

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

3
4 DORIS CARLSEN,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF PORTLAND,
10 *Respondent,*

11 and

12
13 OREGON HOLOCAUST MEMORIAL
14 COALITION,
15 *Intervenor-Respondent.*

16
17 LUBA No. 98-184

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19 ARLINGTON HEIGHTS NEIGHBORHOOD
20 ASSOCIATION,
21 *Petitioner,*

22
23 vs.

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25 CITY OF PORTLAND,
26 *Respondent,*

27 and

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29 OREGON HOLOCAUST MEMORIAL
30 COALITION,
31 *Intervenor-Respondent.*

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33 LUBA No. 98-185

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35 FINAL OPINION
36 AND ORDER

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38 On remand from the Court of Appeals.

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40 Phillip E. Grillo and Steven F. Hill, Portland, represented petitioner Doris Carlsen.

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42 Gregory S. Hathaway and E. Michael Connors, Portland, represented petitioner
43 Arlington Heights Neighborhood Association.
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NATURE OF THE DECISION

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

FACTS

This case is before us on remand from the Court of Appeals. *Carlsen v. City of Portland*, 169 Or App 1, ___ P2d ___ (2000) (*Carlsen II*). We repeat the relevant facts from our earlier decision:

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

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

“In 1989, the city adopted a memorial siting policy (siting policy), that provides a review process for seven different types of memorials. Approval or denial of a proposed memorial is based on specified criteria. For memorial gardens, the siting policy prescribes a particular review process requiring review by Park Bureau planning staff, the Metropolitan Art Commission, the Design Review Commission, and Park Bureau managers. The Park Bureau director is the ultimate decision maker. The director’s decision can be appealed by either the donor or citizens opposed to the project, first to the city council member in charge of the Park Bureau, and then to the city council.

1 “Although the siting policy has been in effect since 1989, the city has never
2 had occasion to apply it until the present case. The city’s consideration of the
3 proposed memorial leading up to the 1995 resolution did not follow the
4 requirements of the siting policy. After opposition to the proposed location
5 emerged following the city’s 1995 resolution, the city initiated the process
6 prescribed in the siting policy. After conducting the required reviews and
7 providing for two additional public meetings not required by the policy, the
8 Park Bureau director approved the proposed memorial on April 23, 1998,
9 based on findings of consistency with the siting policy and the Washington
10 Park master plan. After appeals to the city council member in charge of the
11 Park Bureau and the city council, the city council approved the proposed
12 memorial on October 1, 1998.” *Carlsen v. City of Portland*, 36 Or LUBA
13 614, 617-20 (1999) (*Carlsen I*) (footnotes omitted).

14 In our decision, we sustained petitioners’ first assignment of error, which argued that
15 the city’s decision under the siting policy approved the “proposed development of land”
16 under city legislation or regulation and was thus a “permit” as defined at ORS 227.160(2).¹
17 Because the city’s decision approved a “permit,” we held, the city council was subject to the
18 requirement, at ORS 227.180(3), that its members disclose the substance of any *ex parte*
19 communications.² Accordingly, we concluded that remand was appropriate to allow for
20 disclosure of any *ex parte* communications, and to provide an opportunity for rebuttal. We
21 then addressed and denied petitioners’ second and sixth assignments of error.³ We declined
22 to resolve petitioners’ third, fourth and fifth assignments of error, which went to the merits of
23 the city’s decision to approve the proposed memorial under its zoning ordinance and the
24 siting policy, because the new proceedings required under the first assignment of error might
25 result in new evidence and new findings regarding those criteria.

¹ORS 227.160(2) defines “permit” as the “discretionary approval of a proposed development of land, under ORS 227.215 or city legislation or regulation. * * *”

²As noted in our earlier opinion, no party disputed that there was evidence of undisclosed *ex parte* communications between at least one city council member and various parties, or that each of the city council members was a current or former honorary co-chair in the applicant’s organization.

³The second assignment of error alleged that the city’s failure to adopt the siting policy as a city “development ordinance” violates ORS 227.173(1). The sixth assignment of error alleged that the city council members were biased and that they prejudged the matter.

1 Petitioners appealed our decision to the Court of Appeals. The court’s analysis first
2 addressed an issue raised under the third assignment of error to LUBA but not addressed in
3 our opinion in *Carlsen I*: whether the city erred in concluding that the proposed memorial
4 was a “plaza” or “public square” and thus a “parks and open area” use allowed outright under
5 the applicable zoning ordinance provisions. The court concluded that the city’s
6 interpretation of its code to that effect is entitled to deference and must be affirmed. The
7 court’s conclusion effectively rejected petitioners’ third assignment of error. The court then
8 addressed *sua sponte* our conclusion under the first assignment of error that the city’s
9 decision under the siting policy approved a “permit” as defined at ORS 227.160(2).⁴ The
10 court determined that the siting policy did not regulate land uses and in fact was more
11 analogous to “medical licensing requirements” than to a land use regulation. *Carlsen II*, 169
12 Or App at 15. The court concluded that, because the terms of the siting policy did not
13 regulate land uses or constitute land use approval standards, the city’s decision under the
14 siting policy was not a permit, *i.e.*, the “discretionary approval of a proposed development of
15 land, under ORS 227.215 or city legislation or regulation.” ORS 227.160(2).

16 The court remanded the decision to us to consider petitioners’ fourth and fifth
17 assignments of error, which challenge the city’s findings under its zoning ordinance and
18 under the siting policy. The court also directed us to reconsider our conclusion regarding *ex*
19 *parte* contacts under the first assignment of error.

⁴Our opinion noted that the city conceded LUBA’s jurisdiction, based on the undisputed fact that the city council applied provisions of its zoning ordinance in making the challenged decision. *Carlsen I*, 36 Or LUBA at 622 n 4. Our opinion did not consider whether our jurisdiction rested on the city council’s application of the siting policy. Nonetheless, the court viewed our holding, that the siting policy constituted “legislation or regulation” under which the city could discretionarily approve the proposed development of land, to have jurisdictional consequences.

1 **ISSUES RAISED ON REMAND**

2 At the request of the parties, the Board allowed supplemental memoranda in this case,
3 limited to discussing the implications of the court’s remand. The city and both petitioners
4 submitted memoranda, raising several issues that we address below.

5 **A. Jurisdiction to Review the City’s Actions under the Siting Policy**

6 The city’s supplemental memorandum argues that the fifth assignment of error, which
7 challenges the city’s findings under the siting policy, should be denied, because the court’s
8 conclusion that the siting policy is not a land use regulation deprives LUBA of jurisdiction to
9 review challenges under that policy. Petitioner Carlsen argues that LUBA should review the
10 fifth assignment of error, but requests that the city’s decision be transferred to circuit court
11 pursuant to ORS 34.102(4) if the Board determines that it lacks jurisdiction to review that
12 aspect of the city’s decision.

13 As defined by ORS 197.015(10)(a)(A), statutory land use decisions include local
14 government decisions that apply the statewide planning “goals,” “a comprehensive plan
15 provision” and “a land use regulation.” However, in reviewing local government decisions
16 that apply one or more of the land use standards identified in ORS 197.015(10)(a)(A), as
17 well as other standards that are not identified in ORS 197.015(10)(a)(A), LUBA considers
18 allegations that applicable non-land use standards are violated by the challenged decision, as
19 well as allegations that the land use standards are violated. *Cedar Mill Creek Corr. Comm. v.*
20 *Washington County*, ___ Or LUBA ___ (LUBA No. 99-138, June 26, 2000), slip op 9
21 (ancillary determination regarding compliance with a condition of subdivision approval);
22 *Johnson v. City of La Grande*, 37 Or LUBA 380, 385 (1999), *aff’d* 167 Or App 35, 1 P2d
23 1036 (2000) (compliance with annexation statutes). In neither of these cases did we
24 articulate the basis for our authority to review challenges under standards that do not
25 constitute one of the land use standards identified at ORS 197.015(10)(a)(A). However, for
26 the following reasons we believe such standards may constitute “applicable law” for

1 purposes of ORS 197.835(9)(a)(D), even if they are not land use standards listed at
2 ORS 197.015(10)(a)(A).⁵

3 Construing the reference to “applicable law” in ORS 197.835(9)(a)(D) as potentially
4 encompassing standards that are not land use standards identified at ORS 197.015(10)(a)(A)
5 presents the possibility that LUBA could be asked to review land use decisions for
6 compliance with standards that have nothing to do with land use planning. However, this is
7 more a hypothetical danger than a real one. It is rare that decisions applying statewide
8 planning goals, comprehensive plan provisions or land use regulations, which for that reason
9 are land use decisions subject to review by LUBA, also concern the application of standards
10 that have nothing to do with land use planning. More commonly, as in the present case, they
11 may also concern the application of non-land use standards that resemble land use standards
12 specified in ORS 197.015(10)(a)(A), even if they were not formally adopted as part of a local
13 government’s comprehensive plan or land use regulations. Where such decisions apply both
14 land use and non-land use standards, ORS 197.835(9)(a)(D) authorizes LUBA to provide the
15 opportunity for a complete review of the land use decision for compliance with “applicable
16 law,” subject to judicial review by the Court of Appeals.⁶

17 We need not and do not attempt to identify here the precise parameters of our scope
18 of review of land use decisions for compliance with “applicable law” under ORS
19 197.835(9)(a)(D). Specifically, we leave open the possibility that applicable law that is
20 applied in a land use decision might be so unrelated to the land use standards that are
21 identified in ORS 197.015(10)(a)(A) that assignments of error challenging compliance with

⁵Otherwise, if a local government made a land use decision in which it, *inter alia*, directly applied a newly adopted Land Conservation and Development Commission (LCDC) administrative rule or land use statute pursuant to ORS 197.646(3), LUBA arguably would be precluded from reviewing arguments that the local government misconstrued that rule or statute.

⁶The potentially splintered nature of judicial review of land use decisions that would result if ORS 197.835(9)(a)(D) were not interpreted in this manner is exemplified by petitioner Carlsen’s alternative request to transfer *aspects* of the city’s decision to circuit court.

1 such non land use criteria would not be reviewable by LUBA under ORS 197.835(9)(a)(D).
2 Consistent with the Court of Appeals’ discussion in *Carlsen II*, a land use decision that also
3 included a determination concerning “medical licensing requirements,” might well be an
4 example of a land use decision that is not fully reviewable for compliance with “applicable
5 law” under ORS 197.835(9)(a)(D). *Carlsen II*, 169 Or App at 15.

6 Whether the siting policy in the present case is properly viewed as “applicable law”
7 within the meaning of ORS 197.835(9)(a)(D) is at least debatable, based on the Court of
8 Appeals’ suggestion in *Carlsen II* that the siting policy is analogous to medical licensing
9 requirements. However, for the following reasons, we will conclude that it is.⁷ The Court of
10 Appeals directed us to address petitioners’ fourth and fifth assignments of error. Part of the
11 fourth assignment of error and all of the fifth assignment of error challenge the city’s
12 findings or determinations under the siting policy. The court addressed and answered
13 jurisdictional questions related to the city’s application of the siting policy. If the court felt
14 LUBA lacked jurisdiction to review arguments under the siting policy, we can think of no
15 reason why it would remand the city’s decision and direct us to review those arguments.

16 **B. Permit Decision**

17 Petitioner Arlington Heights Neighborhood Association (Arlington Heights)’s
18 supplemental memorandum argues that, notwithstanding the Court of Appeals’ reasoning,
19 LUBA should sustain the first assignment of error, which argues that the city erred in
20 determining that its decision was not a permit as defined at ORS 227.160, and in determining
21 that it need not disclose any *ex parte* contacts, as required by ORS 227.180(3).

22 Arlington Heights contends, first, that the city’s decision is a permit as defined by
23 ORS 227.160(2) because the decision applies a number of zoning ordinance provisions to
24 determine that the proposed memorial is a permitted use in the OS zone. Arlington Heights

⁷We will also assume, because no party contends otherwise, that the city’s findings under the siting policy must be adequate for our review and supported by substantial evidence. ORS 197.835(9)(a)(C).

1 argues that the decision, for that reason, constitutes the “[d]iscretionary approval of a
2 proposed development of land.” ORS 227.160(2). However, Arlington Heights fails to
3 recognize that the city’s determinations to that effect fall within an exception to the definition
4 of “permit,” at ORS 227.160(2)(b). That section provides that a “permit” does not include
5 “[a] decision which determines the appropriate zoning classification for a particular use by
6 applying criteria or performance standards defining the uses permitted within the zone[.]”

7 **C. Due Process**

8 Next, Arlington Heights contends that, even if the city’s decision is not a permit
9 decision, and if ORS 227.180(3), for that reason, does not apply, petitioners have a
10 constitutional due process right under *Fasano v. Washington Co. Comm.*, 264 Or 574, 507
11 P2d 23 (1973), to an impartial tribunal free from undisclosed *ex parte* communications.
12 However, Arlington Heights does not identify anywhere in the petition for review where
13 arguments under *Fasano* or either the state or federal constitution were raised before LUBA
14 in the prior proceeding. Arlington Heights’ constitutional argument is outside the scope of
15 the supplemental briefing agreed to by the parties. In any case, we do not believe it
16 appropriate to allow petitioner to advance new bases for reversal or remand in the current
17 proceeding on remand from the Court of Appeals. See *DLCD v. Douglas County*, 37 Or
18 LUBA 129, 143 (1999) (failure to raise issues before LUBA in a previous appeal bars raising
19 such issues on appeal of the decision on remand), citing *Kalmiopsis Audubon Society v.*
20 *Curry County*, 131 Or App 308, 312, 884 P2d 894 (1994); *Mill Creek Glen Protection Assoc.*
21 *v. Umatilla Co.*, 88 Or App 522, 526-27, 746 P2d 728 (1987); and *Schatz v. City of*
22 *Jacksonville*, 23 Or LUBA 40, 48, *aff’d* 113 Or App 675, 835 P2d 923 (1992).⁸

⁸Further, in *1000 Friends of Oregon v. Wasco Co. Court*, 304 Or 76, 81, 742 P2d 39 (1987), the Supreme Court clarified that the procedural protections described in *Fasano* were not based on constitutional due process doctrines, but were rather implied from statutory requirements that county zoning conform with the comprehensive plan.

1 **D. Portland City Code (PCC) 33.730.110**

2 Finally, Arlington Heights argues that the city’s own quasi-judicial procedures
3 require that in any quasi-judicial hearing the decision maker disclose any *ex parte*
4 communications and provide an opportunity for parties to rebut the substance of those
5 communications. PCC 33.730.110. The city’s supplemental memorandum anticipates this
6 argument, asserting that the PCC 33.730.110 requirement applies only to quasi-judicial land
7 use reviews identified in PCC 33.730. The purpose of land use reviews under PCC 33.730,
8 the city argues, is to describe the procedures applicable to the city’s Type I, II, and III quasi-
9 judicial land use reviews. PCC 33.730.010. Because the city did not conduct a Type I, II, or
10 III quasi-judicial land use review under PCC 33.730 in this case, the city contends,
11 PCC 33.730.110 is not applicable. We agree. In addition, as we pointed out above,
12 petitioners failed to raise any argument under PCC 33.730.110 in the initial petition for
13 review and cannot do so now.

14 **E. ORS 227.180(3)**

15 Petitioner Carlsen’s supplemental memorandum argues that, as a consequence of our
16 earlier conclusion that the city had violated ORS 227.180(3), the city’s decision is invalid
17 and must be remanded for a “plenary rehearing on the application.” *Horizon Construction,*
18 *Inc. v. City of Newberg*, 114 Or App 249, 254, 834 P2d 523 (1992); *Opp v. City of Portland,*
19 *___ Or LUBA ___* (LUBA No. 2000-001, June 16, 2000), *petition for judicial review*
20 *pending*. Petitioner argues that further review by LUBA and the Court of Appeals of an
21 “invalid” decision is of no consequence and that the appropriate disposition is simply to
22 remand the decision to the city for a plenary rehearing.

23 Petitioner’s premise is mistaken. As we held above, and as the Court of Appeals held
24 in its decision, the city’s decision is not a permit subject to ORS 227.180(3), and therefore
25 the city cannot have violated that provision.

1 **FIRST, SECOND, THIRD AND SIXTH ASSIGNMENTS OF ERROR**

2 For the reasons explained in the Court of Appeals’ decision, that portion of our earlier
3 decision affirmed by the court, and as explained above, petitioners’ arguments under the first,
4 second, third and sixth assignments of error provide no basis for reversal or remand. These
5 assignments of error are denied.

6 **FOURTH ASSIGNMENT OF ERROR**

7 Petitioners argue that the city violated the applicable law in approving the proposed
8 memorial without amending the Washington Park Master Plan (master plan).

9 According to petitioners, the master plan is a conditional use master plan governing
10 development and use of Washington Park. As relevant here, the master plan identifies the
11 subject site as suitable for “medium development.” The master plan also recommends that
12 three nearby streets providing access to the site be closed to vehicular traffic, to create
13 exclusive pedestrian-bicycle paths. Petitioners argue that PCC 33.820.090(A) requires that
14 the master plan be amended pursuant to a “Type III” conditional use review when
15 development is proposed within 400 feet of the master plan boundaries, and when new uses
16 not covered by the master plan will draw more people to the site.⁹ Petitioners also argue that

⁹PCC 33.820.090 provides:

“Amendments to the master plan are required for any use or development that is not in conformance with the plan, except as stated in [PCC] 33.820.080. The approval criteria of [PCC] 33.820.050 apply. The thresholds and procedures for amendments are stated below.

“A. **Type III Procedure.** Unless the master plan specifically provides differently, amendments to a master plan which require a Type III procedure are:

“1. Any proposed development within 400 feet of the master plan boundaries or any changes to the boundaries, unless a greater distance is stated in the master plan;

“* * * * *

“3. New uses not covered in the plan which will draw more people to the site, except for those which are replacing another use so that there is no net increase;

1 an amendment to the master plan is required by the siting policy itself, which requires that
2 “[w]here a master plan exists and a proposed memorial is a variance to the master plan, the
3 proposal will be processed as an amendment to the master plan.” Record 222.
4 Consequently, petitioners argue, the city cannot approve the memorial until it amends the
5 master plan.

6 The city adopted the master plan by resolution on May 29, 1981, as “the concept
7 guiding development and programming of Washington Park.” Record 5. The city’s decision
8 rejects petitioners’ contention that the master plan is a “conditional use master plan” within
9 the meaning of PCC 33.820, instead describing the master plan as

10 “a policy and administrative guide and capital improvement plan for
11 Washington Park. It was not intended to establish any binding limitations on
12 the development of the park. Although the Master Plan also identifies areas
13 of the park suitable for improvement, it is not and never was intended to be
14 the kind of land use master plan regulated by the Zoning Code. It was not
15 adopted through the conditional use process as a land use regulatory plan. It
16 is no different than master plans or facility plans adopted by many city
17 bureaus which guide decisions on spending, facility programming and capital
18 improvements, but which are not regulated by or approved pursuant to the
19 Zoning Code.” Record 5.

20 Petitioners argued below that, pursuant to PCC 33.820.100(A), the master plan constitutes a
21 conditional use master plan notwithstanding that it was not originally adopted as such.¹⁰ The
22 city’s decision rejects that argument:

“* * * * *

“**B. Type II procedure.** Unless the master plan specifically provides differently, amendments to a master plan not specifically stated in Subsection A. above are processed through a Type II procedure.”

¹⁰PCC 33.820.100(A) provides:

“Master plans that were approved by the City prior to January 1, 1991 are deemed to be in conformance with this chapter and continue in effect until their expiration dates. Approved master plans that do not have an expiration date continue in effect until development allowed by the plan has been completed.”

1 “The Council finds that the purpose of [PCC 33.820.100(A)] was to
2 grandfather those master plans that had received land use review and approval
3 by the City at the time this regulation became effective on January 1, 1991.
4 The term ‘master plans’ as used in this code section means master plans
5 designed to regulate land uses for particular uses or institutions, not master
6 plans prepared for the purposes of strategic planning, capital improvements or
7 facilities programming. Bureaus throughout the City have adopted master
8 plans for a variety of purposes other than land use regulation. The effect of
9 adopting [petitioners’] interpretation would be to subject all of these plans, if
10 adopted before January 1, 1991, to regulation as conditional use master plans,
11 regardless of whether the purpose or content of the plans involves land use.
12 This interpretation is neither consistent with the language or purpose of
13 PCC 33.820.020, nor with the Council’s intent in adopting that regulation.
14 Accordingly, the Council concludes the Washington Park Master Plan is not a
15 conditional use master plan to which PCC 33.820.020 applies.” Record 5-6.

16 **A. Conditional Use Master Plan**

17 Petitioners dispute the city’s above-quoted conclusions. According to petitioners,
18 PCC 33.820.100(A) applies by its terms to all master plans that were approved by the city
19 prior to January 1, 1991, and contains no language limiting its application to master plans
20 that were originally adopted as conditional use master plans. Petitioners submit that the
21 city’s interpretation of PCC 33.820.100(A) to limit the scope of that provision constitutes an
22 impermissible attempt by the city to amend its legislation *de facto* or to subvert its meaning
23 in the guise of interpretation. *Goose Hollow Foothills League v. City of Portland*, 117 Or
24 App 211, 218, 843 P2d 992 (1992).

25 Petitioners also dispute the city’s characterization of the master plan as not intended
26 to establish binding limitations on the development of the park. Petitioners point out that the
27 master plan states that its purpose is to

28 “define and clarify present and future programming and development of the
29 park, and to provide a framework in which decisions about the park can be
30 made in the best interest of current and future generations.” Record 99.

31 According to petitioners, the master plan identifies specific projects and development
32 limitations in the park, including existing features such as the zoo, the Japanese Garden and
33 tennis courts, as well as future development projects such as family and group activity

1 centers, additional tennis courts, sports fields, a new zoo train station and food concession
2 areas. Petitioners identify certain mandatory policies governing circulation and parking, and
3 argue that the city mischaracterizes the master plan as strictly a non-binding, conceptual
4 guideline. Petitioners argue that the master plan does what a conditional use master plan is
5 intended to do under the city’s regulations: identify existing uses and development, and
6 provide for future uses and development, including those that are allowed by right.

7 The city responds that the city council was within its discretion in rejecting
8 petitioners’ arguments under PCC 33.820.100(A). We agree. PCC title 33, chapter 820
9 deals exclusively with conditional use master plans. It is within the city council’s discretion
10 under ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992), to
11 interpret the term “master plan” in that context as referring only to conditional use master
12 plans. Further, petitioners have not demonstrated that the Washington Park Master Plan is or
13 should be considered a “conditional use master plan.” PCC 33.820.010 describes the
14 purpose of regulating conditional uses under master plans pursuant to that chapter:

15 “A conditional use master plan is a plan for the future development of a use
16 that is subject to the conditional use regulations. Expansions of the use may
17 have impacts on surrounding neighborhoods and on public services that are
18 better addressed through the review of the master plan than through reviewing
19 the expansions individually over time. In addition, by creating long term
20 plans, some impacts may be prevented that would have occurred with
21 uncoordinated piecemeal expansions. The development of a master plan is
22 intended to provide the surrounding neighborhoods and the City with
23 information about, and an opportunity to comment on, the use’s plans for
24 future development. The plan also enables the operator of the use and the City
25 to address the effects of the future development. Finally, an approved master
26 plan is intended to ensure that the use will be allowed to develop in a manner
27 consistent with the plan. * * *”

28 Thus, a conditional use master plan is required only when an applicant contemplates
29 present or future development that is subject to conditional use regulations. Although a
30 conditional use master plan must cover the entire use, including portions of the use on lands
31 where the use is allowed by right, the *sine qua non* of a conditional use master plan is the

1 existence of at least one conditional use. Petitioners have not argued or demonstrated that
2 the master plan at issue here regulates or is intended to regulate any particular conditional
3 uses in the park. Although the master plan addresses certain existing and potential future
4 land uses, it does not treat those uses as conditional uses approved under the plan. The city
5 did not err in concluding that the master plan is not a conditional use master plan subject to
6 the requirements of PCC title 33, chapter 820.

7 This subassignment of error is denied.

8 **B. Consistency with the Master Plan**

9 The siting policy provisions governing memorial gardens and plazas provide that if a
10 park master plan exists and the proposed memorial “is a variance” to the master plan, the
11 proposal must be processed as an amendment to the master plan. Record 222. In addition,
12 the “approval criteria” applicable to all memorials require the city to determine whether the
13 memorial is “compatible with the park’s current or historic master plan, if existing.” Record
14 217.¹¹

15 The city’s decision addresses two elements of the master plan that bear on
16 development of the subject site, and finds that development of the proposed memorial is
17 consistent with those two elements:

18 “[T]he Council finds the proposed memorial is in conformance with the
19 Washington Park Master Plan. The Council finds persuasive the testimony of
20 Barbara Walker, who chaired the citizens’ committee that developed the
21 Master Plan. She described the memorial as a quiet, contemplative use in a
22 quiet, contemplative setting and consistent with the Master Plan. Page 13 of
23 the Plan is a map indicating the relative suitability of land in Washington Park
24 for development. The site under consideration for the memorial is identified
25 on that map as suitable for medium development. The memorial is consistent
26 with the medium development for which the plan finds this site suitable.

¹¹The parties do not appear to dispute that the “master plan” referred to in the siting policy includes the master plan at issue here.

1 “The only provision of the plan with which the appellants claim the memorial
2 conflicts is the plan’s *recommendation* to ‘[c]lose Stearns Drive, SW
3 Washington Way, and SW Washington Circle to vehicular traffic and create
4 exclusive pedestrian-bicycle paths.’ SW Stearns Drive has been closed to
5 vehicular traffic, and the memorial does not call for any change in that
6 closure. For reasons unrelated to the memorial, only a partial closure of SW
7 Washington Way has been implemented to date. The memorial proposal does
8 not call for any change in that partial closure. Thus, nothing in the memorial
9 proposal conflicts with the street closure recommendations in the master
10 plan.” Record 6 (emphasis in original).

11 Petitioners argue that the above-quoted findings are inadequate and not supported by
12 substantial evidence.

13 **1. Suitable for Medium Development**

14 Petitioners argue that the master plan lists a number of existing and contemplated
15 developments within the park, but does not mention or contemplate any park development
16 such as the proposed memorial, at this site or any other. We understand petitioners to argue
17 that, absent some provision in the plan that contemplates development of this type in the
18 park, such development is “a variance” to the master plan.

19 Petitioners also argue that the city erred in relying upon the testimony of the
20 committee chair and the map at page 13 of the master plan, in determining that the proposed
21 memorial was in conformance with the master plan. Petitioners contend that consistency
22 with the master plan is for the city council to determine, and that it is error to simply rely
23 upon the opinion of Barbara Walker, the chair of the committee that drafted the master plan.
24 Petitioners argue that the value of that opinion, if any, is undercut by the fact that two other
25 former committee members testified that the proposed memorial is inconsistent with the
26 master plan.

27 Finally, petitioners contend that the suitability determinations depicted on that map at
28 page 13 of the master plan reflect only considerations of the topography, soil and drainage to

1 support development in general.¹² Petitioners argue that nothing in that suitability analysis
2 provides a sufficient basis for the city to determine that the proposed site is suitable for this
3 particular type of development.

4 The city responds, and we agree, that the decision’s findings on this point are
5 adequate and supported by substantial evidence. The decision implicitly rejects petitioners’
6 view that the memorial can be consistent with the master plan only if the master plan
7 expressly contemplates development of this type. Petitioners do not explain why the city is
8 compelled to find proposed development at variance with the master plan, where the master
9 plan is silent as to such development. We see no error in confining the city’s inquiry under
10 the siting policy to elements of the master plan that support or conflict with the proposed
11 development.

12 The master plan map describes the subject site as suitable for medium development.
13 The city found that that description supports placing the proposed memorial at this site. That
14 the master plan’s suitability analysis was limited to topography, soils and drainage does not
15 detract from the adequacy of or evidentiary support for that finding. The city also relied in
16 part on the opinion of the chair of the committee that drafted the master plan. The fact that
17 other committee members expressed a contrary opinion does not undermine the city’s
18 reliance on the chair’s opinion. To the extent either set of opinions constitutes evidence that
19 a reasonable person would rely upon to determine whether the proposal is consistent with the
20 master plan, the choice between such conflicting evidence is the city’s. *Tigard Sand and*

¹²The map, at Record 110, depicts the suitability for development of all areas within the park as high, medium or low. The text accompanying the map describes how these determinations were made:

“A land suitability analysis was performed in which very steep land, areas of known soil instability, and drainage ways were identified as unsuitable for development. The remaining park areas were considered moderately developable. Of these areas, portions with a warm southwestern exposure and little forest cover were deemed most suitable for development while areas with a cool north or northeastern aspect were considered less suitable.” Record 109.

1 *Gravel, Inc. v. Clackamas County*, 33 Or LUBA 124, 138, *aff'd* 149 Or App 417, 943 P2d
2 1106 (1997).

3 This subassignment of error is denied.

4 **2. Advisory Committee**

5 Petitioners also argue that the city’s decision is “a variance” to the master plan
6 because the city did not invoke or seek input from the advisory committee recommended by
7 the master plan. However, the siting policy requires the city to consider whether the
8 proposed *memorial* is “a variance” to the master plan, not whether the process the city
9 followed complies with recommended processes in the master plan. Petitioners have not
10 established that the city erred in failing to seek input from an advisory committee.¹³

11 This subassignment of error is denied.

12 **3. Circulation Policy**

13 The master plan states that its circulation policy is to “[r]enovate Washington Park’s
14 circulation system to improve its flow and safety * * * and to reduce its impact on adjacent
15 neighborhoods.” Record 126. To that end, the master plan includes a recommendation to
16 “[c]lose Stearns Drive, S.W. Washington Way and S.W. Washington Circle to vehicular
17 traffic and create exclusive pedestrian-bicycle paths.” *Id.* An accompanying map depicts the
18 recommended street closures. Record 127. The proposed memorial site lies adjacent to SW
19 Washington Way, which appears to provide the closest vehicle access and parking area to the
20 site within the park.

21 Petitioners take issue with the city’s findings that the memorial will not conflict with
22 the recommended street closures. Petitioners argue that the memorial relies upon SW
23 Washington Way, which is currently open to vehicular traffic on weekends, for vehicular
24 access, tour bus drop-offs, and parking, and that the existence of the memorial will prevent

¹³Petitioners do not contend that such an advisory committee in fact exists.

1 the city from ever completing the recommended street closures.

2 The city’s decision notes that the recommended street closures have been partially
3 implemented and that, for reasons unrelated to the memorial, “only a partial closure of SW
4 Washington Way has been implemented to date.” Record 6. The decision then concludes
5 that the proposed memorial does not conflict with the recommended street closures because
6 the memorial proposal does not call for any change in the current partial closure of those
7 streets. *Id.*¹⁴ However, neither the city’s decision nor its response brief appears to dispute
8 petitioners’ assertion that the memorial requires SW Washington Way to remain open in
9 order to provide vehicular access, bus drop-offs and parking.¹⁵ If petitioners are correct on
10 that point, then the city’s explanation as to why the proposed memorial does not conflict with
11 the recommended closures is inadequate. The fact that the memorial does not call for change
12 in the current partial closure of the streets does not address the issue of whether, as
13 petitioners contend, the existence of the memorial effectively prevents the full closure of SW
14 Washington Way. The city’s findings do not describe the reasons unrelated to the memorial
15 that have delayed full closure of SW Washington Way, although the findings imply that
16 those reasons are temporary. If those reasons are indeed temporary, and the existence of the
17 memorial would have the effect of requiring SW Washington Way to remain open

¹⁴The city’s decision emphasizes that the street closures discussed in the master plan are “recommendations,” but nonetheless addresses those recommendations as elements of the master plan that must be analyzed as possible conflicts with the proposed memorial. The city’s response brief suggests that the city’s findings, quoted in the text above, interpret those “recommendations” to be non-binding provisions that need not be addressed as potential conflicts under the city’s consistency analysis. However, we see no such interpretation in the city’s findings, and in fact the city chose to address those recommendations as potential conflicts. If the city interprets the term “recommendations” in the way the city suggests in its brief, it must express that interpretation in its decision.

¹⁵Petitioners cite to a study recommending that transportation improvements authorized by an unrelated bond project include conversion of SW Washington Way to a two-way street to accommodate the memorial. Record 1007. The city’s response brief cites to testimony from a traffic consultant at Supplemental Record 9-10, to the effect that the proposed memorial is consistent with any bond-related transportation improvements to SW Washington Way. That testimony suggests that nearby streets can provide vehicular access and parking for the memorial, but it states also that SW Washington Way provides an excellent location for bus drop-offs and immediately adjacent parking for visitors to the memorial.

1 permanently or over the long term, then it is incumbent upon the city to provide a more
2 adequate explanation why the proposed memorial is nevertheless consistent with the master
3 plan recommendation to close SW Washington Way to vehicular traffic.

4 This subassignment of error is sustained.

5 The fourth assignment of error is sustained, in part.

6 **FIFTH ASSIGNMENT OF ERROR**

7 Petitioners argue that the city misconstrued the applicable law, and adopted
8 inadequate findings not supported by substantial evidence, in finding that the proposed
9 memorial complies with four of the siting policy approval criteria.

10 The siting policy sets forth a list of “approval criteria,” and requires that all
11 memorials “should be judged for appropriateness” according to those criteria. Record 216.
12 The siting policy also states that the criteria “are intended to serve as guidelines for the

1 reviewing body.” *Id.* We address separately petitioners’ challenges to the city’s findings of
2 compliance with four approval criteria.

3 **A. Geographic Justification**

4 The siting policy requires consideration of whether “[t]he location under
5 consideration is an appropriate setting for the memorial; in general,* there should be some
6 specific geographic justification for the memorial being located in that spot.”¹⁶

7 As relevant, the city’s findings state with respect to this criterion:

8 “The Council finds that, with the condition the Parks Director imposed, the
9 location is appropriate for this memorial. The Memorial is intimate and
10 contemplative and well suited to the site. The applicant’s proposal will go a
11 long way toward screening the site with rhododendrons and other natural
12 vegetation. The nearest home is 220 feet away from the proposed Memorial.
13 * * * Again, Barbara Walker, who, in addition to chairing the citizens’
14 committee that produced the Master Plan, is one of Portland’s premier
15 advocates for open space, testified heartily that the location is appropriate for
16 this Memorial.” Record 8.

17 Petitioners argue, first, that the city’s findings misconstrue this criterion by focusing
18 “on the appropriateness of the Memorial’s design for the specific site and not why the
19 selected site is appropriate for a memorial to the European Holocaust.” Petition for Review
20 47. Further, petitioners argue that the city’s findings fail to identify any “specific geographic
21 justification” for locating the memorial at this site, or the existence of special circumstances
22 that would obviate such justification. Finally, petitioners submit that there is no geographic
23 justification for siting the memorial at this location. Indeed, petitioners argue that the
24 immediate area is dedicated to memorials and statues exclusively related to the exploration
25 and settlement of Oregon, such as the Lewis and Clark expedition. According to petitioners,
26 the city erred in failing to address evidence that placement of the proposed memorial is

¹⁶The asterisk following the term “in general” in this criterion refers to a footnote, which states: “As used in this policy, ‘in general’ is intended to mean that exceptions are possible for special circumstances.” Record 216.

1 inconsistent with the themes of the existing monuments and memorials in that area of the
2 park.

3 The city responds that its findings of compliance with this criterion are adequate,
4 given the subjective nature of the criterion and the testimony directed at that standard below,
5 to the effect that the existing quiet grove of trees on the site is part of the contemplative
6 design of the proposed memorial.¹⁷ The city argues that that is sufficient to satisfy the
7 criterion, and that there is no requirement that the memorial's theme be consistent with the
8 themes of other memorials in the area.

9 This criterion requires "some specific geographic justification" for locating the
10 memorial on the selected spot. The city's findings do not identify a "specific geographic
11 justification," or explain what special circumstances waive that requirement. The findings
12 conclude only that the memorial is "intimate and contemplative" and thus appropriate for the
13 site. Petitioners are correct that the requirement for a "specific geographic justification" can
14 be read to require more than a finding that the location is appropriate for the memorial. For
15 example, the "specific geographic justification" element could be read to require that there be
16 some association between the person or event memorialized and the location of the
17 memorial, either within the park, or within the city. Because the city's findings do not
18 address that element or determine its meaning, or interpret the criterion in a way that renders
19 further inquiry unnecessary, remand is appropriate for the city to do so in the first instance.

20 This subassignment of error is sustained.

21 **B. Interference with Circulation and Use Patterns**

22 The siting policy also requires a determination that "[t]he location of the memorial
23 will not interfere with existing and proposed circulation and use patterns of the park."
24 Record 216. The city's findings with respect to this criterion state:

¹⁷The city cites to testimony that the grove of trees on the site "is fundamental to the memorial's design." Supplemental Record 20.

1 “* * * The [traffic study] projects that there would not be more than five cars
2 visiting the Memorial at any given time, and documents that those cars can be
3 accommodated by existing park roads and parking spaces. The opponents of
4 the proposal did not submit any traffic study of their own; rather they relied
5 upon anecdotal testimony as to the inadequacy of the current traffic system
6 and their fears of what impact the Memorial would have. The Design
7 Commission criticized what it felt was an inadequate treatment of pedestrian
8 access, circulation and parking. However, [a traffic consultant] gave detailed
9 testimony at the public meeting on February 23, 1998, and a comprehensive
10 summary at the Council hearing on September 16, 1998. The competing
11 testimony did not persuade the Council that there is any substantial reason to
12 doubt the conclusions of [the traffic study], which the Council finds credible
13 and persuasive. The Council finds that the proposed Memorial satisfies this
14 criterion.” Record 8-9.

15 Petitioners contend that the city’s findings fail to address the impact of the memorial
16 on non-vehicular traffic such as pedestrian or bicycle circulation patterns, and further fail to
17 address impacts on use patterns in the park. Petitioners repeat their arguments under the
18 fourth assignment of error that the existence of the memorial will prevent conversion of
19 nearby streets to pedestrian and bicycle paths. If such conversion is prevented, petitioners
20 argue, then the memorial will interfere with those proposed circulation patterns. With
21 respect to use patterns, petitioners argue that the existing meadow has long been used for a
22 variety of passive and active recreational activities, and there is no evidence that such
23 activities can continue once the 3,500-square foot memorial is built in the middle of the
24 meadow.¹⁸

25 The city responds that its findings expressly rely on the traffic consultant’s testimony,
26 which addresses issues of circulation, including pedestrian accessibility. The city cites to a
27 transcript of that testimony at Record 26-27 for the proposition that the proposed memorial
28 will not affect existing circulation patterns in the area. With respect to use patterns, the city

¹⁸Petitioners point to evidence that intervenor is planning on developing guidelines for acceptable behavior for visitors to the memorial. Petitioners argue that the memorial is intended to be a solemn and contemplative place, and that there is no evidence that recreational activities such as ball-playing, Frisbee-throwing or sunbathing will be “acceptable” behavior at the memorial. Petition for Review 51.

1 points to a finding of compliance with another siting policy criterion that “[a]ll of the passive
2 recreational activities currently available on the site will continue to be available.” Record 9.
3 The city also points to findings that the memorial design “preserves the character of the site
4 as an open area,” and has a “negligible impact” on the 23,850-square foot meadow. Record
5 7.

6 This criterion requires consideration of interference with “circulation and use
7 patterns.” The findings do not specifically address pedestrian or bicycle circulation patterns
8 and, as discussed in the fourth assignment of error, do not adequately explain why the
9 proposed memorial is consistent with the recommended conversion of nearby streets to
10 pedestrian and bicycle paths. That being the case, we agree with petitioners that the city’s
11 findings with respect to this criterion are inadequate to demonstrate that the proposed
12 memorial will not interfere with proposed circulation patterns.

13 With respect to use patterns, petitioners argue here and argued below that existing
14 uses include both passive *and* active recreation, and a finding that *passive* recreational
15 activity will continue to be available is not adequate to demonstrate compliance with this
16 criterion. The city’s response brief does not dispute that existing uses on the subject site
17 include both active and passive recreational uses, or respond to petitioners’ contention that
18 the city’s findings fail to address interference with active uses. We agree with petitioners
19 that the findings regarding interference with existing uses are inadequate.

20 This subassignment of error is sustained.

21 **C. Compatibility with Park Master Plan**

22 The siting policy requires a determination that:

23 “The memorial is compatible with the park’s current or historic master plan, if
24 existing. * * * The location and design of the memorial is consistent with the
25 character and design intentions of the park. For example, a memorial being
26 proposed for Forest Park should be consistent with the forested character of
27 Forest Park. The quality, scale, and character of the memorial is at a level
28 commensurate with the particular park setting.” Record 217.

1 The city’s decision addresses this criterion by referring to the findings regarding
2 consistency with the master plan, discussed above under the fourth assignment of error.
3 Petitioners repeat some of their arguments under that assignment of error and, in addition,
4 argue that the city failed to adopt findings addressing whether the location and design of the
5 memorial are consistent with the character and design intentions of the park, and whether the
6 quality, scale, and character of the memorial are at a level commensurate with the particular
7 park setting. Petitioners submit that no reasonable person could conclude that a 3,500-square
8 foot memorial with a village square, a 90-foot long walkway depicting a railroad track, and a
9 nine-foot high by 50-foot long granite wall commemorating the Holocaust is consistent with
10 an area designed as a picturesque open space. Petitioners also submit that the immediate area
11 of the subject site has been designed with a “unity of purpose” in commemorating ideas of
12 exploration and discovery related to Oregon history, a unity that would be destroyed by the
13 different character of the proposed memorial. Petition for Review 53.

14 The city responds that its findings adequately address this criterion, in finding that the
15 memorial is a “quiet, contemplative use, in a quiet, contemplative setting.” Record 6. The
16 city also cites to other findings stating that:

17 “Neighborhood context and park character were the driving forces behind the
18 evolution of the design. To minimize the impact on the neighborhood, the
19 focal point of the memorial, the Witness Wall, is recessed as far as possible
20 away from SW Wright Avenue, and is 220 feet back from the property line.”
21 Record 1

22 The city also cites to testimony that the memorial is in an “appropriate place” and “the
23 appropriate scale.” Supplemental Record 31. The city argues that such testimony provides
24 evidentiary support for the city’s finding of compliance with this criterion.

25 Petitioners’ arguments under this subassignment that repeat those addressed in the
26 fourth assignment of error are sustained to the extent sustained under that assignment of
27 error; otherwise, those arguments are denied. With respect to petitioners’ other arguments
28 under this subassignment, the city’s findings do not specifically address whether “[t]he

1 location and design of the memorial is consistent with the character and design intentions of
2 the park” and whether “[t]he quality, scale, and character of the memorial is at a level
3 commensurate with the particular park setting.” The city cites to other findings that mention
4 “park character” but do not explain what that character is or why the memorial is consistent
5 with it. The bulk of those findings concern impact on the neighborhood, but such impacts
6 are not the focus of this criterion. Accordingly, we agree with petitioners that the city’s
7 findings are inadequate to explain why the proposed memorial complies with this criterion.

8 This subassignment of error is sustained, in part.

9 **D. Functional or Design Contribution**

10 Finally, the siting policy requires a determination that “[t]he memorial contributes to
11 the park setting from a functional or design standpoint.” Record 217. The city’s decision
12 states with respect to this criterion:

13 “The proposal is for a contemplative memorial in a park. The proposed
14 Memorial will place physical improvements in only a fraction of the
15 immediate site, which in turn is only a minute fraction of Washington Park.
16 All of the passive recreation activities currently available on the site will
17 continue to be available. The proposed Memorial will enhance the
18 opportunities for quiet reflection. The Council finds that the proposed
19 Memorial will contribute to the contemplative nature of the park setting from
20 both a functional and design standpoint. The proposed Memorial meets this
21 criterion.” Record 9.

22 Petitioners argue that the subject site was designed and has functioned as an open
23 space for both active *and* passive recreational activities, and the city’s finding that only
24 passive activities will continue fails to demonstrate that the memorial contributes to the park
25 setting from a functional or design standpoint. For that reason, petitioners argue that the
26 above-quoted finding is inadequate and not supported by substantial evidence.

27 The city responds that “[t]he Council appropriately addressed [this criterion] in its
28 finding that the Memorial will contribute to the contemplative nature of the park setting both

1 from a functional and design focus.” Respondents’ Brief 29.¹⁹ As discussed above, the city
2 does not dispute petitioners’ contention that the proposed memorial will impact active
3 recreation on the subject site, or respond to petitioners’ argument that the city failed to
4 address impacts on active recreation. We agree with petitioners that the city’s finding of
5 compliance with this criterion is inadequate in that respect.

6 This subassignment of error is sustained.

7 **E. Donor Obligations**

8 Finally, petitioners argue that the siting policy requires that the memorial donor pay
9 for the design, installation, manufacture, and maintenance of the memorial and, furthermore,
10 the donor must enter into an agreement with the city regarding those obligations.

11 The city responds that the donor obligations portion of the siting policy is not part of
12 the criteria for approval of an application under the policy. The city argues that the city
13 treated the donor obligations aspect of the siting policy as a prerequisite to a building permit,
14 not as part of the decision for siting and design approval.

15 Petitioners do not identify any language in the siting policy that requires the city to
16 address donor obligations as part of site and design approval. Absent such a requirement,
17 petitioners have not demonstrated that the city erred in failing to do so.

18 This subassignment of error is denied.

19 The fifth assignment of error is sustained, in part.

20 The city’s decision is remanded.

¹⁹The city also responds that the city council’s interpretation of the siting policy should be given “great weight.” Respondents’ Brief 29. However, the city’s brief does not identify any language in the challenged findings containing an express or implicit interpretation to which we might defer under ORS 197.829(1).