BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ARLINGTON HEIGHTS
HOMEOWNERS ASSOCIATION,
Petitioner,

vs.

CITY OF PORTLAND,
Respondent,

and

OREGON HOLOCAUST MEMORIAL COALITION,
Intervenor-Respondent.

LUBA No. 2001-099

FINAL OPINION
AND ORDER

Appeal from City of Portland.

Gregory S. Hathaway, Portland and E. Michael Connors, Portland, filed the petition for review. With them on the brief was Davis Wright Tremaine. E. Michael Connors argued on behalf of petitioner.

Kathryn Beaumont, Senior Deputy City Attorney, Portland, filed a joint response brief and argued on behalf of respondent.

Paul Norr, Portland, filed a joint response brief and argued on behalf of intervenor-respondent.

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

AFFIRMED 12/17/2001

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

Opinion by Holstun.

NATURE OF THE DECISION

The challenged decision approves a site and design for a Holocaust Memorial in Washington Park.

FACTS

> "*Carlsen v. City of Portland*, 36 Or LUBA 614 (1999) (*Carlsen I*) was our initial decision in this matter. *Carlsen I* was remanded to us by the Court of Appeals. *Carlsen v. City of Portland*, 169 Or App 1, 8 P3d 234 (2000) (*Carlsen II*). Following the Court of Appeals' remand in *Carlsen II*, we issued our final decision in *Carlsen v. City of Portland*, 39 Or LUBA 93 (2000) (*Carlsen III*), in which we remanded the city's decision based on a number of inadequacies in the city's findings. This appeal concerns the city council's decision following our remand in *Carlsen III*." *Arlington Heights Homeowners Assoc. v. City of Portland*, ___ Or LUBA ___ (LUBA No. 2001-099, Order, November 26, 2001), slip op 1.

Before the city adopted its decision following our remand in *Carlsen III*, it rejected petitioner's request for an opportunity for another hearing before the city council to present argument and evidence.[1] In the challenged decision, the city adopts additional findings addressing the city's Memorial Siting Policy and the Washington Park Master Plan (Park Master Plan) provisions that we found the city had not adequately addressed in *Carlsen III*.

JURISDICTION

In our November 26, 2001 order in this appeal, we rejected respondent's and intervenor-respondent's (respondents') arguments that LUBA does not have jurisdiction over this matter and should dismiss the appeal. Respondents renewed their jurisdictional arguments at oral argument. For the reasons we have already explained in our earlier order,

[1]The city council did conduct a hearing before it adopted its initial decision that was appealed in *Carlsen I*. Petitioner was allowed to present argument and evidence at that hearing. Under its first assignment of error, petitioner argues that it was error for the city council to refuse to allow another hearing, following LUBA's remand in *Carlsen III*.

we continue to believe we have jurisdiction. Slip op 1-4. Respondents' motion to dismiss is denied.

INTRODUCTION

Petitioner alleges two assignments of error, with subassignments of error under each. The first assignment of error alleges procedural error based on the city's refusal to allow a hearing before the city council, before it adopted the challenged decision. Petitioner's second assignment of error alleges substantive error. We would normally address petitioner's procedural assignment of error first, because our resolution of that assignment of error might require remand for additional proceedings and make it premature to address petitioner's substantive assignment of error. However, we conclude below that neither of petitioner's assignments of error warrants reversal or remand. Because our resolution of the procedural assignment of error is affected by certain conclusions that we reach in resolving petitioner's substantive assignment of error, we turn to the second assignment of error first.

SECOND ASSIGNMENT OF ERROR

A. Introduction

Petitioner argues that the city council's findings (1) misinterpret certain Memorial Siting Policy Approval Criteria and Park Master Plan provisions, (2) are inadequate to demonstrate compliance with those approval criteria and plan provisions and (3) are not supported by substantial evidence.

Before turning to petitioner's arguments, we first consider a threshold question raised by respondents. As the city correctly notes, the Court of Appeals has already held that the Memorial Siting Policy Approval Criteria that are at issue under this assignment of error are not comprehensive plan or land use regulation provisions. Assuming that holding extends to the Park Master Plan itself, a question is presented whether city council interpretations of the park master plan and memorial siting criteria are entitled to deference under ORS 197.829(1)

and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992).[2] *Clark* and its progeny establish a highly deferential standard of review that must be applied by LUBA and the appellate courts in reviewing local government interpretations of local land use legislation. *Huntzicker v. Washington County*, 141 Or App 257, 261, 917 P2d 1051 (1996); *Zippel v. Josephine County*, 128 Or App 458, 461, 876 P2d 854 (1994); *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 217, 843 P2d 992 (1992). *Clark* and its progeny also provided the impetus for enactment of ORS 197.829, which was adopted to codify the deferential *Clark* standard of review, with modifications.[3] *See Friends of Neabeack Hill v. City of Philomath*, 139 Or App 39, 45-46, 911 P2d 350 (1996) (explaining the 1993 legislation that adopted ORS 197.829).

We are unaware of any appellate court decision that explicitly takes the position that *more* deference must be given on administrative and judicial review of a local enacting

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[2]We determined in *Carlsen III* that the Park Master Plan is not a conditional use master plan, within the meaning of the city's zoning code. 39 Or LUBA at 107. Petitioner does not argue that the Park Master Plan is properly viewed as a comprehensive plan or a land use regulation for any other reason, and as far as we can tell the Park Master Plan only applies to this decision because the Memorial Siting Policy Approval Criteria make it a relevant consideration.

[3]ORS 197.829 provides as follows:

> "(1) The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> > "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
> >
> > "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
> >
> > "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
> >
> > "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements.
>
> "(2) If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, the board may make its own determination of whether the local government decision is correct."

body's interpretations of *land use* legislation than is applied on administrative or judicial review of enacting bodies' interpretations of *other kinds of* legislation.[4] Nevertheless, the Court of Appeals' characterizations of the *Clark* standard of review as well as the court's application of that standard of review appear to be uniquely deferential. *See Huntzicker*, 141 Or App at 261 ("no person could reasonably interpret"); *Zippel*, 128 Or App at 461 ("beyond colorable defense"); *Goose Hollow Foothills League*, 117 Or App at 217 ("clearly wrong"). As far we can tell, following *Gage*, the Court of Appeals has only expressly applied *Clark* deference in cases where it was reviewing enacting body interpretations of local land use legislation. We also note that ORS 197.829(1) is limited by its express language to interpretations concerning comprehensive plans and land use regulations. *See* n 3.

The outer parameters of *Clark* deference are sufficiently unclear, and there is sufficient question in our mind about whether *Clark* deference applies to review of an enacting body's interpretations of local legislation other than land use legislation, that we do not apply *Clark* deference here. That does not mean the city council's interpretations of the Memorial Siting Policy and Park Master Plan are entitled to no deference in this appeal. The city council is the legislative body that adopted the Memorial Siting Policy and Park Master Plan and its interpretations of those documents are entitled to some deference. However, we do not apply the uniquely deferential standard of review that is required under *Clark*.

B. Memorial Siting Policy Approval Criterion 4 (Geographical Justification or Special Circumstances)

Memorial Siting Policy Approval Criterion 4 provides as follows:

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[4]There are several Oregon Supreme Court decisions that suggest *Clark* deference is only a particular example of the deference that is generally extended to an enacting body's interpretation of its own legislation. *OR-OSHA v. Don Whitaker Logging, Inc*., 329 Or 256, 262 n 7, 985 P2d 1272 (1999); *Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 142 n 8, 881 P2d 119 (1994); *Gage v. City of Portland*, 319 Or 308, 316-17, 877 P2d 1187 (1994).

> "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] Record 1044.[6]

In *Carlsen III*, we concluded that the city's findings were inadequate to provide a specific geographic justification or, alternatively, to describe special circumstances that would make a specific geographic justification unnecessary. On remand the city focused on the special circumstances alternative, but also found a specific geographic justification. The city council's findings are lengthy, but the central theme upon which those findings elaborate is relatively straightforward. The council found that Washington Park is Portland's oldest and preeminent park and is already the home of a number of memorials to other historic events that have no specific geographic connection to Washington Park. The city council found that the Holocaust was by a number of measures an extraordinary historic event. Based on these findings the city council found that special circumstances justified siting the Holocaust Memorial in Washington Park or that any needed specific geographic justification was satisfied.[7] Petitioner advances various criticisms of these findings and other findings that were adopted by the city council to address Memorial Siting Policy Approval Criterion 4.

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[5]The Memorial Siting Policy Approval Criteria are not numbered. We have added numbers for ease of reference. The Memorial Siting Policy Approval Criteria include a footnote that explains the asterisk in the above provision:

> "As used in this policy, 'in general' is intended to mean that exceptions are possible for special circumstances."

[6]In this opinion, citations to the Record are to the record that was submitted by the city in the prior appeal, which is incorporated into the record of this appeal. We refer to the record compiled by the city following our remand in *Carlsen III* as the Remand Record.

[7]The city council's findings include the following:

> "The Council finds that special circumstances exist that justify an exception, in the case of this memorial, for placement at this site, regardless of whether a geographic justification exists. Washington Park is the preeminent park in our community, in our region and in our state. It is the oldest park in Portland and the most visited in the City. Likewise, this memorial will be an important memorial, to recall an extraordinary historic event that has affected the lives of so many Oregonians. It is designed to remember those lost, to honor those who struggled against hate, and to celebrate those who survived and made Oregon their

The language of Memorial Siting Policy Approval Criterion 4 is subjective. That criterion only requires that "there should be some specific geographic justification for the memorial being located" at the selected site or, alternatively, that there should be "special circumstances" that warrant approving the site without specific geographic justification. The nature and scope of the "specific geographic justification" or "special circumstances" referenced in the criterion are not defined or limited by the language of the criterion.

We conclude that the city council's findings are adequate to express its view of "special circumstances" that warrant approving the proposed memorial site without specific geographic justification. The findings that there is a specific geographic justification present

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> home. By making this memorial part of our most preeminent park we show our commitment to overcome hate, racial tension, religious intolerance, and bigotry. We also demonstrate to our children and generations to come the importance of learning from our shared past to enrich our future. This memorial deserves a prominent location, in the City's 'front yard' to demonstrate the community's commitment to remember and to learn from one of the darkest moments of the last century.
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> "* * * As explained by Dr. Marshall Lee, a professor of history at Pacific University:
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> > "'The very essence of the Holocaust was a siting issue[.] Siting camps and killing centers in the East as the Germans said, out of sight, from prying Western eyes. Thus, the Washington Park site, so prominent in the Rose City, works to defeat the marginalization and concealment of Hitler's East. * * *
> >
> > "'* * * * *'
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> "Washington Park, as a preeminent park, is also the site of other historic memorials including the Lewis & Clark memorial, the sculpture of Sacajawea, 'The Coming of the White man' and the Viet Nam Memorial. None of the other memorials have any specific geographic connection to Washington Park. Yet all are located there, because Washington Park is so prominent and popular. Because memorials to other historically significant events are located in the general vicinity, it is appropriate * * * to make an exception to the generally applicable requirement for a specific geographic justification and to locate the Memorial at this site.
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> "Alternatively, if these special circumstances do not qualify as an appropriate exception to the geographic justification, they sufficiently establish a geographic justification. The preeminence of Washington Park is matched by the tremendous significance of the historic event being memorialized. The Council finds that there is a geographic justification to site such an important memorial that has affected the lives of so many Oregonians in a prominent park to achieve the educational purposes of the memorial, the visibility, easy access and high traffic, of Washington Park in general, and in this particular location within the vicinity of other well-known historic memorials and other well-visited Portland sites." Remand Record 23-24 (record citations omitted).

a closer question, but we conclude that they are adequate on that point as well. The city's findings set forth a detailed explanation of the city council's reasoning. To the extent interpretations are necessary, they are explicitly or implicitly provided. That petitioner or this Board might adopt different findings or reach a different conclusion is not a basis for reversal or remand under this subjectively worded siting criterion.

This subassignment of error is denied.

C. Memorial Siting Policy Approval Criteria 5 (Existing and Proposed Circulation and Use Pattern of the Park) and 6 (Compatibility with the Park Master Plan)

Memorial Siting Policy Approval Criteria 5 and 6 are as follows:

> "[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. * * * 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 forested character of Forest Park." Record 1044-45.

The Park Master Plan includes a circulation policy to "[r]enovate Washington Park's circulation system to improve its flow and safety, to provide users with alternative modes of transportation, and to reduce its impact on adjacent neighborhoods." Record 126. Following the circulation policy are a number of recommendations, one of which recommends road closures (Recommendation B):

> "Close Stearns Drive, S.W. Washington Way, and S.W. Washington Circle to vehicular traffic and create exclusive pedestrian-bicycle paths. Fire access to dwellings backing on Stearns Drive must be preserved." *Id*.

In *Carlsen III*, we concluded that the city's findings were not adequate to explain why approving the disputed memorial was consistent with Recommendation B. On remand, the city adopted four alternative interpretations of Recommendation B and found that approval of the memorial complied with all of the alternative interpretations.

The most controversial interpretation of Recommendation B, and one that is at odds with the findings in the first decision, is that the above-quoted version of Recommendation B is not the one that the city council adopted when it adopted the Park Master Plan. The city council found that the adopted version recommends closure of Stearns Drive only, and it is not disputed that Stearns Drive has been closed to vehicles.[8] A second interpretation of Recommendation B is that the recommendation, like the Park Master Plan as a whole, is not a mandatory approval criterion and therefore approval of the memorial need not be consistent with Recommendation B.[9] A third interpretation finds that the existing closures of Stearns Drive and S.W. Washington Circle, along with the existing *partial* closure of S.W. Washington Way, are sufficient to fully implement Recommendation B. A fourth interpretation essentially accepts petitioner's interpretation of Recommendation B to require that S.W. Washington Way be closed to vehicles.

Under the fourth interpretation, although the city council disputes petitioner's understanding of Recommendation B's meaning and legal status, the city council nevertheless finds Recommendation B is satisfied. The city council's findings (1) identify the amount and type of parking spaces the memorial will likely require, (2) identify nearby parking that could serve the memorial if S.W. Washington Way were closed in the future and no longer available for parking, and (3) explain that approval of the memorial would therefore not preclude future closure of S.W. Washington Way.[10] The city council also

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[8]The city council reached this conclusion based on an exhibit to the adopting resolution. Remand Record 16.

[9]In *Carlsen III* we concluded that this interpretation of Recommendation B was not sufficiently stated in the city council's initial decision. 39 Or LUBA at 111 n 14.

[10]The city's findings include the following:

> "[N]othing is proposed as part of the Holocaust Memorial which would conflict with the manner in which the City has historically implemented the Washington Park Master Plan. If the City decides to implement a full closure of Washington Way at some time in the future, the siting of the Holocaust Memorial as proposed will not prevent such a closure.

adopted findings that specifically address the evidence the city council relied on in reaching these conclusions and why it did not find the evidence to the contrary to be persuasive. Respondents argue these findings are adequate to dispose of any issues that were raised below under Recommendation B and that the findings are supported by substantial evidence.

> "To the extent that the Master Plan, contrary to the City Council's interpretation of the Plan, is read to require a full-time closure between S.W. Washington Way and Sacajawea Blvd., such a closure would not prevent the Holocaust Memorial from being sited as proposed. The council finds the most credible testimony on this subject to be that of Kittleson & Associates, as found in their Transportation Impact Study dated November 26, 1997. As stated in their report:
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> > "'[T]he total number of vehicles requiring parking space is unlikely to exceed five at any given time. Available parking is sufficient for the expected visitors. Visitors entering via the main entrance at S.W. Park Place have access to approximately 50 on-street parking spaces on Cedar Street near the Memorial. These 50 spaces are within reasonable walking distance of the Memorial site.
> >
> > "'Some accommodations may be needed for buses. Striping of existing on-street parking to designate bus parking would be sufficient. However, due to the low overall volume of buses, and since bus visitation will be coordinated through the Center, it may be reasonable to simply direct bus drivers to the closest existing bus parking, as long as a drop-off area is available near the Memorial.'
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> "The Council also finds the hearing testimony of Mr. Phillip Worth of Kittleson & Associates to be the most reasonable and credible on this subject. The Council finds the situation to be as summarized by Mr. Worth:
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> > "'What we found is that under peak circumstances, we expect approximately five vehicles to require parking spaces while visitors to the memorial spend time in that area. The parking supply is more than adequate to accommodate those vehicles whether they park on Cedar Loop, along Washington Way, other areas of the park, or even the adjacent street system. The accommodation for buses is provided. The drop-off, and pick-up can be made here, [and] the bus can actually store up by the Rose Garden itself in an area where we've allowed for tour buses and other large vehicles to store while they are waiting for the tours to be completed.'
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> "Thus, vehicular access, car parking, pedestrian access, bus drop-off and bus parking for the Holocaust Memorial are not dependent on the use of Washington Way. Nothing in the proposal to site the Holocaust Memorial affects the use of S.W. Washington Way. Whether the use of Washington Way stays the same as it has been for the past 20 years or changes at some time in the future is not dependent on or compromised by the proposed Holocaust Memorial." Remand Record 18-19 (record citations omitted).

We agree with respondents that the city has adequately demonstrated that approval of the memorial is consistent with Recommendation B, even if Recommendation B is interpreted to require closure of S.W. Washington Way in the future, as petitioner argues it does. Given that conclusion, it is not necessary for us to consider the city's alternative interpretations of Recommendation B.

This subassignment of error is denied.

D. Memorial Siting Policy Approval Criteria 5 (Existing and Proposed Circulation and Use Pattern of the Park) and 7 (Functional or Design Contribution to Park Setting).

Memorial Siting Policy Approval Criterion 5 is quoted above at the beginning of our discussion of Recommendation B. Memorial Siting Policy Approval Criterion 7 is as follows:

> "[7.] The memorial contributes to the park setting from a functional or design standpoint." Record 1045.

In *Carlsen III*, we remanded the city's decision because we concluded the initial decision did not adequately address the impact the memorial will have on passive and active uses of the existing meadow under these criteria. 39 Or LUBA at 115 and 118-19. The city council's findings on this issue include the following:

> "The site is currently an open, grassy meadow, with mature landscaping and tall trees, available to hikers, walkers, and runners. The total square footage of the site is approximately 24,000 sq. ft. The memorial will occupy about 3,500 square feet thereby leaving 85 [percent] of the site untouched. Because the site leaves 85 [percent] in its natural state, there will be little, if any, interference with current uses, either active or passive. The meadow is used for a variety of passive and active recreational uses, including picnicking, throwing Frisbees, walking dogs, hiking, walking, running, playing with children and for artwork. The memorial will leave ample space for historical uses of the meadow to continue and the memorial and these uses can coexist. This is particularly true since the memorial is set back in the bowl in the meadow, leaving much of the remaining meadow area available for the kinds of active and passive uses that have taken place there over the years." Remand Record 27.

> "The proposal is for a contemplative memorial in a park. The proposed Memorial will place physical improvements in only a fraction of the immediate site, which in turn is only a minute fraction of Washington Park. As discussed in the findings addressing criterion 6 above, all of the passive and active recreation activities currently available on the site will continue to be available. The memorial will only be a small fraction of the meadow in which it is located, leaving the remainder available and usable for active and passive neighborhood uses. The proposed Memorial will enhance the opportunities for quiet reflection because it is designed to be a place for quiet contemplation as visitors explore the memorial at their own pace. The Council finds that the proposed Memorial will contribute to the contemplative nature of the park setting from both a functional and design standpoint. * * *" Remand Record 29 (emphases omitted).

We believe the above findings are adequate to respond to our remand in *Carlsen III* and that they are supported by substantial evidence. In reaching that conclusion, we first note that although impacts the memorial may have on both active and passive historic use of the proposed site are relevant considerations under these criteria, neither criterion requires that the memorial have no impact on such active and passive uses of the site. The city's findings focus on the relatively small area of the existing meadow that will be improved, and the siting of those improvements in the meadow, to conclude that past active and passive uses can continue. We are inclined to agree with petitioner that the city's findings likely understate the impact that use of the memorial for its intended purpose may have on past active uses of the meadow and some types of passive uses. However, the siting of any memorial will inevitably displace some historic uses of previously undeveloped parkland. The city's findings explain why any such displacement of past uses of the meadow where the memorial will be sited is mitigated to some extent by the size, design and siting of the memorial. The findings also explain that the memorial site and the meadow are a small part of a much larger park where opportunities for a variety of both active and passive park uses will continue to be available.

For the reasons explained above, we conclude the city council's findings are adequate to address impacts of the memorial on active and passive recreation and to demonstrate

compliance with Memorial Siting Policy Approval Criteria 5 and 7. This subassignment of error is denied.

The second assignment of error is denied.

FIRST ASSIGNMENT OF ERROR

Petitioner argues the city council committed legal error when it refused petitioner's request for an opportunity to present legal argument and additional evidence to the city council, before it adopted its decision on remand. Petitioner advances three separate legal theories in support of the first assignment of error.

A. Intervenor Prepared the City's Findings

Intervenor was invited to submit proposed findings to respond to deficiencies in the city's earlier decision that LUBA identified in *Carlsen III*.[11] Petitioner asserts that those proposed findings constitute additional legal and factual argument by intervenor and that petitioner was entitled to present argument and evidence to respond to intervenor's proposed findings in a hearing before the city council.

In *DLCD v. Crook County*, 37 Or LUBA 39 (1999) we explained that where a local government elects to provide an opportunity to present additional argument and evidence following a remand from LUBA, it must extend that opportunity to all parties and commits legal error when it conducts such a hearing without providing notice to all parties. However, we do not agree with petitioner that intervenor's proposed findings are accurately characterized as additional legal and factual argument.

The Oregon Supreme Court long ago recognized and approved of what has become the common practice of having parties in quasi-judicial land use proceedings prepare draft findings that a local decision maker then considers and adopts or adopts in revised form in support of its decision. *Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 21,

[11]According to the city, those draft findings were received by the city attorney's office, revised and provided to the city council.

569 P2d 1063 (1977). This process of submitting and considering draft findings typically occurs after the evidentiary and argument phases of the local quasi-judicial proceedings have concluded. Citing *Sorte v. City of Newport*, 26 Or LUBA 236, 244-45 (1993) and *Adler v. City of Portland*, 24 Or LUBA 1, 12 (1992), we explained in our earlier order in this matter that we have previously held that parties in a quasi-judicial land use proceeding have no right to rebut proposed findings absent local provisions to the contrary. *Arlington Heights Homeowners Assoc. v. City of Portland*, slip op 5. Petitioner identifies no such right under the city's code.

Sorte and *Adler* both involved appeals of decisions where the proposed findings were submitted following conclusion of the city's initial evidentiary hearing and before the city's initial decision, rather than following a remand from LUBA of that initial local government decision. However, we see no reason why a different result is warranted where a local government, in responding to our remand, readopts its initial decision with revised findings. We do not believe the city council's decision to proceed by requesting, considering and adopting revised findings in support of the earlier decision to approve the memorial necessarily required that the city council provide petitioner another opportunity to present argument or additional evidence. If petitioner has such a right in this matter, it is not because the city council allowed intervenor to submit proposed findings.

B. Significantly Changed or Unforeseeable Interpretation

As we have already explained, once the phase of a local land use proceeding where the parties are allowed to present evidence and legal argument has concluded, a local government typically will render an oral decision and request that a written decision with supporting findings be prepared for its review and adoption. A question that may arise in such a process is whether new or changed interpretations of relevant criteria, which appear for the first time in the final written decision, could not reasonably have been anticipated and addressed by the parties before the opportunities for evidentiary presentations and legal

argument concluded. In *Gutoski v. Lane County*, 155 Or App 369, 963 P2d 145 (1998), the Court of Appeals held that in such circumstances local governments may be obligated to allow additional opportunities for legal argument or evidentiary presentations or both. However, the Court of Appeals clearly established that the circumstances that may give rise to such an obligation are quite limited.

Gutoski involved a local government land use decision that had been remanded to the county following an appeal to LUBA. The county had concluded in its initial decision that a comprehensive plan policy did not apply to the disputed decision. Although LUBA agreed with the county's initial interpretation, the Court of Appeals did not.[12] Following remand, unlike the city in this appeal, the county allowed an evidentiary hearing. However, after the hearing closed, the county hearings officer, and ultimately the board of county commissioners, interpreted the policy "to permit a conflicting residential use as long as it did not force a significant change in or significantly increase the cost of accepted farming practices on [an adjoining farm]." *Id.*

The petitioners in *Gutoski* argued that this interpretation of the policy set out at n 12, which was announced for the first time after the hearing on remand was closed, obligated the county to reopen the evidentiary hearing and allow the petitioners to present evidence and argument with the benefit of knowing how the county interpreted the plan policy. Both LUBA and the Court of Appeals rejected the petitioners' argument.

LUBA acknowledged that in some limited circumstances, significant changes in established interpretations that appear for the first time in a written decision after the parties'

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[12]The plan policy in that case required that the county

> "[p]rovide maximum protection to agricultural activities by minimizing activities, particularly residential, that conflict with such use. Whenever possible, planning goals, policies and regulations should be interpreted in favor of agricultural activities." 155 Or App at 371.

opportunity to present argument and evidence ends might require that additional opportunities for argument or evidence be provided:

> "We acknowledged in *Heceta Water District v. Lane County*, 24 Or LUBA 402 (1993), that the local government may be required to reopen the evidentiary hearing where the local government (1) changes to a significant degree an established interpretation of an approved standard, (2) the change makes relevant a different type of evidence that was irrelevant under the old interpretation, and (3) the party seeking to submit evidence responsive to the new interpretation identifies what evidence not already in the record it seeks to submit. * * *" *Gutoski v. Lane County*, 34 Or LUBA 219, 233-34 (1998).

However, LUBA went on to reject the petitioners' argument that the disputed interpretation, which did not change an established interpretation, required a new evidentiary hearing:

> "* * * Where the interpretation of a local provision is a matter of first impression for the local government, the participants should have realized that a variety of interpretations might be adopted, and should have presented their evidence accordingly." *Id.*

The Court of Appeals elaborated on LUBA's reasoning:

> "Generally, as in the trial court and the agency setting, interrelated questions of fact and law are 'tried' and decided simultaneously in the local land use hearing process. From the standpoint of both litigants and decisionmakers, questions of fact and of law can have reciprocal effects on the answers to one another, and the ability to deal with the two as part of the same exercise is an essential tool of the advocate's craft. Hence, what petitioners appear to perceive as a chicken-and-egg problem that is somehow unique to this case is, in our view, simply a variation of a standard practice in which lawyers and judges have been engaging for centuries." 155 Or App at 373.

However, the Court of Appeals went on to agree in principle with LUBA that, in limited situations, a local government may be obligated to provide additional opportunities to present evidence or arguments:

> "We nevertheless agree with LUBA that, in certain limited situations, the parties to a local land use proceeding should be afforded an opportunity to present additional evidence and/or argument responsive to the decisionmaker's interpretations of local legislation and that the local body's failure to provide such an opportunity when it is called for can be reversible error. We also agree with LUBA, however, that *at least* two conditions must exist before it or we may consider reversing a land use decision on that basis. First, the interpretation that is made after the conclusion of the initial

> evidentiary hearing must either significantly change an existing interpretation or, for other reasons, be beyond the range of interpretations that the parties could reasonably have anticipated at the time of their evidentiary presentations. Second, the party seeking reversal must demonstrate to LUBA that it can produce specific evidence at the new hearing that differs in substance from the evidence it previously produced and that is directly responsive to the unanticipated interpretation." *Id*. at 373-74 (emphasis in original; citations and footnote omitted).[13]

The Court of Appeals concluded in *Gutoski* that the petitioners in that appeal failed to satisfy either of the above-described requirements. First, the court concluded that the plan policy by its terms did not have the "absolute and preclusive" effect that the petitioners argued it did. 155 Or App at 374. The court further concluded that, while the petitioners disagreed with the interpretation, that "does not mean that they should not have *reasonably foreseen* that it or something like it was among the interpretive possibilities that could have been taken into account in preparing for the evidentiary hearing." *Id*. Regarding the second requirement, the court first noted that the petitioners had already been given the opportunity for an evidentiary hearing and that what they sought was "the extraordinary remedy of being allowed to repeat the exercise." 155 Or App at 374-75. The court concluded such a second opportunity was not warranted "[i]n the absence of any demonstration that petitioners have a meaningful and nonredundant showing to make." *Id*.

Petitioners who seek to demonstrate that a local government committed error by closing the phase of a land use proceeding where the opportunity for argument and evidentiary presentation is provided and *then* adopting an unforeseeable interpretation of local land use legislation, without first reopening the record to allow parties to supplement their argument and evidentiary presentations, must make the minimum two-part showing that is articulated in *Gutoski*. We emphasize that there is nothing wrong with a local government

[13]In the omitted footnote, the Court of Appeals stated it did not believe it was necessary "to establish a definitive across-the-board test of the kind developed by LUBA[.]" 155 Or App at 374 n 2. Rather, the court described its two-part test as "the most minimal standards imaginable[.]" *Id*.

granting the parties an opportunity to present additional argument or evidence or both, with the benefit of the precise interpretation that the local government plans to adopt in its first decision or in a decision following a remand from LUBA. However, the two-part *Gutoski* test must be met to establish that the interpretation was so unforeseeable that it necessitates such a reopening of the record for additional argument or evidence, or both.

We consider below petitioner's arguments that a hearing was required following LUBA's remand under *Gutoski* to address unforeseeable interpretations.

1. Road Closure Recommendation B

As explained earlier in this opinion, the city adopted several alternative interpretations of Recommendation B in support of its decision that the master plan road closure recommendation either does not apply or is not violated by the proposed memorial. The city council concluded that the proposed memorial may be approved under all of these alternative interpretations. As we explain above, one of those interpretations accepts petitioner's view that Recommendation B requires that S.W. Washington Way ultimately be completely closed. The city council concludes the memorial is consistent with that recommendation, because approval of the memorial in this location would not prevent future closure of S.W. Washington Way. Since we have already agreed with respondents that this interpretation and application of Recommendation B is independently adequate to support the city's decision that the proposed memorial is consistent with Recommendation B, the first question under *Gutoski* becomes whether petitioner has demonstrated that this interpretation constitutes the kind of unforeseeable interpretation that could obligate the city to provide a hearing on remand. If not, it does not matter that the city might be obligated to provide a hearing if the challenged decision must rely on one or more of the other three alternative interpretations of Recommendation B.

Petitioner does not argue that this interpretation is one that changed an existing interpretation or is one that was unforeseeable for other reasons under the first *Gutoski* factor. Rather, petitioner presents the following argument:

> "* * * The city also asserts that the Memorial is not dependent upon the vehicular access and parking via SW Washington Way. Petitioner intended to submit argument and evidence that the Circulation Policy of the Master Plan requires full compliance with the required street closures and the Memorial will prevent full closure of Washington Way, including new information regarding the parking supply and bus access for the Memorial." Petition for Review 20 (citation omitted).

The above-quoted argument has two flaws. First, petitioner makes no attempt to argue that this interpretation is one that could not have reasonably been foreseen during the initial hearing in this matter. Indeed, the interpretation appears to be the same as or indistinguishable from the interpretation that petitioner supports. Second, petitioner makes no attempt to explain why the evidence it now wants an opportunity to submit at a second hearing could not have been submitted during the city's initial evidentiary hearing in this matter. For both of those reasons, we reject petitioner's argument that it was entitled to a hearing on remand to address Recommendation B.

This subassignment of error is denied.

2. Geographic Justification or Special Circumstances

In our resolution of the second assignment of error above, we reject petitioner's arguments that are directed at the city's findings addressing the memorial siting policy criterion concerning geographic justification or special circumstances. The interpretations that are expressed in the city's findings addressing this criterion are at least as foreseeable as the interpretation that was at issue in *Gutoski*. Because the first part of the two-part *Gutoski* test is not met, it follows that petitioner was not entitled to an additional hearing following our remand in *Carlsen III* to present evidence or argument concerning the city's ultimate interpretations of this criterion.

This subassignment of error is denied.

C. Hearing Following LUBA Remand

Under this subassignment of error, petitioner argues that even if an additional hearing was not required under *Gutoski* to address unforeseeable interpretations, at least one hearing is always required whenever LUBA remands a land use decision for a new decision.[14] Petitioner's argument that it has an unqualified right to at least one hearing following a LUBA remand, before the city adopts its decision on remand, is based on *Morrison v. City of Portland*, 70 Or App 437, 689 P2d 1027 (1984) and decisions of this Board that have relied on the *Morrison* decision. According to petitioner, the unqualified right to at least one hearing following a LUBA remand under *Morrison*, is unaffected by *Gutoski*.

Petitioner cites two of our decisions that lend support to its contention that at least one hearing of some sort is always required where LUBA remands a decision for inadequate findings. In *Friends of the Metolius v. Jefferson County*, 28 Or LUBA 591, 594 (1995) we concluded that because the county adopted "interpretive findings," on remand "[a]t a minimum, on remand the county should have conducted a hearing to allow the parties an opportunity to present argument based on the interpretations adopted by the county on remand." This decision suggests that a right to a hearing following a LUBA remand would be triggered by adoption of *any* interpretive findings. We specifically relied on *Morrison* in reaching that conclusion. *Id*. In *Collins v. Klamath County*, 28 Or LUBA 553, 556 (1995) (*Collins*), we appear to adopt an even broader rule:

> "The county suggests it was not required to hold any hearing following LUBA's remand in [*Collins v. Klamath County*, 26 Or LUBA 434 (1994) (*Collins I*)] The county was required to adopt a new decision after remand, because we determined in *Collins I* that the decision at issue there did not establish compliance with relevant approval standards. Thus, at a minimum, on remand, the county was required to conduct a hearing for argument concerning the proposal's compliance with LDO 54.040(C). * * *"

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[14] In *Gutoski* the county did provide one hearing before making its decision on remand. The question in *Gutoski* was whether the interpretation that was included in the county's remand decision, after the remand hearing was concluded, necessitated still another hearing before the remand decision could properly be adopted.

Collins can be read to say that any time a decision is remanded by LUBA for a new decision, the parties are entitled to an opportunity to present argument to the local decision maker before a decision to respond to the remand is adopted. We relied on *Morrison* in *Collins* as well.

In *Gutoski*, the Court of Appeals expressly rejected the petitioners' arguments that *Morrison* supported their right to a second evidentiary hearing following LUBA's remand, after the county adopted its interpretive findings:

> "Petitioners rely on *Morrison v. City of Portland*, 70 Or App 437, 689 P2d 1027 (1984), and on our statement there:
>
> > "'The plain import of LUBA's first opinion was that the city's decisional criteria needed clarification that only the city could provide. If that was a correct disposition, petitioners were entitled to present an argument with the benefit of the city's clarification of its standards.' *Id*. at 442 (footnote and citations omitted).
>
> "The petitioners in *Morrison* brought two sequential appeals to LUBA from city decisions allowing variances. In the first, LUBA remanded for the city to make clarifying findings 'about the meaning and application of its variance ordinance' because, LUBA concluded, the ordinance and the city's interpretation of it in the first local proceeding were so unclear that LUBA could not 'properly perform [its] review function.' *Id*. at 439, 689 P2d 1027. No party sought our review of LUBA's decision in the first appeal. In the city proceedings on LUBA's remand, the city made the explanatory findings, 'but did not permit petitioners or their attorney to offer argument or evidence[.]' *Id*. The petitioners appealed to LUBA again, and it affirmed the city's decision. The petitioners then sought our review of LUBA's disposition of the second appeal and contended that the city had erred by not allowing them to present evidence or argument following LUBA's remand in the earlier appeal. We agreed. We reasoned that the basis for the remand was LUBA's conclusion that the city's original proceedings had not produced a comprehensible interpretation of the ordinance, and it followed that the petitioners 'could not have been in a better position to present an argument for denying the variance before [the clarifying] findings were made than LUBA was to review the decision.' *Id*. at 442. We emphasized that our holding was logically compelled by LUBA's first decision, the correctness of which was not before us, but which we nevertheless questioned in a footnote. *Id*. at 442 n 3.

> "*Morrison* has no application beyond its own unusual facts. In the light of LUBA's decision in the first appeal there, it was a given at the outset of our review of the second that the city's original interpretation and application of the ordinance eluded comprehension. In essence, LUBA had decided in the first appeal that the city's original interpretation was such that the parties had not had a reasonable opportunity to make a responsive presentation in the original city proceedings but, in the second appeal, LUBA held that the city was not required to provide that opportunity along with the clarification that LUBA did require. Thus, the question before us here was effectively answered in *Morrison* before we began: The city's initial interpretation there was outside the range of reasonable anticipation. For the reasons we have discussed, that is not the case here." 155 Or App at 375-76.

We believe our decisions in *Friends of the Metolius* and *Collins* overstated the right of parties to a hearing following a LUBA remand, under *Morrison*. There certainly may be circumstances where a particular LUBA decision that remands a land use decision will require that the record be reopened for additional evidence or additional argument, or both.[15] However, there is no general or unqualified requirement that a local government necessarily *must* allow at least one hearing, following a remand from LUBA, before it adopts a new decision to respond to the remand.

The city's initial evidentiary hearing in this matter, the city's first decision at the conclusion of that initial evidentiary hearing, LUBA's remand of that decision in *Carlsen III*, and the city's second decision following LUBA's remand are all different stages of the same land use proceeding. *Beck v. City of Tillamook*, 313 Or 148, 151, 831 P2d 678 (1992). With the clarification provided by *Gutoski*, it is clear that the right that was at issue in *Gutoski* is the same right that was at issue in *Morrison*. That right is the right to an *additional* opportunity to present argument or evidence, after the parties have already been given that

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[15]For example, if LUBA concludes that a decision is not supported by substantial evidence or that the local government committed procedural errors that impermissibly prejudiced a party's right to present its evidence or arguments to the local government, a new hearing on remand would presumably be required in such cases to correct such errors. We do not attempt to describe all the circumstances where a particular LUBA decision that remands a land use decision will necessitate at least one hearing on remand. Petitioner's argument under this subassignment of error is not that there is anything in particular about LUBA's decision in *Carlsen III* that requires an additional hearing. Rather, petitioner's argument is that *Morrison* establishes a general rule that a hearing is always required following remand from LUBA.

opportunity and all that remains to be done is adopt a decision. That right may exist at more than one stage of a local land use proceeding, but it is only triggered when the local government includes unforeseeable or significantly changed interpretations in its written decision, and it does not exist unless the two-part test in *Gutoski* is satisfied.

Unless the legal errors that are identified in an appellate court or LUBA decision that leads to remand necessitate a hearing, we can think of no reason why a party should have an unqualified right to expand his or her argument and evidentiary presentation following a remand from LUBA. The Court of Appeals' decision in *Gutoski* makes it clear that its earlier decision in *Morrison* extends no such unqualified right. Because our decisions in *Friends of the Metolius* and *Collins* rely on *Morrison* to hold that such a broad or unqualified right exists, they are overruled. Petitioner had no unqualified right under *Morrison* to present argument and evidence following our remand in *Carlsen III*.

Petitioner's first assignment of error is denied.

The city's decision is affirmed.