BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

SAFEWAY, INC.,
Petitioner,

vs.

CITY OF NORTH BEND,
Respondent,

and

GRAHAM OIL CO.,
Intervenor-Respondent.

LUBA No. 2004-088

FINAL OPINION
AND ORDER

Appeal from City of North Bend.

Roger A. Alfred, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Perkins Coie, LLP.

No appearance by City of North Bend.

Jerry O. Lesan, Coos Bay, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Lesan and Finneran.

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

REVERSED 09/21/2004

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a city decision denying an application for parking lot improvements associated with a fuel station on a portion of an existing shopping mall parking lot.

MOTION TO INTERVENE

Graham Oil Co. (intervenor) moves to intervene on the side of respondent. There is no opposition, and it is allowed.

MOTION TO STRIKE

Petitioner moves to strike the documents at Appendix 14-17 of the intervenor's brief, arguing that the documents are not in the record and intervenor has not asserted a basis for LUBA to consider documents outside the record. Intervenor responds that the disputed documents are relevant to this appeal and were referenced in various documents in the record. Neither consideration is a basis for LUBA to consider documents outside the record. Petitioner's motion to strike is granted.

FACTS

The subject property is the northwestern portion of the Pony Village Mall, a large mall-style shopping center. Petitioner leases the subject property from the Pony Village Mall for use in the operation of a Safeway grocery store, which petitioner constructed in 1997. A large parking lot adjacent to the intersection of Virginia Avenue and Marion Street exists on the subject property. The area leased by petitioner is located in the rear of the main mall structure, which generally faces east, and is separated from the mall structure by an alleyway and truck delivery area. The subject property, as well as the entire shopping mall property, is zoned General Commercial (GC).

On July 27, 2001, petitioner applied to the city for site review approval of a drive-through fuel center at the northwest corner of the subject property. The fuel center is an outright permitted use in the GC zone. In 2002, the city council approved petitioner's site review application for the proposed fuel center, subject to conditions (2001 decision). Intervenor appealed the 2001 decision

to LUBA and LUBA affirmed, after rejecting a number of challenges intervenor made to the decision and the conditions imposed. *Graham Oil Co. v. City of North Bend*, 44 Or LUBA 18 (2003) (*Graham Oil*).

Among the issues addressed in the city's 2001 site review decision and challenged in *Graham Oil* was compliance with North Bend Zoning Ordinance (NBZO) off-street parking requirements, specifically NBZO 45(4) and NBZO 80(2). NBZO 45(4) provides in relevant part that the planning commission may require development within a "unified shopping area" to provide adequate off-street parking facilities.[1] NBZO 80(2) requires that retail commercial uses provide one parking space per 200 feet of floor area and that a "service station" provide one parking space "per 2,000 square feet lot area." Petitioner proposed 247 parking spaces to accommodate the parking needs of the existing Safeway store and the proposed fuel center. The 2001 site review decision adopted findings of compliance with NBZO 45(4) and 80(2), based on a determination that the portion of the Pony Village Shopping Mall leased by petitioner could provide enough parking spaces for both the existing Safeway store and the proposed fuel center. The city's decision further determined that the relevant "lot area" for purposes of calculating how many parking spaces petitioner must provide for the fuel center was the "total site area that will be occupied by the fueling center[.]"[2] Because petitioner had submitted a conceptual site plan for the fuel center

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[1] NBZO 45(4) provides, in relevant part:

> "No construction, reconstruction, expansion, addition or alteration shall be commenced in a unified shopping area without approval having first been obtained from the Planning Commission of the City of North Bend of the location and design of any use, structure, access road, driveway or fire lane; the location, design and adequacy of off-street parking facilities; the height of buildings; and the location, type and sufficiency of screening of adjacent residential areas. In granting any approval under this subsection, the Planning Commission may impose conditions and restrictions for the purpose of insuring orderly commercial development, with adequate access, parking and traffic control. * * *."

[2] The city's 2001 decision adopted the following findings to demonstrate compliance with NBZO 45(5) and related parking requirements:

> "**2.2 bb Finding**: Section 80(2) of the [NBZO] requires 1 parking space per 2,000 square feet lot area for the fueling center, and 1 space per 200 square feet of floor area for the Safeway store.

"* * * * *

"**2.2.be Finding**: 'Lot area' is defined by Section 3(22) of the [NBZO] as, 'The horizontal area within the lot lines of a lot.'

"**2.2.bf Finding**: 'Lot' is defined by Section 3(21) of the [NBZO] as, 'For the purposes of this ordinance, a parcel or tract of land.'

"**2.2bg Finding**: The fueling center will be located on the lot of the existing Safeway store, which has its own parking requirements.

"**2.2bh Finding**: The existing Safeway building is 48,494 square feet which requires 242.47 parking spaces.

"**2.2.bi Finding**: The required amount of parking spaces for the existing Safeway supermarket will not be reduced when the proposed fueling center is constructed.

"**2.2.bj Finding**: [247] spaces are proposed by Safeway on Sheet DD1 * * *.

"**2.2.bk Finding**: The applicant has proposed that the 'Lot Area' for purposes of determining the amount of parking required for the fueling center should be determined by the size of the area being leased for the fueling center. The Planning Commission agreed with this interpretation, but did not have the exact square footage of the area to be leased by Safeway. Therefore, the Planning Commission approved a maximum leased area of 'up to 9,000 square feet' as the 'Lot Area' for purposes of calculating the parking requirements, which would require the fueling center to have 4.5 parking spaces in addition to the 242.47 spaces required for the Safeway supermarket.

"**2.2.bl Finding**: * * * Before the City Council, the applicant provided evidence that the size of the parking lot area to be leased for the fuel center was 8,248 sq. ft, which was the area beneath the canopy, and above the underground fuel tanks.

"**2.2.bm Finding**: The City Council determined that for the purposes of calculating the amount of required parking for this application under Section 80 of the [NBZO], the term 'lot area' must be interpreted to mean the total site area that will be occupied by the fueling center, including all necessary components.

"* * * * *

"**2.2.bo Finding**: Based upon the above stated findings, the City Council determined that there is not sufficient information at this time to determine the exact size of the lot area for purposes of parking, although it is feasible that the applicant can comply with the parking standards.

"**2.2.bp Finding**: The City Council finds that the exact size of the lot area for purposes of required parking will be determined by the City Planner and Building Inspector as part of the application for a building permit, applying the clear and objective standards set forth in this Finding. Within the northeast corner of the Safeway lot, the size of the lot area of the fueling center for purposes of calculating parking required by Section 80 shall be determined by drawing a rectangular shape over the fueling center just large enough to encompass all of the components of the fueling center, as shown on the applicant's site plan (Sheet No. DD2) and itemized as follows: (a) all canopy areas, (b) the area above the underground storage tanks, (c)

rather than a detailed construction plan, the 2001 decision found that there was insufficient information to determine the exact size of the fuel center and hence the "lot area" and the required number of parking spaces. However, the city council concluded that it was feasible for the applicant to comply with the NBZO parking standards, and imposed a condition requiring that the exact size of the fuel center and the precise number of required parking spaces will be determined by the city planner and building inspector as part of the building permit application, under a prescribed set of "clear and objective" standards. The city imposed condition 8 to ensure compliance with the parking standards.[3] The 2001 decision also imposed condition 9, requiring compliance with the parking lot layout, construction and design requirements of NBZO 81 to 85.[4]

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the new vent stacks, (d) the new telephone unit, (e) the new air/water unit, and (f) the new curbs and planters surrounding items (c) - (e). * * *

"**2.2.bq Finding**: The City Council finds that the method they have set forth in regards to interpretation of the City's ordinance in regards to calculating parking is the best way to apply the intent of the entire ordinance, and provide meaning to the parking requirements which are intended to provide a sufficient amount of combined parking spaces for each of the two uses on a single site." Record 166-168.

[3] Condition 8 states:

"The exact size of the lot area for purposes of required parking shall be determined by the City Planner and Building Inspector as part of the application for a building permit, applying the clear and objective standards set forth in Finding 2.2bp in this Final Order. If any further interpretation or exercise of policy or legal judgment is required in determining lot area for parking purposes, the issue shall be referred back to the Planning Commission for a decision." Record 171.

[4] Condition 9 states:

"There shall be compliance with the layout, construction and design requirements set forth in Sections 81-85 and with parking space definition (34) for reconfiguration of existing parking and loading, and any new parking and loading to accommodate the proposed new use." Record 171.

In relevant part, NBZO 81 provides:

"* * * * *

3) In the event that several uses occupy a single structure or parcel of land, the total requirements for off-street parking shall be the sum of the requirements for the several uses computed separately.

On appeal of the 2001 decision to LUBA, intervenor's fifth assignment of error challenged the city's finding that it was feasible to comply with the NBZO parking standards and condition 8. We rejected that assignment of error and, as noted, affirmed the 2001 decision. *Graham Oil*, 44 Or LUBA at 35.

In September 2003, petitioner submitted a building permit application and a parking lot application to construct the proposed fuel station and to provide the required parking facilities. City planning staff reviewed petitioner's parking lot application for compliance with the conditions set forth in the 2001 decision and approved the application. With respect to condition 8, the city planner and building inspector applied the standards prescribed in the 2001 decision and determined that the fuel center "lot area" was 14,870.44 square feet, which requires 7.44 parking spaces. Based on that determination, staff approved petitioner's proposal to provide 250 parking spaces for the two uses on the subject property, the existing Safeway store and the fuel center.

Intervenor appealed the staff approval to the planning commission, arguing that the "lot area" for purposes of calculating required parking is the entire Pony Village Shopping Mall, and that the parking lot application must be denied because the amount of parking available on the entire mall property is insufficient to meet the needs of the mall tenants by approximately 172 spaces, as those needs are calculated under NBZO 80(2). The planning commission denied the appeal, concluding that intervenor's argument was essentially a collateral attack on the 2001 decision.

Intervenor appealed the planning commission's denial to the city council, advancing a number of different challenges. The city council concluded that some of intervenor's challenges were directed at determinations made in the 2001 decision that could not be revisited in an appeal

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4) Required parking facilities of two or more uses, structures, or parcels of land may be satisfied by the same parking facilities used jointly, to the extent that it can be shown by the owners or operators that the need for the facilities does not materially overlap (e.g., uses primarily of a daytime vs. nighttime nature) and provided that such right of joint use is evidenced by a deed, lease, contract or similar written instrument establishing such joint use."

of the parking lot application approval.[5] However, the city agreed with intervenor that it could revisit the issue of the relevant "lot area" and the required number of parking spaces, because that issue had not been resolved in the 2001 decision and because of new facts presented in the parking lot application.[6] The principal "new fact" relied upon was the lease between petitioner and the Pony Village Shopping Mall, which clarified that all mall tenants had shared parking rights on common areas on the mall property, including the portion leased by petitioner.[7]

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[5] The city council rejected intervenor's attempts to re-open issues regarding whether the fuel center was a safety hazard and whether fuel trucks would obstruct the alley between the leased portion and the existing mall structure. Record 7.

[6] The city's findings state, in relevant part:

> "Safeway has contended that the parking issue was decided in the earlier proceeding, and since it was not raised in the earlier proceeding, it has now been waived by the [intervenor]. The issue of the application of Sec. 81(3) to the entire Pony Village Mall complex for the determination of parking requirements was not raised or ruled on in the prior proceeding. Since it was not ruled on in the prior proceeding, it cannot be contended that it was already decided at that time. The issue is not waived by [intervenor], because new facts have been presented which demonstrate that the number of users whose parking requirements must be determined, and the determination of the correct parcel for purposes of parking, have changed. This is not an issue that was specifically addressed during the earlier proceeding." Record 6.

[7] The city council's findings state, as relevant here:

> "* * * The actual lease provisions submitted by Safeway with the parking application contain new evidence that contradicts earlier evidence [submitted during the 2001 proceedings] that demonstrated Safeway had the exclusive use of its own leased parking lot, that only two users were authorized to use the lot; and that the parking ordinance was complied with when applied to those two users and that site.
>
> "The evidence of record on this issue consists of evidence submitted prior to the Council's earlier decision granting a unified shopping area permit and evidence submitted with the current pending parking lot application. Review of a one-page Memorandum of Lease dated July 15, 1997 [submitted during the 2001 proceedings], at Section 2.2.1, shows the following language:
>
> > 'The Common Area shall be for the sole, exclusive and joint use of all tenants in the shopping center and their customers and invitees * * *. Tenant [Safeway] will direct its employees not to park on any portion of the Shopping Center except the Leased Premises while on duty. Landlord will require all occupants of [Pony Village] Shopping Center to direct their employees not to park on the Leased Premises while on duty * * *. Landlord grants to Tenant and its customers, invitees and employees such exclusive joint use of all said Common Area outside the Leased Premises. Tenant grants to Landlord's tenants and _____ and employees the right of such exclusive use of all said Common Area on the Leased Premises.' (Graham Ex. 13)

On the merits, the city council agreed with intervenor that, read together with NBZO 81(3), the "lot area" for purposes of calculating required parking under NBZO 80(2) is the entire Pony Village Shopping Mall.[8] The city council relied on calculations supplied by intervenor to conclude

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> "In January of 2002, the applicant's attorney submitted a letter discussing Safeway's right under its lease agreement to use other parking facilities in Pony Village Mall. (Graham Ex. 15). Both of these documents were submitted at the City's request for the purpose of demonstrating access rights on the part of the applicant. There is no clear indication in either of these documents that any parking rights are granted to other tenants of Pony Village Mall within Safeway's leased premises.
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> "The lease between Pony Village Properties and Safeway (submitted with the application for the parking lot permit in September 2003, Graham Ex. 6), explains in more detail the actual shared parking arrangement that exists between Safeway and Pony Village Mall. The lease reveals that:
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> "1. The Safeway leased site is considered to be a portion of the 'shopping center';
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> "2. The Common Area for purposes of shared parking is specifically defined as all portions of the shopping center not used for buildings including the Safeway leased premises;
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> "3. The lease specifically provides that there [are] reciprocal parking rights between the Safeway lease premises and the remainder of the shopping center;
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> "4. Joint use of the common area is specifically delineated to include parking and access of all tenants, customers and invitees of the shopping center including Safeway and is described as the 'primary purpose of the Common area.'
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> "The appellant also submitted a traffic impact analysis for Pony Village expansion prepared in 1997 and identified as Ex. 2. This analysis makes it clear that Pony Village acknowledges that the City of North Bend Ordinances for required parking apply to the full Pony Village site including the Safeway lease site.
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> "Graham Exs. 13 and 15 were submitted to demonstrate access, and they did not contain enough information to determine the nature of the shared parking arrangement between Safeway and Pony Village Mall. The new evidence received with the parking lot application, Graham Ex. 6, and the earlier traffic analysis, Graham Ex. 2, contain new evidence which fully explains the shared parking arrangement with Pony Village Mall. Based upon this new evidence concerning the shared parking relationship, the Council re-evaluates the parking lot application under Section 81(3) and (4)." Record 4-5.

[8] The city's findings state, in relevant part:

> "It is clear from the text of Ordinance 81(3) and the facts revealed by the Safeway/Pony Village Properties lease document submitted with the application for the parking lot by Safeway; and the Pony Village Properties' own analysis, that the 'parcel' within the meaning of Ordinance 81(3) to be considered in determining the parking requirements for Safeway's proposed fueling

that there is insufficient parking available on the whole mall property, including the proposed 250 spaces on the leased portion of the mall, after taking into consideration the shared parking rights of all mall tenants. The city council voted 3-2 to deny the parking lot application.

This appeal followed.

SECOND ASSIGNMENT OF ERROR

Petitioner argues that intervenor's challenge to the city's approval of the parking lot application for the fuel center is an impermissible collateral attack on the city's 2001 final decision approving the fuel center. Petitioner contends that the city erred in denying the parking lot application based on issues that were either resolved in the 2001 decision or the appeal of that decision, or issues that could have been, but were not, raised in the 2001 proceedings.

Intervenor responds that the 2001 decision did not resolve the issue of shared parking rights under the lease and how those rights affect the question of the "lot area" and the amount of required parking for purposes of the applicable NBZO parking standards. According to intervenor, that issue could not have been raised during the 2001 proceedings because the information petitioner submitted included only a portion of the lease, and that portion did not clearly indicate that the leased portion was subject to shared parking rights. It was not until the 2003 application for

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station includes the whole Pony Village Properties parcel and not just that portion leased by Safeway.

"Once the correct parcel is determined, then the method of determining the off-street parking requirements under Section 81 is arrived at by computing the number of parking spaces for each of the Pony Villages Properties' tenants as required by Section 80 and adding them together to determine the total number of parking spaces that need to be supplied by Pony Villages Properties on the Pony Village Shopping Center parcel.

"At the Planning Commission and City Council Hearings on Graham's appeal of the Staff's approval of the parking lot application, Graham submitted detailed evidence analyzing the requirements of Ordinance Sections 80 and 81(3). The analysis considered the Pony Village Shopping Center parcel in its entirety. Safeway offered no factual evidence to contest the analysis of the appellant regarding the number of parking spaces required in Pony Village Properties' parcel in general and in Safeway's parcel in particular. The appellant's parking analysis is additional evidence of the applicant's failure to demonstrate compliance with Section 81(3) and demonstrate compliance with the parking requirements taking into consideration the shared parking rights of the applicant and the remainder of Pony Village Mall." Record 5-6.

building permit and parking lot approval that petitioner submitted the entire lease, intervenor argues, and not until the entire lease could be examined that intervenor realized that the lease included shared parking rights. Intervenor argues that the city and other parties to the 2001 decision understood, based on petitioner's incomplete or misleading representations, that petitioner had exclusive control of parking on the leased portion, which led the city to apply the NBZO parking standards as it did. Finally, intervenor argues that even if the issue of shared parking rights could have been raised during the 2001 proceedings, when petitioner submitted the entire lease during the 2003 proceedings that opened the door for intervenor to raise new issues related to that evidence, including whether the proposed parking lot complied with applicable NBZO parking standards.

We agree with petitioner that the city's denial of the parking lot plan, based on the issues raised by intervenor, is in essence a collateral attack on the 2001 decision. As a general principle, issues that were conclusively resolved in a final discretionary land use decision, or that could have been but were not raised and resolved in that earlier proceeding, cannot be raised to challenge a subsequent application for permits necessary to carry out the earlier final decision. *See Piltz v. City of Portland*, 41 Or LUBA 461, 467 (2002) (absent statutory or other legal authority to revisit issues resolved in a tentative subdivision plat approval, such issues cannot be raised to challenge the final plat application); *Bauer v. City of Portland*, 39 Or LUBA 715, 725 (2000) (same). The relationship between the 2001 decision and the parking lot application at issue in the present case is similar to the relationship between the tentative plat and final plat approvals at issue in *Piltz* and *Bauer*. In both circumstances, the second decision is a largely nondiscretionary review for compliance with the conditions imposed in an earlier final decision. As was the case with *Piltz* and *Bauer*, no party cites us to any statute or legal authority allowing the city to revisit issues that were conclusively determined in an earlier final decision or that could have been raised, but were not. If the issues of the "lot area" and the number of required parking spaces that formed the basis for denial of the parking lot application were issues that were either resolved in the 2001 decision or that could have been raised, but were not raised, in the 2001 proceedings, then intervenor cannot

ask the city to revisit those issues in this proceeding. Under those circumstances, we believe, the city cannot deny the parking lot application based on those revisited issues.

An understanding of what the 2001 decision resolved is obviously critical. In our view, the city made a final determination in the 2001 decision that the relevant area of analysis for purposes of NBZO parking standards is the leased portion occupied by the existing Safeway and proposed fuel center. *See* n 2. Because the exact size of the fuel center was not yet determined, the 2001 decision left the exact number of spaces required for the fuel center to be calculated as part of building permit review, under standards no party disputes are clear and objective.

On appeal of the 2001 decision to LUBA, intervenor challenged the city's findings of compliance with the applicable NBZO parking standards and the conditions imposed to ensure compliance with those standards, but the Board rejected those challenges and ultimately affirmed the 2001 decision. Rightly or wrongly, once the dust settled on that decision, the only possible live issue remaining with respect to determining the "lot area" and how many parking spaces petitioner must provide was exactly how big the fuel center would be.

The issues intervenor raised in the review of the parking lot application regarding the correct "lot area" and shared parking rights have nothing to do with the size of the proposed fuel center. The issues intervenor raised were either resolved adversely to intervenor in the 2001 decision and on appeal of that decision or, as discussed below, are issues that could have been, but were not, raised in the 2001 proceeding.

Stated differently, the city's denial of the parking lot application effectively negates determinations that were conclusively resolved in the 2001 decision and the appeal of that decision. In essence, intervenor argued to the city, and the city found, that the 2001 decision made a mistake in determining the "lot area" and in limiting required parking on the leased portion to that needed by the two uses on that portion. The city's attempt to correct that mistake by denying a parking lot application that is consistent with the 2001 decision is nothing short of a collateral attack on the correctness of the 2001 decision. It seems almost certain that, had the city applied its current

understanding of the law and the facts during the 2001 proceedings, it would have denied the 2001 site review application for failure to comply with the NBZO parking standards.[9]

We disagree with intervenor that the issues it raised and that formed the basis for the city's denial of the parking lot application could not have been raised during the 2001 proceedings. We understand intervenor to argue that it and the city failed to appreciate during the 2001 proceedings that NBZO 80(2) and 81(3), read together, require that the "lot area" for purposes of determining the amount of parking required for the proposed fuel center is the entire Pony Village Shopping Mall. However, compliance with the NBZO parking standards was a hotly debated issue in the 2001 proceedings, and intervenor does not explain why the issue of what NBZO 80(2) and 81(3) require when read together could not have been raised in the earlier proceeding.

We also disagree with intervenor that the issue of shared parking rights under the lease could not have been raised during the 2001 proceedings. As an initial matter, we note the parties' agreement that the portion of the lease submitted during the 2001 proceeding was submitted to substantiate that the leased portion benefits from an easement for access over the mall property. Condition 5 of the 2001 decision requires petitioner to submit a "copy of the easement for shared access" at the time of building permit review. During building permit and parking lot application review petitioner ultimately submitted the entire lease to satisfy condition 5.[10] As far as we can tell, no portion of the lease was submitted to demonstrate compliance with NBZO parking standards, either in the 2001 proceeding or the current proceeding. That makes it highly unlikely that the city

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[9] Petitioner points out, and there seems no dispute, that it is physically impossible for petitioner to provide the additional 172 parking spaces required to meet the needs of the entire mall on the leased portion of the mall parcel, as intervenor and the city calculate those needs. Petitioner does not control any part of the mall parcel other than the leased portion. In short, denial of the parking lot application effectively renders the 2001 site plan approval nugatory.

[10] Petitioner initially submitted only three additional pages of the lease, and resisted intervenor's request for the entire lease, arguing that the remainder of the lease is a "proprietary matter" that is none of intervenor's business. Record 258. Although intervenor assigns suspicious motives to petitioner's reluctance to provide the entire lease, it is easy to understand petitioner's reluctance to disclose proprietary business documents to a business competitor and land use application opponent.

relied on the portion submitted in 2001 to determine the "lot area" or to resolve compliance with the NBZO parking standards.

In any case, intervenor argued to the city, and the city found, that the portion of the lease submitted in 2001 did not adequately disclose the shared parking rights under the lease. Not until the entire lease was examined, the city found, did it become clear that the lease granted mall tenants the reciprocal right to park in any common area on the mall parcel, including the common areas on the leased portion. However, it seems reasonably clear to us from the portion of the lease submitted in 2001, particularly the last sentence, that the lease grants reciprocal rights to park on the common area on the leased portion. *See* n 7. While examination of the entire lease may have clarified what constituted the common area and made it crystal clear that the leased portion was subject to shared parking rights, the information supplied during the 2001 proceeding was sufficient to put intervenor on notice that the leased portion was subject to at least some shared parking rights. There is no reason why that issue could not have been raised in the 2001 proceeding.

Intervenor next argues, and the city's decision can be read to suggest, that during the 2001 proceedings petitioner represented to the city that it had exclusive right to park on the leased portion of the mall property. We assume, without deciding, that under some circumstances an applicant's misrepresentation of a material fact in a discretionary permit proceeding might suffice to allow the local government to deny subsequent administrative permits that are consistent with and carry out that earlier discretionary permit approval. However, neither intervenor nor the city's decision have established that during the 2001 proceeding petitioner represented that it had the exclusive right to park on the leased portion. Nothing in the record or elsewhere cited to us indicates that petitioner made that representation.[11] While it is clear that petitioner took the position that the amount of

[11] Some of intervenor's citations are to documents at appendix 14-17 of its brief that we have stricken. To avoid an unnecessary remand in case our grant of petitioner's motion to strike those documents is overturned on appeal, we have examined the documents at appendix 14-17. Like the record citations provided us, those documents do not establish that petitioner represented that it had the exclusive right to park on the leased portion.

parking required by NBZO 80(2) and 81(3) should be determined based on the existing and proposed uses within the leased portion, a position that staff, the planning commission, the city council and intervenor accepted at the time, that position falls far short of representing that petitioner has the exclusive right to park on the leased portion.

Next, we understand intervenor to argue that when petitioner submitted new evidence during the building permit and parking lot review, *i.e.*, the entire lease, it opened the door for intervenor to raise "new issues" and submit evidence related to that new evidence, and thus allowed the city to revisit otherwise final determinations made in the 2001 decision. Intervenor cites to *Prineville Properties Inc. v. City of Prineville*, 32 Or LUBA 139 (1996), for the proposition that when the local government reopens the evidentiary record on remand from LUBA, new issues may be raised and may be the basis for a new decision that modifies or is even contrary to determinations resolved in the initial decision and affirmed by LUBA.

Prineville Properties Inc. does not assist intervenor. *Prineville Properties Inc.* involved an open-ended evidentiary remand of phase one of a multi-phase tentative subdivision plat approval. The local government combined the remand proceedings with the proceedings on the next ten subdivision phases, under a single master plan. The master plan modified the sequence of phase one, and the applicant appealed to LUBA, arguing that because sequencing was not challenged in the appeal of the initial decision, the local government had no authority to modify the sequencing on remand. We disagreed, noting the open-ended nature of our remand, and the different standards that applied to the combined master plan proceedings. *Id.* at 145. In the present case, there was no remand of the 2001 decision, evidentiary or otherwise.

We understand intervenor to argue, however, that the parking lot application is a different land use application than the 2001 site review application, subject to at least nominally different standards. According to intervenor, the city's denial of the parking lot application was based on NBZO 81(3), which was not applied or considered in the 2001 decision, but which was applied for the first time pursuant to condition 9. *See* n 4. Therefore, intervenor argues, the city's denial for

noncompliance with NBZO 81(3) is not a collateral attack on the 2001 decision, because compliance with NBZO 81(3) was not at issue in the 2001 proceedings.

Again, we disagree. As an initial matter, it is not entirely accurate to say that NBZO 81(3) was not applied or considered during the 2001 decision. As intervenor points out, albeit in a different context, the 2001 staff report applied NBZO 81(3) to determine that the number of required parking spaces shall be the sum of the spaces needed for the existing Safeway store and proposed fuel center on the leased portion. Record 342. In other words, the 2001 staff report presumed, as apparently did all parties to the 2001 proceeding, that the relevant area of analysis for purposes of both NBZO 80(2) and 81(3) is the leased portion of the mall property.

It is true that condition 9 expressly requires petitioner to comply with the "layout, construction and design requirements set forth in Sections 81-85" for "reconfiguration of existing parking and loading, and any new parking and loading to accommodate the proposed use." However, for several reasons condition 9 cannot be read to authorize the city to apply NBZO 81(3) to revisit its otherwise final determinations regarding "lot area" and how to calculate the number of required parking spaces. First, condition 9 does not concern lot area or calculating the number of required parking spaces, matters that are addressed in condition 8 and in the findings quoted at n 2. Instead, it concerns "layout, construction and design requirements" for "reconfiguration" of existing parking and new parking, which suggests that the city intended condition 9 to require review of a specific parking plan for compliance with width, striping and similar technical requirements in NBZO 81 to 85. Since NBZO 81(3) is not a "layout, construction, or design requirement," it is doubtful that the city intended condition 9 to require evaluation (or reevaluation) under NBZO 81(3). Second, and more importantly, the city's application of NBZO 81(3) in the present case is completely inconsistent with condition 8, and with final determinations made in the 2001 decision that the relevant area of analysis for purposes of parking requirements is the leased portion. Even if NBZO 81(3) is applicable to the parking lot application pursuant to condition 9, in our view the city cannot deny that application for noncompliance with

NBZO 81(3), when doing so is inconsistent with how NBZO 81(3) was applied during the 2001 proceedings, with condition 8, and with final, conclusive determinations made in the 2001 decision.

In sum, the 2001 decision determined, rightly or wrongly, that the relevant area of analysis for purposes of determining the number of required parking spaces was the leased portion. The only live issue remaining regarding the required number of parking spaces was the exact size of the fuel center, to be determined as part of an otherwise ministerial review process. The issues intervenor raised in the parking lot application review process regarding the correct area of analysis or how to calculate the required number of parking spaces were either resolved conclusively in the 2001 decision, or could and should have been raised in that proceeding. Intervenor's challenges are, in substance, collateral attacks on the correctness of the 2001 decision. Just as intervenor cannot collaterally attack the 2001 decision in the context of the present application, by revisiting issues that were conclusively resolved in the 2001 decision, the city cannot deny the application based on those revisited issues.

The second assignment of error is sustained.

FIRST AND THIRD ASSIGNMENTS OF ERROR

Because we have concluded that the city erred in denying the parking lot application for the reasons expressed in the second assignment error, no purpose would be served by addressing petitioner's first and third assignments of error.

CONCLUSION

Petitioner requests that we "reverse the decision of the city council and issue an order directing the city to affirm the decision of the planning commission approving [petitioner's] application." Petition for Review 29. While intervenor requests that we affirm the city council decision, intervenor does not otherwise respond to petitioner's requested relief.

OAR 661-010-0071(1)(a) and (c) provide that LUBA shall reverse a land use decision when "[t]he governing body exceeded its jurisdiction" or "[t]he decision violates a provision of applicable law and is prohibited as a matter of law." OAR 661-010-0071(2)(d) provides in

relevant part that LUBA shall remand a land use decision for further proceedings when "[t]he decision improperly construes the applicable law, but is not prohibited as a matter of law."

In our view, reversal is appropriate rather than remand. Denial of the challenged parking lot application for a reason that amounts to an impermissible collateral attack on the 2001 decision is inconsistent with applicable law and prohibited as a matter of law. However, we decline to order the city to affirm the planning commission approval, as petitioner requests. The only authority we are aware of that would allow us to order the city to approve a development application is ORS 197.835(10)(a)(A).[12] Petitioner does not cite to that statute, or attempt to demonstrate that either of the circumstances described in ORS 197.835(10(a)(A) or (B) are present, or that the findings required by the statute can be made in this case.

The city's decision is reversed.

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[12] ORS 197.835(10) provides:

> "(a) [LUBA] shall reverse a local government decision and order the local government to grant approval of an application for development denied by the local government if [LUBA] finds:
>
> > "(A) Based on the evidence in the record, that the local government decision is outside the range of discretion allowed the local government under its comprehensive plan and implementing ordinances; or
> >
> > "(B) That the local government's action was for the purpose of avoiding the requirements of ORS 215.427 or 227.178.
>
> "(b) If the board does reverse the decision and orders the local government to grant approval of the application, the board shall award attorney fees to the applicant and against the local government."