detail as possible, including general size and preferred location, time frame and materials. * * * If the design is conceptually approved, the donor will be required to provide a site plan and detailed design drawings.
- "2. The Park Planning Section will review the proposal for concurrence with the park's master plan and park policies. If no current master plan exists, or if there is some reason to question the suggested location in light of the character of the park, circulation, traffic, or use patterns, the proposal will be delayed until an in-depth analysis can be done. Where a master plan exists and a proposed memorial is a variance to the master plan, the proposal will be processed as an amendment to the master plan. * * *
- "3. The Park Planning section will review the proposal with the Metropolitan Arts Commission. The Arts Commission has jurisdiction over the acceptance of all art work that is donated to the City. * * *
- "4. The Park Planning section will review the proposal with park operations, and suggest modifications to the proposal. The proposal, with suggested modifications, will be reviewed by the Park Bureau Managers and the Commissioner's office.
- "5. The memorial proposal will be reviewed by the Design Review Commission (augmented by an architect/landscape architect and a professional historian).
- "6. If the memorial proposal is accepted, the proposal with suggested modifications will be reviewed with the donor, and a standard form agreement on maintenance and responsibilities should be prepared." Record 1050.

1 member in charge of the Park Bureau and the city council, the city council approved the
2 proposed memorial on October 1, 1998.

3 This appeal followed.

4 **FIRST ASSIGNMENT OF ERROR**

5 Petitioners argue that the city misconstrued the applicable law and failed to follow the
6 applicable procedures in a manner that prejudiced the substantial rights of petitioners, when
7 the city determined that approval of the proposed memorial was not a "permit" subject to the
8 requirements of ORS 227.175, and thus did not conduct the proceedings below in accordance
9 with the procedural requirements of ORS 227.175 and 197.763.

10 ORS 227.160(2) defines "permit" as the "discretionary approval of a proposed
11 development of land, under ORS 227.215 or city legislation or regulation." ORS 227.215
12 defines "development" to include "making a material change in the use or appearance of a
13 structure, or land[.]" According to petitioners, the city's approval of the proposed memorial
14 is a permit, because it involves the discretionary approval of the proposed development of
15 land, pursuant to city legislation (i.e., the siting policy). Therefore, petitioners argue, the city
16 was required to follow the requirements of ORS 227.175 and, by virtue of ORS 227.175(5)
17 or (10)(a), the procedural requirements of ORS 197.763.

18 The city council rejected a similar argument below, concluding first that the proposed
19 memorial is an allowed use with in the OS zone because it falls within the description of
20 "parks and open areas," an allowed use in the zone under the Portland City Code (PCC). The
21 city relied on the described characteristics of "parks and open areas" provided in PCC
22 33.920.460, which describes parks and open areas as including "plazas" and "public
23 squares." The city council found that the proposed memorial is a "plaza" or "public square"
24 and is therefore a park and open area use allowed by right in Washington Park. Record 4.
25 The decision then concludes:

1 "The Council finds the proposed memorial does not require review as a land
2 use 'permit' under ORS Chapter 227 because the memorial is a 'parks and
3 open area use' in the OS zone and is allowed by right without any further land
4 use review under the Zoning Code. To the extent placing the memorial in
5 Washington Park constitutes 'development,' it is development the Council has
6 chosen to allow as a matter of right for zoning purposes in the OS zone. This
7 is an appropriate exercise of the discretion to regulate development granted
8 the Council by ORS Chapter 227. The Council and the Parks Bureau have
9 also chosen to establish a separate review process for siting memorials, which
10 is the process that yielded this decision. This process is independent of the
11 Zoning Code and was established for reasons unrelated to zoning regulation.
12 The fact that it requires the exercise of discretion does not transform this
13 review of the memorial for compliance with the Memorial Siting Policy into a
14 'permit' nor does it subject the memorial to review under the Zoning Code that
15 is otherwise not required." Record 7.

16 The response brief amplifies the city's reasoning, arguing that the city's approval does
17 not constitute a "permit" within the meaning of ORS 227.160(2), because the proposed
18 memorial does not constitute "the proposed development of land" as development is defined
19 at ORS 227.215.⁴

20 Respondents argue, first, that the proposed memorial does not meet the definition of
21 "development" at ORS 227.215(1) because it will occupy only 3,500 square feet of the
22 23,850-square foot clearing, or 15 percent of the total area, and thus will not cause a material
23 change in the use or appearance of the site. Respondents contend that a material change
24 must be substantial, and conversion of 15 percent of the clearing from open meadow to a
25 memorial is not a substantial change because most of the clearing will remain available for
26 casual recreational uses. We disagree. By any reasonable definition, conversion of 3,500
27 square feet of open meadow to include a structure featuring nine-foot high granite walls

⁴Neither the city nor intervenor disputes that the challenged decision is a land use decision as defined by ORS 197.015(10)(a) subject to our jurisdiction under ORS 197.825. The response brief explains that LUBA has jurisdiction because the city council applied and expressly interpreted provisions of its zoning ordinance in the decision, and therefore the decision concerns the application of land use regulations. Nonetheless, as elaborated in the text below, the response brief argues that the challenged decision is not a "permit" as defined at ORS 227.160(2) because the city did not approve the proposed memorial under discretionary approval standards in its zoning ordinance, but rather under the provisions of its siting policy, which is not part of its zoning ordinance.

1 constitutes a material change in the appearance or use of land, notwithstanding that the site
2 covered by the memorial is part of a larger area that will remain unchanged.

3 Respondents next argue that to the extent the proposed memorial meets the definition
4 of "development" at ORS 227.215(1), it falls within a category of development that the city
5 has legislatively determined does not require a permit. Respondents rely on ORS
6 227.215(3), which provides:

7 "A development ordinance may provide for:

8 "(a) Development for which a permit is granted as of right on compliance
9 with the terms of the ordinance;

10 "(b) Development for which a permit is granted discretionarily in
11 accordance and consistent with the requirements of ORS 227.173;

12 "(c) Development which need not be under a development permit but shall
13 comply with the ordinance; and

14 "(d) Development which is exempt from the ordinance."

15 Respondents contend that, under the city's zoning ordinance, the siting of memorial
16 gardens in the OS zone is a category of development best described by ORS 227.215(3)(c),
17 "development which need not be under a development permit but shall comply with the
18 ordinance." According to respondents, the category of development described by ORS
19 227.215(3)(c) includes uses that are allowed by right in the underlying zone, subject to
20 compliance with certain nondiscretionary requirements. Under the PCC, allowed uses in the
21 OS zone are subject to a limited set of development standards, such as setbacks, but are not
22 required to obtain a development permit or demonstrate compliance with any discretionary
23 approval criteria in the ordinance.⁵ In sum, the city argues that, because the proposed

⁵For example, PCC 33.100.200(A) provides in relevant part:

"Allowed or limited uses are subject to the development standards stated below.

"1. Building setbacks. Buildings must be set back from all property lines 1 foot for each foot of building height.

1 memorial is an allowed use and thus not subject to any discretionary approval criteria
2 contained in its zoning ordinance, the city's approval under the siting policy does not
3 constitute a development permit within the meaning of ORS 227.160(2).

4 The difficulty with the respondents' argument is that it does little to explain the role
5 of the siting policy in approving the proposed memorial, or the anomaly of an "allowed use"
6 that is nonetheless subject to discretionary approval criteria. Respondents do not dispute that
7 the siting policy contains discretionary approval criteria, and that applicants for a memorial
8 within city parks are required to obtain the city's approval by demonstrating compliance with
9 those criteria. Instead, respondents rely on the fact that the city has not codified the siting
10 policy in its zoning ordinance, title 33 of the city's code, or otherwise made the siting policy
11 part of its "development ordinance," as that term is used in ORS chapter 227.

12 The term "development ordinance" is not defined in ORS chapter 227. ORS
13 227.215(2) provides that

14 "[a] city may plan and otherwise encourage and regulate the development of
15 land. A city may adopt an ordinance requiring that whatever land
16 development is undertaken in the city comply with the requirements of the
17 ordinance and be undertaken only in compliance with the terms of a
18 development permit."

19 We understand respondents to contend that the city's zoning ordinance, PCC title 33,
20 is the ordinance authorized under ORS 227.215(2) and, consequently, the fact that the siting
21 policy is not part of PCC title 33 is dispositive as to whether discretionary approvals of
22 development pursuant to the siting policy constitute "development permits." We disagree.
23 ORS 227.215(2) broadly authorizes cities to regulate development of land and specifically
24 authorizes cities to adopt "an ordinance" to regulate development of land. However, nothing
25 in ORS 227.215(2) indicates that how a city's development approval criteria are codified is

"2. Outdoor activity facility setbacks. Outdoor activity facilities * * * must be set back 50 feet from abutting R-zoned properties. Playground facilities must be set back 25 feet from abutting R-zoned properties if not illuminated, and 50 feet if illuminated."

1 dispositive as to whether those criteria are part of the city's "development ordinance." Taken
2 to an extreme, respondents' argument would allow a city to adopt different sets of
3 discretionary approval criteria governing different types of development applications, but
4 only those criteria codified in a denominated "development ordinance" would be subject to
5 the requirements of ORS chapter 227. It is inconsistent with ORS 227.215(2) and 227.173(1)
6 for a city to create "stand alone" sets of discretionary approval criteria and apply those
7 criteria to approve the development of land without regard to the requirements of ORS
8 chapter 227, merely because those criteria are not codified in the city's zoning ordinance.

9 Stated differently, it is immaterial that the proposed memorial is a "plaza" or "public
10 square" and thus an allowed use not subject to discretionary approval criteria contained in
11 PCC title 33, where such memorials are nonetheless subject to discretionary approval criteria
12 contained in other parts of the city's legislation. We conclude that the siting policy "regulates
13 the development of land" by requiring "compliance with the terms of a development permit"
14 and is thus properly considered part of the city's "development ordinance" for purposes of
15 ORS chapter 227, notwithstanding that it is not codified in PCC title 33.⁶

16 Consequently, we agree with petitioners that the challenged decision constitutes
17 "discretionary approval of a proposed development of land, under ORS 227.215 or city
18 legislation or regulation," and thus is a discretionary permit decision subject to the
19 requirements of ORS chapter 227. ORS 227.160(2). ORS 227.180(3) requires that, on
20 review of an action on a permit application, members of the city governing body must
21 disclose on the record the substance of any ex parte communication concerning the action.

⁶The siting policy was adopted by city council resolution, rather than as an ordinance. No party argues that the method by which the city adopted the siting policy has significance in determining whether it should be considered part of the city's "development ordinance." In any case, the form in which an enactment is adopted is immaterial where the enactment is in substance and effect a permanent regulation and hence an ordinance. See Baker v. City of Milwaukie, 271 Or 500, 511, 533 P2d 772 (1975) (a comprehensive plan adopted by resolution is effective to control zoning, because where a resolution is in substance and effect an ordinance or permanent regulation, the name given to it is immaterial); Boom v. Columbia County, 31 Or LUBA 318, 323 (1996)(whether a land use regulation is adopted by resolution or ordinance is immaterial).

1 Petitioners argue that one of the city council members in this case had a number of ex parte
2 communications with the parties and with a mediator, but did not disclose those
3 communications at the hearing before the city council. Further, petitioners argue that all of
4 the city council members were current or former honorary co-chairs of intervenor Oregon
5 Holocaust Memorial Coalition at the time of the 1998 decision, and that it is highly likely
6 that ex parte communications occurred between city council members and intervenor that
7 were not disclosed. Accordingly, petitioners argue that remand is necessary to allow
8 disclosure of any ex parte communications and to allow petitioners to rebut those contacts.
9 Horizon Construction, Inc. v. City of Newberg, 114 Or App 249, 253-54, 843 P2d 523
10 (1992).

11 The response brief does not address petitioners' arguments regarding violation of
12 ORS 227.180(3), or dispute petitioners' contention that in fact city council members received
13 ex parte communications that, if the proceedings were conducted pursuant to ORS 227.180,
14 would require disclosure. We agree with petitioners that remand is necessary to allow city
15 council members to disclose the substance of any ex parte communications and allow
16 petitioners to rebut those communications.

17 The first assignment of error is sustained in part.⁷

⁷Petitioners also argue under this assignment of error that the city violated the notice and hearing requirements of ORS 197.763 by failing to provide petitioners with notice of both the 1995 decision and the decision challenged in this appeal. Petitioners contend that the failure to provide notice of the 1995 decision prejudiced their substantial rights because "by the time the 1998 decision-making process began, the City had already committed to the site by virtue of its 1995 decision." Petition for Review 19. However, petitioners did not appeal the 1995 decision and any procedural error associated with that decision cannot provide a basis to reverse or remand the 1998 decision challenged in this case. Petitioners do not identify any prejudice to their substantial rights from the city's failure to provide them notice of the 1998 decision. Petitioners' arguments regarding lack of notice do not provide a basis to reverse or remand the challenged decision.

1 **SECOND ASSIGNMENT OF ERROR**

2 Petitioners contend that the city erred in approving the proposed memorial under the
3 siting policy requirements, because those requirements have not been “set forth” or
4 referenced in the city’s "development ordinance," as required by ORS 227.173(1).

5 Petitioners' argument under this assignment of error is essentially the mirror image of
6 the respondents' argument in the previous assignment of error, and fares no better. The scope
7 of the term "development ordinance" as used in ORS chapter 227 is not a function of how the
8 city's land use legislation is codified. That the city has not codified the siting policy within
9 PCC title 33 along with its other development regulations does not mean that the city has
10 violated ORS 227.173(1), and does not provide a basis to reverse or remand the challenged
11 decision.

12 The second assignment of error is denied.

13 **SIXTH ASSIGNMENT OF ERROR**

14 Petitioners contend that the city council members were biased and prejudged this
15 matter. Petitioners argue that the city council members did not reach their decision by
16 applying the relevant standards based on the evidence and the argument presented. In
17 particular, petitioners contend that the city council had already decided to approve the
18 proposed memorial at its proposed location in Washington Park as early as 1995, when it
19 adopted a resolution reserving the subject site for that use.

20 As further evidence of the city council's alleged prejudgment, petitioners point to a
21 letter from a city council member stating:

22 "I support the notion that neighborhood livability needs to be protected. I
23 believe the leaders of the Oregon Holocaust Memorial Coalition are very open
24 to looking at reasonable efforts to work with the surrounding neighborhood.
25 However, the Oregon Holocaust Memorial Coalition has, for the past two
26 years, moved ahead with the unanimous support of the Council on the site.
27 They have raised money and prepared designs based upon the site and have
28 also invested a great deal in this process. We cannot ignore the effort they
29 have expended and the process they have gone through." Record 1099.

1 Petitioners also point to a handwritten note from an unidentified city employee
2 stating: "Let's clarify that we are keeping the memorial in Washington Park since the Council
3 has already decided that. We are reviewing where in Washington Park and the design of the
4 memorial." Record 998 (emphasis in original). Petitioners submit that, under these
5 circumstances, the city council was incapable of approving or denying the proposed
6 memorial based on the relevant standards and the evidence and argument presented, and that
7 the process leading up to the challenged decision was therefore a sham.

8 The challenged decision addresses petitioners' concerns regarding bias, stating:

9 "The Council intended that, even after it identified the site for a Holocaust
10 memorial, the final proposal would have to meet the procedural requirements
11 and approval criteria of the memorials policy." Record 2.

12 "To some extent confusion was inevitable. [Intervenor] could not prepare a
13 design for the Memorial until it had identified a site; it could not go through
14 the memorials policy process for approval of the placement of the Memorial
15 at the site until it had a design. The experience of this Memorial has
16 highlighted some shortcomings of the policy. * * * The Council finds,
17 however, that none of the shortcomings of the policy resulted in any
18 fundamental unfairness or prejudice to the opponents of this proposal.
19 Ultimately, they were notified of the exact location of the proposed site, and
20 have had a full and fair opportunity * * * to voice and to have considered all
21 of their concerns about the location and design of the proposal. [Intervenor]
22 has followed the process that was in effect when it made the proposal. The
23 application will be decided based on the existing policy.

24 "* * * No Council member, staff member, or anyone else has suggested that
25 this design and site should be approved regardless of the applicable criteria of
26 the memorials policy. All are committed to making sure that the City's parks
27 are used and managed for the benefit of the people of Portland." Record 3.

28 In addition, respondents note that only two of the five city council members who
29 voted during the 1998 proceedings leading up to the challenged decision were on the city
30 council when it adopted the 1995 resolution.

31 Respondents argue, and we agree, that petitioners have not demonstrated that any of
32 the five current members of the city council were incapable of deciding the merits of
33 intervenor's application based on the evidence and arguments before them. Personal bias

1 sufficient to disqualify a public official must be demonstrated in a clear and unmistakable
2 manner. Knapp v. City of Jacksonville, 20 Or LUBA 189, 206 (1990) quoting Schneider v.
3 Umatilla County, 13 Or LUBA 281, 284 (1985). Petitioners' evidence in this case falls far
4 short of that demonstration. The 1995 resolution merely reserved a potential site for the
5 proposed memorial, and did not purport to approve the proposal or find that it complied with
6 the siting policy. The city council member's comments indicate that he intended to take into
7 account intervenor's reliance on the 1995 resolution, but does not suggest that the council
8 member was incapable of approving or denying the proposal under the relevant standards.
9 The potential bias of city staff other than the city decision-makers is not relevant in
10 determining whether those decision-makers were biased or had prejudged the application.
11 Knapp, 20 Or LUBA at 205.

12 The sixth assignment of error is denied.

13 **THIRD, FOURTH AND FIFTH ASSIGNMENTS OF ERROR**

14 The remaining assignments of error challenge the merits of the city's decision to
15 approve the proposed memorial under the provisions of its zoning ordinance and the siting
16 policy. Because we sustained the first assignment of error, remand is necessary to reopen the
17 evidentiary record to allow petitioners an opportunity to rebut any undisclosed ex parte
18 communications. The proceedings on remand may result in new evidence and new findings
19 regarding compliance with applicable criteria. Consequently, resolving these assignments of
20 error based on the current record and current findings would serve no purpose. Therefore,
21 we do not consider these assignments of error.

22 The city's decision is remanded.