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

GENE LEYDEN,
Petitioner,

and

WILL, LLC, and JAMES RICHARDI,
Intervenors-Petitioners,

vs.

CITY OF EUGENE,
Respondent,

and

EUGENE CIVIC ALLIANCE,
Intervenor-Respondent.

LUBA Nos. 2019-009 and 2019-010

WILL, LLC,
Petitioner,

and

GENE LEYDEN and JAMES RICHARDI,
Intervenors-Petitioners,

vs.

CITY OF EUGENE,
Respondent,

and

EUGENE CIVIC ALLIANCE,
Intervenor-Respondent.

LUBA Nos. 2019-012 and 2019-013

JAMES RICHARDI,
Petitioner,

and

GENE LEYDEN and WILL, LLC,
Intervenors-Petitioners,

vs.

CITY OF EUGENE,
Respondent,

and

EUGENE CIVIC ALLIANCE,
Intervenor-Respondent.

LUBA Nos. 2019-016 and 2019-017

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Bill Kloos, Eugene, represented petitioner/intervenor-petitioner Gene Leyden.

Micheal M. Reeder, Eugene, represented petitioners/intervenors-petitioners James Richardi and Will, LLC.

Emily N. Jerome, Deputy City Attorney, and Lauren A. Sommers, Assistant City Attorney, Eugene, represented respondent.

William K. Kabeiseman, Portland, represented intervenor-respondent Eugene Civic Alliance.

ZAMUDIO, Board Member; RYAN, Board Chair; RUDD, Board Member, participated in the decision.

TRANSFERRED 07/23/2019

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

Opinion by Zamudio.

NATURE OF THE DECISION

In these consolidated appeals, petitioners and intervenors-petitioners (collectively, petitioners) appeal two separate building permits issued by city planning staff to construct a neighborhood center, including an administrative building, gymnasium, and athletic courts, and an outdoor athletic field with seating, restrooms, concourse, storage, a ticket booth, and a press box (collectively, the development).

BACKGROUND

On February 12, 2019, the Board received the original record transmittal from the city in these appeals. On February 22, 2019, prior to the deadline for filing objections, petitioners filed their petition for review. On February 25, 2019, intervenor-respondent Eugene Civic Alliance (ECA) filed precautionary record objections. On March 8, 2019, the city filed a response to ECA's record objections, disputing one objection and conceding another, and filed supplemental record materials consistent with that concession. On March 11, 2019, petitioners responded to the record objections, arguing that the objections should be denied and, consequently, the record should not be supplemented pursuant to the city's concession and supplemental record.

On March 22, 2019, after transmitting the record and supplemental record, the city filed a motion to dismiss, asserting that LUBA lacks jurisdiction over the building permit decisions because those building permits are not "land use

decisions" under ORS 197.015(10)(b)(B), which excepts from LUBA's review "a decision of a local government * * * [t]hat approves or denies a building permit issued under clear and object land use standards." On March 28, 2019, petitioners filed a joint response to the motion to dismiss and a contingent motion to transfer to circuit court. On April 4, 2019, the Board issued an order suspending the appeals pending resolution of the motion to dismiss. On June 7, 2019, petitioners filed a motion to defer ruling on the motion to dismiss and to continue briefing on the merits. On June 14, 2019, the city filed a response opposing petitioners' motion to defer ruling on the motion to dismiss. The pending record objections have no impact on the jurisdictional issues raised in the city's motion to dismiss or petitioners' response to the motion to dismiss.

An explanation of the procedural history of this development provides context for our decision. The development that is the subject of the building permit approvals received prior land use approvals, including (1) a 2015 Zone Verification, and (2) a 2018 site plan review, adjustment review, and traffic impact analysis review (collectively, 2018 Approval). Those decisions were appealed to LUBA and we affirmed. *Richardi v. City of Eugene*, ___ Or LUBA ___ (LUBA Nos 2018-082/083, Oct 24, 2018), *aff'd*, 295 Or App 840, 434 P3d 990 (2019) (affirming 2018 Approval and rejecting collateral attacks on 2015 Zone Verification); *Leyden v. City of Eugene*, ___ Or LUBA ___ (LUBA No

2018-114, Feb 8, 2019) (dismissing an untimely appeal of the 2015 Zone Verification).[1]

As we explained in *Richardi*, in the 2015 Zone Verification, the city verified that a neighborhood center and outdoor athletic field are outright permitted uses in the Public Land (PL) zone, relying on Eugene Code (EC) 9.2682.[2] *Richardi*, ___ Or LUBA ___ (LUBA Nos 2018-082/083, Oct 24, 2018)

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[1] While this appeal was pending, petitioner Leyden filed another appeal challenging the development. *Leyden v. City of Eugene*, __ Or LUBA __ (LUBA No 2019-057). At the time of this decision, that appeal is suspended pursuant to the parties' stipulation.

[2] EC 9.2682(1) provides, in part:

> "Public Land Zone Land Use and Permit Requirements.
>
> "(1) Permitted Public or Semi-Public Uses. The following uses are permitted in the PL public land zone:
>
> "* * * * *
>
> "(b) Public Uses, operated by the public agency that owns the development site, except for the intensification of uses that require a site review or conditional use permit according to EC 9.2683 Special Use Limitations. Examples include government offices, libraries, park and recreation facilities, neighborhood and community centers, post offices, fire stations, pump stations, electrical substations, school district offices, schools, reservoirs, and specialized housing. (Refer to EC 9.2683 Special Use Limitations.)
>
> "* * * * *

(slip op at 5, 7–8). The planner that issued the 2015 Zone Verification reasoned that "sites owned by non-profit organizations established primarily to provide public uses are treated the same as public agencies regarding permitted uses allowed in EC 9.2682(1)."[3] Record 1861.

The 2015 Zone Verification explained that, while the neighborhood center and outdoor athletic field are outright permitted uses in the PL zone, "future work on the site will need to comply with applicable zoning code and building code standards." Record 1861–62. In the 2018 Approval, the city determined that the proposed uses require site review and traffic impact analysis because the

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> "(d) The following uses not operated by the public agency that owns the property when the owner declares that the property is not currently needed for public uses:
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> "1. Athletic Field, outdoor.
>
> "* * * * *
>
> "4. Community and Neighborhood Centers.
>
> "* * * * *
>
> "9. Combinations of the above uses." (Boldface and underscoring omitted.)

[3] Petitioners concede that ECA is a "public agency" that owns the development site for purposes of conducting permitted uses in the PL zone because ECA is a public/private partnership with the city. Petition for Review 27, 29. *See* EC 9.2680 ("As used in EC 9.2680 through 9.2687, 'public agency' includes public/private partnerships that conduct the activities authorized in those sections.").

proposed uses are located within 300 feet of residentially zoned land and will generate over 100 peak hour vehicle trips. Record 3067; EC 9.2683(2); EC 9.8670.[4] ECA submitted a detailed site plan and traffic impact analysis and requested adjustments to lot standards, landscaping standards, driveways and internal circulation, minimum off-street parking requirements, and location of public access connections. *Id.* In the 2018 Approval, the city approved with conditions the site plan review, traffic impact review, and adjustment review. LUBA and the Court of Appeals affirmed the 2018 Approval.

ECA subsequently submitted building permit applications for structures and other infrastructure approved by the 2018 Approval. Petitioners submitted comments to the city in opposition to the building permit applications. The city

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[4] EC 9.2683(2) provides:

> "Permitted Uses Subject to Site Review. When a proposed public use, other than those listed in subsection (3) of this section, is to be located within 300 feet of land in the broad zone category of residential, and such use will generate the need for a Traffic Impact Analysis according to EC 9.8670 Applicability, such use shall be subject to an approved site review application or an approved final planned unit development application." (Boldface and underscoring omitted.)

EC 9.8670(1) requires traffic impact analysis review if "[t]he development will generate 100 or more vehicle trips during any peak hour as determined by using the most recent edition of the Institute of Transportation Engineer's Trip Generation."

did not hold a public hearing on the building permit applications. The city issued the building permits and this appeal followed.

JURISDICTION

LUBA is authorized to review land use decisions and limited land use decisions. ORS 197.825(1). ORS 197.015(10)(a) defines "land use decision" in relevant part as a final decision of a local government that "concerns" the application of a statewide planning goal, comprehensive plan provision, or land use regulation. "A decision 'concerns' the application of a goal, plan provision or land use regulation if the local government applied, or should have applied, the goal, provision or regulation in making the decision." *Willamette Oaks LLC v. City of Eugene*, 68 Or LUBA 162, 167 (2013) (citing *Jaqua v. City of Springfield*, 46 Or LUBA 566, 574 (2004)).

It is undisputed that the city applied some land use regulations to the building permit applications. The city does not argue that the building permits are not land use decisions as described in ORS 197.015(10)(a). Instead, the city argues that the building permit approvals fall within the building permit exception set out in ORS 197.015(10)(b)(B), for decisions that approve or deny "a building permit issued under clear and objective land use standards."[5] *See*

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[5] ORS 197.015(10)(b)(B) provides:

"(10) 'Land use decision':

"* * * * *

Madrona Park, LLC v. City of Portland, ___ Or LUBA ___ (LUBA No 2019-032, July 17, 2019) (slip op at 5–10) (explaining the legislative history of the building permit exception).

At the outset, we observe, as we have before, the inescapable awkwardness that in order to resolve the jurisdictional question of whether the challenged decisions are land use decisions subject to our review we must review the merits of petitioners' arguments. *Jaqua*, 46 Or LUBA at 574 n 5. For the reasons explained below, we agree with the city that we lack jurisdiction to review the challenged building permits.

A land use standard is not "clear and objective" for purposes of ORS 197.015(10)(b)(B) if the standards under which the permit was issued are "ambiguous." *See Richmond Neighbors v. City of Portland,* 66 Or LUBA 464, 466 (2012) (citing *Tirumali v. City of Portland,* 169 Or App 241, 246, 7 P3d 671 (2000), *rev den*, 331 Or 674 (2001)). The applicable land use regulations are ambiguous if they "can plausibly be interpreted in more than one way." *Id.* In general, approval standards are "clear and objective" if they do not impose "subjective, value-laden analyses that are designed to balance or mitigate

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"(b) Does not include a decision of a local government:

"* * * * *

"(B) That approves or denies a building permit issued under clear and objective land use standards[.]"

impacts[.]" *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 158 (1998), *aff'd*, 158 Or App 1, 970 P 2d 685, *rev den*, 328 Or 594 (1999).

A. Land Use Standards Applied in Issuing the Building Permits

Petitioners argue that the land use regulations that the city undisputedly did apply in issuing the building permits are not clear and objective. In its site review application, ECA proposed outdoor lighting for the development including 12-foot pedestrian lights, 20-foot concourse lights, 25-foot parking lot lights, and 90-foot field lights. Record 3070. The 2018 Approval approved that outdoor lighting subject to future compliance with EC 9.6725. *Id.* The city applied the lighting standards in EC 9.6725 in approving the building permit applications. Petitioners argue that two lighting standards in EC 9.6725 that the city applied are not clear and objective.

1. Parking Lot Lighting

EC 9.6725(9) provides:

> "Parking Lot Lighting. Parking lot lighting shall be designed to provide the minimum lighting necessary to ensure adequate vision and comfort in parking areas, and not to cause glare or direct illumination onto adjacent properties or streets. Parking lot lighting shall comply with the following standards:
>
> "(a) All lighting fixtures serving parking lots shall be cut-off fixtures as defined by the Illuminating Engineering Society of North America (IESNA) and as defined in this land use code.
>
> "(b) Alternative: Within an officially designated historic district, the design for an area may suggest the use of parking lot lighting fixtures of a particular 'period' or architectural style,

as either alternatives or supplements to the lighting described above.

"1. If such fixtures are not 'cut-off' fixtures as defined by IESNA, the maximum initial lumens generated by each fixture shall not exceed 2000.

"2. Mounting heights of such alternative fixtures shall not exceed 20 feet.

"(c) Parking area lighting standards in the various lighting areas are as shown in Table 9.6725(9) Parking Lot Lighting Standards." (Boldface omitted.)

Table 9.6725(9) Parking Lot Lighting Standards			
	High Ambient Areas O-4	**Medium Ambient Areas O-3**	**Low Ambient Areas O-2**
Mounting Height (Maximum). (Mounting height is the vertical distance between the surface being illuminated and the bottom of the lighting fixture.)	**30 ft**	**25 ft**	**25 ft**
Minimum - Maximum Average Maintained Illumination Level.	**.6 to 4.0 foot-candle**	**.6 to 2.0 foot-candle**	**.2 to .8 foot-candle**
Uniformity Ratio. (Uniformity ratio is the ratio of average illumination to minimum illumination.)	**4:1**	**4:1**	**4:1**

EC 9.6725(8) provides outdoor lighting areas classified as "intrinsically dark," "low ambient," "medium ambient," or "high ambient." In the 2018 Approval, the planning director found that the "the proposed use in the PL zone is considered to be in a 'High Ambient Light Area' with a relatively high level of nighttime activity (e.g. outdoor sporting events), according to EC 9.6725(8)(d)."[6] Record 3070.

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[6] EC 9.6725(8)(d) provides:

Petitioners argue that the parking lot lighting standards are not clear and objective because the terms "minimum," "necessary," and "adequate" require subjective determinations. Petition for Review 39; Response to Motion to Dismiss 13–15. The city responds, and we agree, that the terms that petitioners argue are ambiguous describe the desired results achieved by compliance with the design standards in EC 9.6725(9)(a), (b) and (c), and do not represent independent standards that planning staff applied in issuing the building permit.

Petitioners do not challenge the actual land use standards in EC 9.6725(9)(a), (b) and (c) or explain how they are ambiguous or impose "subjective, value-laden analyses." We conclude that those standards are clear and objective.

EC 9.6725(9)(a) requires parking lot lighting fixtures be "cut-off fixtures" as defined by the IESNA and the EC. EC 9.0500 provides the following definition:

"Cut-off Light Fixture. A light fixture designated as cut-off when

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> "High Ambient Light Areas (O-4) shall be permitted in areas planned or developed for a mix of uses and a high level of nighttime activity. This includes areas in the broad zone category of commercial, except for C-1, and areas in the broad zone category of employment and industrial. It also includes portions of colleges and universities, high schools, the fairgrounds, and other areas zoned PL determined by the planning director to have a high level of nighttime activity. Areas determined not to have a high level of nighttime activity that are zoned PL shall be considered Low Ambient Light Areas (O-2)."

> the candlepower per 1000 lamp lumens does not numerically exceed 25 (2 ½ %) at an angle of 90 degrees above nadir (horizontal), and 100 (10%) at a vertical angle of 80 degrees above nadir. This applies to any lateral angle around the lighting fixture." (Boldface omitted.)

That standard is defined, quantified, and unambiguous, and thus is clear and objective.

EC 9.6725(9)(b) applies to lighting "[w]ithin an officially designated historic district." There is no indication that any portion of the development will be located "[w]ithin an officially designated historic district." It does not appear to us that the city applied EC 9.6725(9)(b) in issuing the challenged building permits. Even if it did, EC 9.6725(9)(b) provides that, if alternative period-styled light fixtures are used, and such fixtures are not "cut-off fixtures," "the maximum initial lumens generated by each fixture shall not exceed 2000" and "[m]ounting heights of such alternative fixtures shall not exceed 20 feet." Those standards are unambiguous and thus clear and objective.

EC 9.6725(9)(c) requires parking lot lighting conform to the standards in Table 9.6725(9). The development lighting area designation was previously determined to be High Ambient. For that area, Table 9.6725(9) provides that parking lot lighting maximum mounting height, minimum and maximum average illumination level, and uniformity ratio. Those terms are all specifically defined in the standard. Those standards are unambiguous and thus clear and objective.

2. Lighting of Outdoor Performance Facilities

EC 9.6725(12) provides:

"Lighting of Outdoor Performance Facilities. Outdoor nighttime performance events (concerts, athletic contests, etc.) have unique lighting needs. Illumination levels vary, depending on the nature of the event. The regulations in this section are intended to allow adequate lighting for such events while minimizing skyglow, reducing glare and unwanted illumination of surrounding streets and properties, and reducing energy consumption. These uses shall comply with the following standards:

"(a) Design Plan: A lighting design plan shall be submitted which shows in detail the proposed lighting installation. The design plan shall include a discussion of the lighting requirements of various areas and how those requirements will be met.

"(b) Dual System: The main lighting of the event (spotlighting or floodlighting, etc.) shall be turned off no more than 60 minutes after the end of the event. A low level lighting system shall be installed to facilitate patrons leaving the facility, cleanup, nighttime maintenance, etc. The low level lighting system shall provide an average horizontal illumination level, at grade level, of no more than 3.0 foot-candles with a uniformity ration (average to minimum) not exceeding 4:1.

"(c) Primary Playing Areas: Where playing fields or other special activity areas are to be illuminated, lighting fixtures shall be specified, mounted, and aimed so that their beams fall within the primary playing area and immediate surroundings, and so that no direct illumination is directed off the site.

"(d) Parking Areas: Lighting for parking areas shall comply with EC 9.6725(9).

"(e) Pedestrian/Bikepath Areas: Lighting for pedestrian and bike pathways shall comply with EC 9.6725(8)(b)." (Boldface omitted.)

Petitioners argue that the outdoor performance facility lighting standards are not clear and objective because the terms "adequate", "minimizing", and

"unwanted" compel subjective determinations. Petition for Review 39; Response to Motion to Dismiss 13–15. The city responds, and we agree, that the terms that petitioners argue are ambiguous describe the desired results that are achieved by compliance with the clear and objective design standards.

Petitioners do not challenge the actual land use standards in EC 9.6725(12)(a) through (e) or explain how they are ambiguous or impose "subjective, value-laden analyses." We conclude that those standards are clear and objective.

EC 9.6725(12)(b) requires a dual lighting system with event lights and low-level lights for ingress and egress and maintenance. The standard does not specify a maximum illumination for event lights. However, EC 9.6725(12)(c) requires lighting for playing fields be situated so that light "beams fall within the primary playing area and immediate surroundings and so no direct illumination is directed off the site." EC 9.6725(12)(b) requires the event light system be turned off no more than 60 minutes after the end of the event. The low-level system is required to provide a specified maximum "average horizontal illumination level, at grade level." *Id.* Those standards are unambiguous and thus clear and objective.

EC 9.6725(12)(d) requires parking areas comply with standards in EC 9.6725(9), which we concluded above are clear and objective standards.

EC 9.6725(12)(e) requires pedestrian and bikepath areas comply with standards in EC 9.6725(8)(b), which provides, in pertinent part:

> "1. Walkways or pathways shall be illuminated to a minimum average maintained luminance of .3 foot-candle and not to exceed a maximum average maintained luminance of .9 foot-candle.
>
> "2. Pedestrian/bike tunnels shall be illuminated to a minimum average maintained luminance of 4.0.
>
> "3. Any other lighting fixtures not illuminating walkways, bike paths, tunnels, or parking lots shall be designed to direct light downward, and light sources shall have an initial output of no more than 1,500 lumens."

Those standards are unambiguous and thus clear and objective.

As we have explained, subsections (b) through (e) are clear and objective standards. Accordingly, EC 9.6725(12)(a), which requires a design plan showing the proposed lighting installation and explaining how standards in subsections (b) through (e) are met, is also clear and objective.

The lighting standards in EC 9.6725 that the city applied in issuing the challenged building permits are clear and objective standards.

B. Other Land Use Standards

1. "All land use applications are approved"

The city argues that in approving the building permits in this case, the city planning staff would refer only to the 2015 Zone Verification and the 2018 Approval because those decisions approved the development for which ECA subsequently sought building permits. Petitioners respond:

> "The city ignores the fact that the record shows that the building permit application goes to the planning department for review for land use compliance and, as much as the public works staff may

> simply look at the land use sign-off as an objective yes-no determination, the planning staff exercised discretion during the land use review and sign-off in this proceeding to indicate that all land use approvals have been received." Response to Motion to Dismiss 8.

Petitioners base that argument on a "Check Tab and Staff Notes" spreadsheet in the building permit approval record. A notation in that spreadsheet states "Per email: performance agreement for Civic and all of the land use applications are approved." Record 35; Response to Motion to Dismiss 8; Petition for Review 11.

"The focus of the building permit exclusion is on the applicable land use standards," and not on comments in the record or arguments made during the proceedings that led to the issuance (or denial) of the building permit. *Madrona Park*, ___ Or LUBA at ___ (LUBA No 2019-032, July 17, 2019) (slip op at 15). Petitioners have not cited any land use standard that requires city planning staff to independently verify whether all applicable land use applications have been approved, or whether the previously approved uses may be subject to additional approval criteria. If, as here, the building permit application matches the previously approved site plan, then there is no interpretation required in issuing the building permit. *See Willamette Oaks*, 68 Or LUBA at 168 ("A decision that concerns only the application of a land use decision or conditions of approval attached to a land use decision does not concern the application of a land use regulation * * *." (Citing *Mar-Dene Corp. v. City of Woodburn*, 149 Or App 509, 515, 944 P2d 976 (1997)); *McCollough v. City of Eugene*, 74 Or LUBA 620 (2016).

2. Conditional Use Permit Standards

Petitioners contend that the city should have applied the conditional use regulations and special use limitations pursuant to pursuant to EC 9.2682(2) and EC 9.2683 to the building permit applications. Petitioners argue that the development includes entertainment and recreation uses, administrative offices, parking areas, and broadcasting studios for which a conditional use permit (CUP) is required pursuant to EC 9.2682(2), which describes conditional uses in the PL zone. EC 9.2682(2) provides, in part:

> "Uses Requiring a Conditional Use Permit. The following uses not operated by the public agency that owns the property are permitted conditionally when all or part of the property is declared by the owner to not be needed:
>
> "(a) Administrative, General, and Professional Offices.
>
> "* * * * *
>
> "(d) Broadcasting Studios, Commercial and Public Education.
>
> "* * * * *
>
> "(l) Parking Areas and Structured Parking." (Boldface omitted.)

Petitioners further argue that those aspects of the proposed uses are subject to special use limitations in EC 9.2683(3), which lists "permitted uses subject to conditional use permit" for certain uses "proposed to be located within 300 feet of land in the broad zone category of Residential," including "Entertainment and Recreation Uses required to obtain a Conditional Use Permit in community parks according to Table 9.2630 Park, Recreation, and Open Space Zone Uses and

Permit Requirements" EC 9.2683(3)(b), and "Broadcasting Studios, including commercial and public education," EC 9.2683(3)(p).

The city has never determined that any portion of the development requires CUP approval. Petitioners argue that the prior land use decisions do not encompass all required approvals and the city has never comprehensively determined the approvals required for the uses approved to be developed under the challenged building permits. At the least, petitioners argue, the city planning staff reviewing the building permit applications must have decided that a CUP was not required.

One problem with petitioners' argument is that the 2015 Zone Verification and 2018 Approvals implicitly determined that the development did not include conditional uses in the PL zone. As explained above, in the 2015 Zone Verification and 2018 Approvals, the city determined that the development is comprised of uses permitted in the PL zone and subject to site plan and traffic impact review due to the location and expected traffic generation. *See* EC 9.1080 ("As part of the zone verification, the planning and development director shall determine whether uses not specifically identified on the allowed use list for that zone are permitted, *permitted subject to an approved conditional use permit or other land use permit*, or prohibited, *or whether a land use review is required due to the characteristics of the development site or the proposed site*." (Emphases added.)). Petitioners' argument that the development requires a CUP could have

been, but was not, presented in challenges to the 2015 Zone Verification and 2018 Approval, and is an unreviewable collateral attack on those prior decisions.

Petitioners cannot establish that any of the new arguments that they present in this appeal of the building permits could not have been raised and resolved in the earlier proceedings. *Safeway, Inc. v. City of North Bend*, 47 Or LUBA 489, 500 (2004) ("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."). Allowing petitioners to challenge the building permits based on an argument that standards that were not applied to the land use approvals upon which the building permits are issued should have been applied would effectively allow petitioners to collaterally attack the 2015 Zone Verification and 2018 Approval, which are final land use decisions.

However, the determination that the issue was decided, or could have been decided, in prior land use proceedings relates to our scope of review, and not whether we have jurisdiction to review the building permits. We reiterate that our inquiry under the building permit exception focuses on whether the building permit was "issued under clear and objective land use standards." ORS 197.015(10)(b)(B). For purposes of our jurisdictional analysis, petitioners' argument that the underlying development requires a CUP confuses the jurisdictional issue with the merits of whether the city committed error in

approving the building permits. Petitioners have not cited any land use standard under which the city issued the building permits that requires city planning staff to independently verify that all applicable land use approvals have been obtained, or whether the previously approved uses are subject to additional approvals. If, as here, the building permit application matches the previously approved site plan, then there is no interpretation required in issuing the building permit. As we explained in *Willamette Oaks*, "A decision can be wrong or erroneous or unauthorized, yet not qualify as a statutory land use decision. Errors a local government may commit in issuing building permits that do not qualify as statutory land use decisions or other decisions subject to LUBA's jurisdiction can be challenged in circuit court." 68 Or LUBA at 170.

We do not reach the merits of petitioners' arguments that the development requires a CUP.

3. Off-Site Parking Standard

EC 9.6410(1)(a) provides, in part:

> "(1) Location of Required Off-Street Parking Spaces. Required off-street parking shall be on the development site or within 1/4 mile or 1320 feet of the development site that the parking is required to serve.
>
> > "(a) All required parking shall be under the same ownership as the development site served, except through a city approved agreement that binds the parking area to the development site. * * *" (Boldface omitted.)

As part of the 2018 Approval, ECA submitted a traffic impact analysis that assumed that parking demand will exceed on-site parking availability at the site during certain events. ECA stated that off-site parking at South Eugene High School and nearby public parking will be used to accommodate additional demand. Record 2283. ECA asserted that it would obtain an agreement with the school district to provide additional parking. *Id.*, Record 3090. In the 2018 Approval, the hearings officer found that the proposed on-site parking will meet the typical daily parking demand for the development. Record 3094. With respect to larger event parking, the hearings officer determined that EC 9.6410(1)(a) could feasibly be satisfied with the condition that prior to issuance of an occupancy permit, ECA would provide the city with documentation of a shared parking agreement to satisfy parking demand for larger events. The 2018 Approval includes the following condition of approval:

> "Prior to the City's issuance of any occupancy permit for the proposed development, the applicant shall execute and provide the City with documentation of the required Shared Parking Agreement with South Eugene High School, in accordance with EC 9.6410(1)(a), for a minimum of 108 vehicle parking spaces to be made available during any Tier 2 or 3 event." Record 3095.

Petitioners now argue in challenging the building permits that EC 9.6000 required EC 9.6410 to be satisfied at the time a development permit is issued that allows groundbreaking, and not at the time of occupancy.[7] That argument could

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[7] EC 9.6000 provides:

have been, but was not, presented in petitioners' challenge to the 2018 Approval and is an unreviewable collateral attack on the 2018 Approval. *Safeway*, 47 Or LUBA 489. However, as explained above, the fact that the issue was decided, or could have been decided, in prior land use proceedings relates to our scope of review, and not whether we have jurisdiction to review the building permits.

According to petitioners, city planning staff initially determined that a copy of the shared parking agreement was required before building permits could be issued. However, planning staff later determined that a formal parking agreement was not required prior to issuing the building permits. Record 35, 1756–57. Petitioners argue that the record contains no evidence of a city approved off-site parking agreement for the development and that city planning staff was required to interpret EC 9.6410(1)(a) to determine that it would not require a copy of a shared parking agreement prior to issuing building permits.

As previously explained, our jurisdictional analysis under the building permit exception is focused on applicable land use standards, and our jurisdiction

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> "Purpose and Applicability. Unless otherwise provided in sections 9.6000 through 9.6870 of this land use code, those sections describe the general standards that apply to the entire development site at the time of any development. When an area is zoned S Special Area, as indicated on the Eugene Zoning Map, the general development standards set forth in this land use code shall govern, except when they conflict with the special standards applicable specifically in the special area zone. In cases of conflict, the standards specifically applicable in the special area zone shall control." (Boldface and underscoring omitted.)

does not turn on comments in the record that led to the issuance of the building permit. The fact that planning staff asked and answered the question of whether and when an off-site parking agreement needed to be submitted to the city under a prior condition of approval does not make EC 9.6410(1)(a) applicable to the building permit decisions. For purposes of our jurisdictional analysis, petitioners have not established that EC 9.6410 applies to the building permit applications. The city did not apply EC 9.6410(1)(a) in issuing the building permit decisions and city planning staff did not and was not required to determine whether EC 9.6410(1)(a) was satisfied, or could feasibly be satisfied, in issuing the building permits. That determination was made in the 2018 Approval, as conditioned. Even if the condition of approval required evidence of the shared parking agreement at the time of building permit issuance, a dispute over whether a prior condition of approval is satisfied does not give LUBA jurisdiction over a decision that is not otherwise a land use decision. *See Mar-Dene Corp. v. City of Woodburn*, 33 Or LUBA 245, 252, *aff'd*, 149 Or App 509, 944 P2d 976 (1997) (a decision that concerns only the application of a land use decision or conditions of approval attached to a land use decision does not concern the application of a land use regulation).

For the foregoing reasons, we conclude that we lack jurisdiction to review the challenged building permits.

MOTION TO TRANSFER

Petitioners request that if LUBA determines that the challenged building permits are not subject to LUBA review, then the decisions be transferred to circuit court. ORS 34.102; OAR 661-010-0075(11)(b).[8] Petitioners' motion to transfer is granted.[9]

The appeals are transferred to Lane County Circuit Court.

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[8] OAR 661-010-0075(11)(b) provides in part:

> "A request for a transfer pursuant to ORS 34.102 shall be initiated by filing a motion to transfer to circuit court not later than 14 days after the date a respondent's brief or motion that challenges the Board's jurisdiction is filed."

[9] Because we conclude that we lack jurisdiction over the building permit appeals and grant petitioners' motion to transfer, we do not resolve ECA's pending record objections. Petitioners' motion to defer ruling on the motion to dismiss is moot.