

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

DTL, INC. dba DOUBLE TEE CONCERTS,
Petitioner,

vs.

CITY OF PORTLAND,
Respondent,

and

BEAM DEVELOPMENT,
Intervenor-Respondent.

LUBA No. 2024-081

FINAL OPINION
AND ORDER

Appeal from City of Portland.

Carrie A. Richter filed the petition for review and reply brief and argued on behalf of petitioner. Also on the brief was Bateman Seidel Miner Blomgren Chellis & Gram, PC.

Robert L. Taylor represented respondent. Lauren A. King filed the respondent's brief and argued on behalf of respondent.

Damien R. Hall filed the intervenor-respondent's brief and argued on behalf of intervenor-respondent. Also on the brief were Nikesh J. Patel and Dunn Carney LLP.

ZAMUDIO, Board Chair; BASSHAM, Board Member; WILSON, Board Member, participated in the decision.

AFFIRMED

06/04/2025

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

NATURE OF THE DECISION

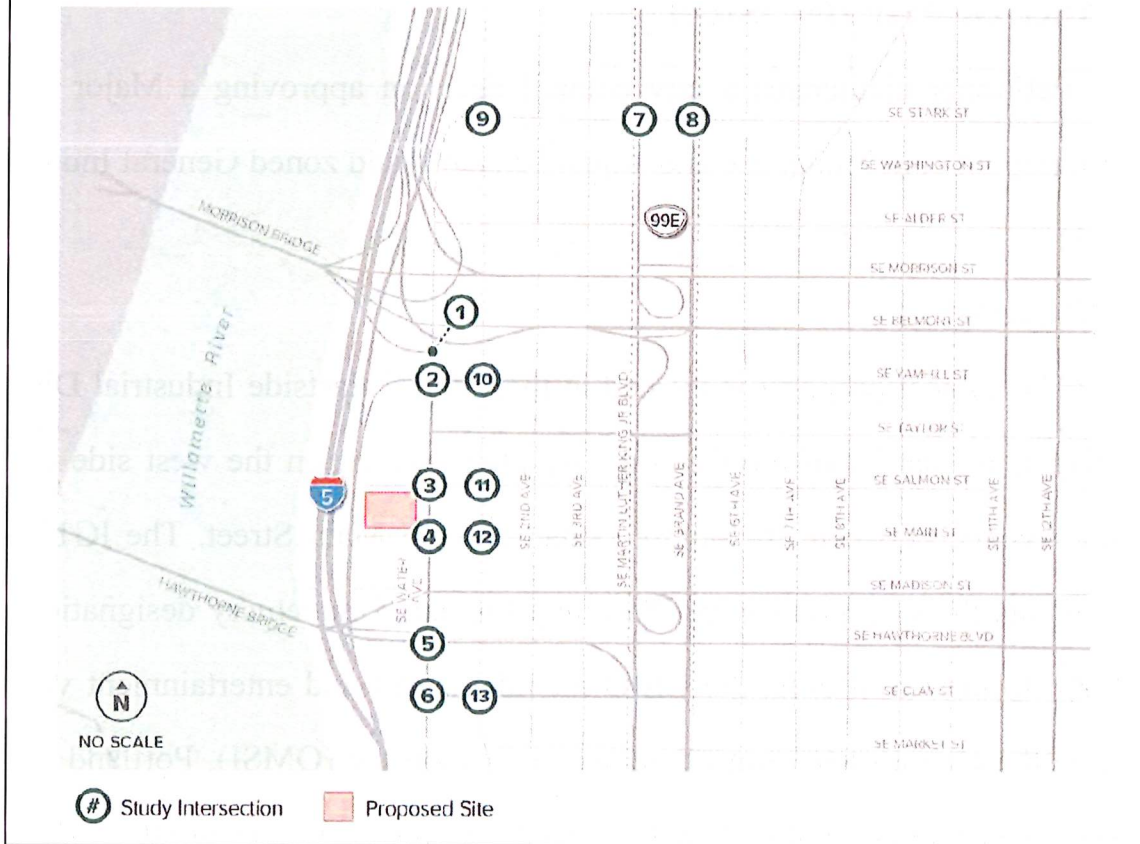
Petitioner challenges a city council decision approving a Major Event Entertainment conditional use and adjustments on land zoned General Industrial 1 (IG1).

BACKGROUND

The subject property is located in the Central Eastside Industrial District (CEID), a subdistrict of the Central City plan district, on the west side of SE Water Avenue between SE Salmon Street and SE Main Street. The IG1 zone implements the Comprehensive Plan map Industrial Sanctuary designation. In addition to industrial uses, the CEID includes event and entertainment venues such as the Oregon Museum of Science and Industry (OMSI), Portland Night Market, and Grand Central Bowl, as well as numerous restaurants and bars. Record 74.

To the west of the site is the I-5 Freeway, Eastbank Esplanade, and the Willamette River. Union Pacific train tracks are located one block east of the site.

FIGURE 1: STUDY INTERSECTIONS AND RAIL CROSSINGS



1 city to find that the transportation system is capable of supporting the proposed
2 use considering, among other things and as relevant to this appeal, safety and the
3 availability of pedestrian networks. PCC 33.815.215(A)(3)(a). The city also must
4 conclude that “[p]ublic benefits of the proposed use outweigh any impacts that
5 cannot be mitigated.” PCC 33.815.215(C).

6 City staff recommended approval in a staff report to a city hearings officer.
7 The hearings officer held a public hearing and issued a decision approving the
8 application with conditions. The hearings officer’s decision was appealed to the
9 city council, which held an on-the-record hearing and issued a decision denying
10 the appeal and upholding the hearings officer’s decision with conditions of
11 approval. This appeal followed.

12 **SECOND ASSIGNMENT OF ERROR**

13 PCC 33.815.215 sets out the Major Event Entertainment use approval
14 criteria and provides, in relevant parts:

15 **“A. Public Services.**

16 **“* * * * ***

17 **“2.** If the proposed use will be located in an industrial zone, it will
18 not have a significant adverse effect on truck and freight
19 movement;

20 **“3.** Transportation system:

21 **“a.** The transportation system is capable of supporting the
22 proposed use in addition to the existing uses in the area.
23 Evaluation factors include safety, street capacity, level
24 of service, connectivity, transit availability, availability

1 of pedestrian and bicycle networks, access restrictions,
2 neighborhood impacts, impacts on pedestrian, bicycle,
3 and transit circulation. Evaluation factors may be
4 balanced; a finding of failure in one or more factors
5 may be acceptable if the failure is not a result of the
6 proposed development, and any additional impacts on
7 the system from the proposed development are
8 mitigated;

9 “b. Measures proportional to the impacts of the proposed
10 use are proposed to mitigate on- and off-site
11 transportation impacts. Measures may include
12 transportation improvements to on-site circulation,
13 public street dedication and improvement, private
14 street improvements, intersection improvements,
15 signal or other traffic management improvements,
16 additional transportation and parking demand
17 management actions, street crossing improvements,
18 improvements to the local pedestrian and bicycle
19 networks, and transit improvements.

20 “c. Transportation improvements adjacent to the
21 development and in the vicinity needed to support the
22 development are available or will be made available
23 when the development is complete or, if the
24 development is phased, will be available as each phase
25 of the development is completed.

26 “* * * * *

27 “C. **Benefit.** Public benefits of the proposed use outweigh any
28 impacts that cannot be mitigated[.]”

29 During the local proceeding, opponents of the venue raised concerns that
30 operation of the venue would create dangerous conditions for pedestrians
31 travelling to and from the venue at train track crossings and road intersections
32 with reported vehicle crashes.

1 As quoted above, PCC 33.815.215(A)(3)(a) requires the city to find that
2 the “transportation system is capable of supporting the proposed use in addition
3 to the existing uses in the area” taking into account “safety.” Intervenor submitted
4 a safety analysis as part of intervenor’s transportation impact study (TIS), which
5 was prepared by DKS Associates, a professional transportation engineering firm.
6 Record 512. The TIS identified a study area that included eight intersections and
7 five adjacent at-grade railroad crossings. Record 515. The Portland Bureau of
8 Transportation (PBOT) traffic engineers reviewed the TIS and approved the
9 methodologies, analyses, assumptions, findings, and conclusions therein, and
10 confirmed that the evaluation factors under PCC 33.815.215(A)(3)(a) are
11 addressed and satisfied. The city council agreed with and adopted the findings in
12 the hearings officer’s decision, the staff report, and PBOT’s memorandum, which
13 all determined that the transportation system is capable of supporting the
14 proposed use in addition to existing uses.

15 Petitioner argues that the city erred in finding PCC 33.815.215(A)(3)(a) is
16 satisfied with respect to the safety factor. Petitioner argues that city’s findings
17 and evidence in the record are inadequate to establish that the traffic generated
18 by the entertainment venue use will be safely accommodated.

19 **A. Waiver**

20 Intervenor initially responds by quoting several of petitioner’s specific
21 arguments in the second assignment of error and contends that those arguments
22 were not raised before the city and, thus, are waived. ORS 197.835(3) provides

1 that LUBA “may only review issues raised by any participant before the local
2 hearings body as provided by ORS 197.195, 197.622 or 197.797, whichever is
3 applicable.” ORS 197.797(1), in turn, provides:

4 “An issue which may be the basis for an appeal to [LUBA] shall be
5 raised not later than the close of the record at or following the final
6 evidentiary hearing on the proposal before the local government.
7 Such issues shall be raised and accompanied by statements or
8 evidence sufficient to afford the governing body, planning
9 commission, hearings body or hearings officer, and the parties an
10 adequate opportunity to respond to each issue.”

11 The “raise it or waive it” principle does not limit the parties on appeal to the exact
12 same arguments made below, but it does require that the issue be raised below
13 with sufficient specificity to prevent “unfair surprise” on appeal. *Boldt v.*
14 *Clackamas County*, 21 Or LUBA 40, 46, *aff’d*, 107 Or App 619, 813 P2d 1078
15 (1991); *Friends of Yamhill County v. Yamhill County*, LUBA No 2021-074 (Apr
16 8, 2022), *aff’d*, 321 Or App 505 (2022) (nonprecedential memorandum opinion),
17 *rev den*, 370 Or 740 (2023) (slip op at 5-6). A particular issue must be identified
18 in a manner detailed enough to give the local government and the parties fair
19 notice and an adequate opportunity to respond. *Boldt*, 21 Or LUBA at 46. When
20 attempting to differentiate between “issues” and “arguments,” there is no “easy
21 or universally applicable formula.” *Reagan v. City of Oregon City*, 39 Or LUBA
22 672, 690 (2001).

23 A petitioner is required to demonstrate in the petition for review “that the
24 issue raised in the assignment of error was preserved during the proceedings

1 below. Where an assignment raises an issue that is not identified as preserved
2 during the proceedings below, the petition shall state why preservation is not
3 required.” OAR 661-010-0030(4)(d). In the petition for review second
4 assignment of error preservation statement, petitioner states that concerns that the
5 concert venue would create safety conflicts with respect to train crossings,
6 pedestrians, and vehicles were raised below, citing Record 1460, 1728-1729.
7 Petition for Review 13. Opponents argued that the existing high crash frequency
8 of adjacent intersections coupled with a large injection of pedestrians would
9 increase the likelihood of injury or death. Record 1642. Petitioner points to
10 testimony that dangerous behavior of impaired people in and around the nearby
11 train tracks and that this venue would exacerbate these unsafe conditions, citing
12 Record 1391 and 1707.

13 In its reply brief, petitioner replies, and we agree, that intervenor’s waiver
14 argument misapprehends the preservation obligation. The issue raised below, and
15 on appeal in the second assignment of error, is whether the transportation system
16 is capable of safely serving the entertainment venue use for purposes of satisfying
17 PCC 33.815.215(A)(3)(a). Petitioner’s specific arguments in the petition for
18 review all address that same issue. The city council findings also specify the
19 safety issues raised below “that the proposed use would generate: conflicts with
20 trains as it relates to pedestrian access and rail crossings; increased darkness and
21 poor visibility for pedestrians at late hours; increased alcohol use; and increased
22 accidents.” Record 37. We agree with petitioner that intervenor has not

1 established that any particular argument in the petition for review raises a new
2 issue that was not raised so that the city or other parties were deprived of an
3 opportunity to respond during the local proceedings. We proceed to analyze the
4 merits of petitioner's arguments under the second assignment of error.

5 **A. PCC 33.815.215(A)(3)(a) Interpretation "Balancing"**

6 On the merits, intervenor responds that the city interpreted and applied
7 PCC 33.815.215(A)(3)(a) by balancing the nine evaluation factors including
8 safety. The city also responds that the city council "found that the plain language
9 of the criterion requires considering and balancing a variety of factors."
10 Respondent's Brief 6 (citing Record 35). The findings state the "Council finds
11 that this criterion requires considering a variety of factors but that the facts are
12 balanced." Record 35. Petitioner argues that the city findings do not "balance"
13 any of the transportation system evaluation factors. Instead, petitioner asserts, the
14 city decided that all of the factors are satisfied, including the safety factor.

15 With respect to the safety factor, we understand the city accepted and
16 considered the safety concerns identified in the TIS and elaborated upon by
17 opponents' testimony. However, the city concluded that the identified safety
18 concerns are acceptable because the identified unsafe conditions are "not a result
19 of the proposed development, and any additional impacts on the system from the
20 proposed development." PCC 33.815.215(A)(3)(a). For example, the city found
21 that the "overall" cause of collisions reported in crash data for the study
22 intersections was inattentive driving and the proposed venue would not

1 *exacerbate* that safety risk. Record 36. With respect to train track crossing safety,
2 the city relied on the TIS assessment that increased traffic from the use would not
3 result in *increased* frequency of train crossing accidents. *Id.*

4 While petitioner does not expressly pose the second assignment of error as
5 an interpretation challenge, petitioner’s findings and evidence arguments are
6 premised on petitioner’s proffered interpretation of the safety factor in PCC
7 33.815.215(A)(3)(a). Specifically, petitioner argues that the city was obligated to
8 “determine what level of safety is required for this facility” and to ensure that the
9 transportation system meets those safety standards with respect to intersection
10 crashes, rail crossing injuries, and pedestrian route safety features, including
11 lighting levels and transportation system features separating pedestrians from
12 vehicular and train traffic. Petition for Review 15. Essentially, petitioner argues
13 that in interpreting and applying the safety factor, the city was required to express
14 more specific standards for determining whether the transportation system is safe
15 and then determine whether the proposed venue use meets those specified safety
16 standards. For example, petitioner argues that PCC 33.815.215(A)(3)(a) requires
17 the city to deny the use if the evidence shows that there is *any* chance of traffic
18 accidents involving patrons of the proposed venue use. Petition for Review 23.¹

¹ Petitioner argues that PCC 33.815.215(A)(3)(a) “furtheres the City’s transportation safety policy that calls for ‘Vision Zero’ – no accidents.” It is not clear to us that a separate city transportation safety policy provides relevant context for the city’s interpretation of PCC 33.815.215(A)(3)(a). However, we note that a city transportation safety policy aiming for no accidents is distinct

1 Petitioner’s arguments are not framed within the applicable standard of
2 review. We will reverse or remand a land use decision if we find that the local
3 government improperly construed the applicable law. ORS 197.835(9)(a)(D). We
4 must defer to the city’s interpretation of its own plan or regulation if that
5 interpretation is not “inconsistent with the express language of the
6 comprehensive plan or land use regulation” or inconsistent with the underlying
7 purposes and policies of the plan or regulation. ORS 197.829(1); *Siporen v. City*
8 *of Medford*, 349 Or 247, 243 P3d 776 (2010) (applying ORS 197.829(1)).

9 “[T]he plausibility determination under ORS 197.829(1) is not
10 whether a local government’s code interpretation best comports with
11 principles of statutory construction. Rather, the issue is whether the
12 local government’s interpretation is plausible because it is not
13 expressly *inconsistent* with the text of the code provision or with
14 related policies that ‘provide the basis for’ or that are ‘implemented’
15 by the code provision, including any ordained statement of the
16 specific purpose of the code provision at issue.” *Kaplowitz v. Lane*
17 *County*, 285 Or App 764, 775, 398 P3d 478 (2017) (emphasis in
18 original).

19 We are not required to defer to an interpretation presented for the first time
20 in the response brief. In order for the deferential standard to apply, the local
21 government’s interpretation must be explicit or implicit in the challenged
22 decision. *Green v. Douglas County*, 245 Or App 430, 438-40, 263 P3d 355
23 (2011). A local government’s interpretation of an ordinance or plan provision

from a land use approval standard requiring an applicant to affirmatively demonstrate that zero traffic accidents are likely to occur in relation to the land use.

1 need not be explicit; an interpretation may also be “inherent in the way that it
2 applied the standard.” *Alliance for Responsible Land Use v. Deschutes County*,
3 149 Or App 259, 267, 942 2d 836 (1997), *rev dismissed as improvidently*
4 *allowed*, 327 Or 555, 971 P2d 411 (1998); *1000 Friends of Oregon v. Linn*
5 *County*, 306 Or App 432, 435, 475 P3d 121 (2020).

6 In this case, we agree with respondents that petitioner’s second assignment
7 of error is premised on petitioner’s preferred interpretation of PCC
8 33.815.215(A)(3)(a) as imposing safety standards that are not contained in the
9 approval criteria. The city evaluated the safety factor considering all of the
10 evidence in the record and concluded that “[t]he transportation system is capable
11 of supporting the proposed use in addition to the existing uses in the area.” The
12 city council’s interpretation is inherent in the way that it applied the standard. We
13 agree with intervenor that the city council implicitly interpreted the PCC
14 33.815.215(A)(3)(a) safety factor to not require elimination of all transportation
15 risks. PCC 33.815.215(A)(3)(a) does not provide that any evidence of potential
16 traffic accidents involving vehicles and pedestrians in the vicinity of the venue
17 should result in denial. Neither does the safety factor require a lighting study.
18 Instead, the standard requires the city to evaluate the safety of the transportation
19 system as one factor among nine. We agree with intervenor that the city plausibly
20 interpreted the safety factor to require “a reasoned evaluation, not risk
21 elimination.” Intervenor-Respondent’s Brief 34. Petitioner does not establish that
22 the city implausibly interpreted PCC 33.815.215(A)(3)(a) to allow the

1 transportation risks identified in the city’s findings and evidence in the record
2 that the city relied upon, including the TIS. We proceed to resolve petitioner’s
3 inadequate findings and substantial evidence challenges through this deferential
4 interpretative lens.

5 Generally, findings must (1) address the applicable standards, (2) set out
6 the facts relied upon, and (3) explain how those facts lead to the conclusion that
7 the standards are met. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992).
8 “What is needed for adequate judicial review is a clear statement of what,
9 specifically, the decision-making body believes, after hearing and considering all
10 the evidence, to be the relevant and important facts upon which its decision is
11 based.” *Sunnyside Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 20-21, 569
12 P2d 1063 (1977). Findings must address and respond to specific issues relevant
13 to compliance with applicable approval standards that were raised in the
14 proceedings below. *Norvell v. Portland Area LGBC*, 43 Or App 849, 853, 604
15 P2d 896 (1979). “While a local government is required to identify in its findings
16 the facts it relies upon in reaching its decision, it is not required to explain why it
17 chose to balance conflicting evidence in a particular way, or to identify evidence
18 it chose not to rely on.” *Moore v. Clackamas County*, 29 Or LUBA 372, 380
19 (1995); *see also Tallman v. Clatsop County*, 47 Or LUBA 240, 246 (2004) (“At
20 least where this Board is able to determine that a reasonable decision maker
21 would rely on the evidence the decision maker chose to rely on, findings
22 specifically addressing conflicting evidence are unnecessary.”).

1 A finding of fact is supported by substantial evidence if the record, viewed
2 as a whole, would permit a reasonable person to make that finding. *Younger v.*
3 *City of Portland*, 305 Or 346, 360, 752 P2d 262 (1988); *Dodd v. Hood River*
4 *County*, 317 Or 172, 179, 855 P2d 608 (1993). In reviewing the evidence, we
5 may not substitute our judgment for that of the local decision maker. Rather, we
6 must consider all the evidence to which we are directed, and determine whether
7 based on that evidence, a reasonable local decision maker could reach the
8 decision that it did. *Younger*, 305 Or at 358-60. The substantial evidence standard
9 is not satisfied when “the credible evidence apparently weighs overwhelmingly
10 in favor of one finding and the [decision maker] finds the other without giving a
11 persuasive explanation.” *Wal-Mart Stores, Inc. v. City of Bend*, 52 Or LUBA 261,
12 271 (2006) (quoting *Armstrong v. Asten-Hill Co.*, 90 Or App 200, 206, 752 P2d
13 312 (1998)).

14 **B. Street Intersection and Rail Crossing Safety**

15 The city council’s findings begin by explaining that the TIS determined
16 that “with the recommended improvements, the transportation system will be
17 capable of safely supporting the proposed venue, in addition to accommodating
18 existing uses.” Record 35. The city also explained that the PBOT traffic engineers
19 reviewed the TIS and confirmed that the evaluation factors in PCC
20 33.815.215(A)(3)(a) were addressed and satisfied. The city council also agreed
21 with and adopted the findings in the hearings officer’s decision, staff report, and

1 PBOT memorandum, which each determined that the transportation system can
2 support the proposed use in addition to existing uses. Record 35.

3 The city council findings respond in detail to specific opponent arguments
4 and testimony regarding pedestrian access; street intersection and rail crossing
5 accidents; darkness and poor visibility for pedestrians at late hours; alcohol use;
6 and adequacy of the traffic evidence. The city concluded that “the proposed use
7 is not expected to result in any material change to the frequency of accidents.”
8 Record 38. With respect to criticism of the TIS, the city found that the opponents’
9 comments did not provide any empirical traffic data and analysis sufficient to
10 undermine the TIS analysis and conclusions. *Id.* As a whole, the city’s findings
11 are adequate because they (1) address the applicable standards, (2) set out the
12 facts relied upon, and (3) explain how those facts lead to the conclusion that the
13 standards are met.

14 Petitioner argues that the city failed to address specific issues raised below
15 regarding the safety of the transportation system. Petitioner points out that the
16 TIS identifies three intersections as having an “over critical crash rate”: SE Water
17 Avenue/I-5 Off Ramp/SE Yamhill Street (study intersection 2); SE Water
18 Avenue/SE Salmon Street (study intersection 3); and SE Water Avenue/SE
19 Hawthorne Boulevard (study intersection 5). Record 524-25. However, the city
20 council’s findings specifically address only SE Water Avenue/SE Salmon Street
21 (study intersection 3), concluding that crashes at this intersection were the result

1 of “inattentive” driving and that, given the improvements to the intersection, “the
2 proposed venue is not anticipated to exacerbate it.” Record 36.

3 Petitioner argues that the city failed to make findings addressing whether
4 the proposed venue use will exacerbate the crash rate at study intersections 2 and
5 5. Respondents respond, and we agree, that the city was not required to make
6 specific findings on every intersection in the study area identified in the TIS with
7 an “over critical crash rate” in order to find that PCC 33.815.215(A)(3)(a) is
8 satisfied. The city’s findings address the study intersections, generally stating that
9 “[t]he most common collision types at the study intersections were angle, turning
10 and rear-end crashes, many of which show ‘no yield’ or ‘disregarded traffic
11 signal’ as the cited cause.” Record 35. The city pointed to the TIS, which supports
12 that finding. Record 35, 522-25. The city may have focused on study intersection
13 3 because it is adjacent to the venue site and intervenor will provide frontage
14 improvements adjacent to those intersections, which the city found “can improve
15 driver awareness.” Record 36.

16 Ultimately, the city concluded that the TIS and PBOT memorandum
17 provided sufficient evidence that that the transportation systems is capable of
18 supporting the proposed use. The city further found:

19 “[T]he proposal is designed to ensure safe conditions for all modes
20 and PBOT standards are designed to provide safe conditions for all
21 modes, especially pedestrian and cyclists. The applicant will be
22 required to dedicate property along all three frontages and
23 reconstruct the abutting pedestrian corridor to City standards.
24 Exhibit H-16, at 3. The TIS also recommended curb extensions at

1 both the SE Salmon and SE Main Street intersections. The curb
2 extension into SE Main Street (see Figure 10 of Exhibit A-10) would
3 shift the travelway slightly south for drivers heading westbound
4 away from SE Water Avenue and would provide space for a tour
5 bus to be staged on-street during events to the east of the loading
6 dock for the proposed venue. Exhibit A-10, at 36-37. The curb
7 extension into SE Salmon is adjacent to the proposed bike parking
8 on SE Salmon Street and is recommended to support the proposed
9 bike parking. *Id.* at 37 and 39. As noted by PBOT, there is also a
10 planned two-way cycle track along the site's SE Water frontage in
11 the future. Exhibit H-16, at 3. Additional safety improvements such
12 as crosswalk stripping, signage, lighting, etc. will be determined
13 during the review of the Public Works permitting process. Exhibit
14 H-16, at 3." Record 36-37.

15 Those findings are adequate and supported by substantial evidence.

16 Petitioner argues that licensed traffic engineer H. Lee independently
17 evaluated the traffic safety concerns and that the findings do not respond to all of
18 Mr. Lee's testimony. Record 1457-58. The city responds that the city council
19 explicitly rejected opponents' testimony related to safety and increased accidents
20 at Record 37-38. The city expressly rejected H. Lee's testimony because the city
21 council found that Lee's comments "simply agree[d] with appellant without
22 providing any empirical traffic data and analysis." Record 38. The city was not
23 required to respond to every comment in opponents' testimony.

24 **C. Train Rail Crossing Safety**

25 Petitioner argues that the city failed to adopt adequate findings supported
26 by substantial evidence that the transportation system is safe with respect to travel
27 across train tracks to and from the proposed venue site. The TIS reports that over

1 a five-year period, three train collisions were reported, two of which were fatal.²
2 Petitioner points out that “[g]iven the location of surface parking and transit,
3 opponents calculated that approximately one-third of the visitors to this venue
4 would have to cross these tracks either on foot or by car at least twice in order to
5 access this venue.” Petition for Review 22.

6 The city found that, based on the TIS At-Grade Study Rail Crossing Safety
7 Assessment, “the accident probability analysis found the study crossings to be
8 well below 0.50 accidents per year with existing crossing safety protection, and
9 the increased traffic in the 2025 Build scenario would not be expected to result
10 in any material change to the frequency of accidents compared to the 2025 No-
11 build scenario.” Record 36. The city further found that, as explained in the TIS:

12 “[T]he standard protective devices at rail crossings in Oregon are
13 installed and maintained by the railroad (not the applicant or the
14 City) per OAR 741-110-0020 to 0090 and 741-115-0010 to 0080.
15 Exhibit H-52, at 4. The crossing characteristics near the proposed
16 venue are documented in the TIS at SE Stark Street, SE Yamhill
17 Street, SE Salmon Street, SE Main Street and SE Clay Street (see
18 page 6 of the TIS), and include advance warning pavement markings
19 and signage, and post mounted flashing light signals, automatic
20 gates and supplemental signage indicating the number of tracks at
21 the crossing, with the crossing at SE Clay Street also including
22 flashing-light signals on cantilevered supports. Exhibit H-52, at 4.
23 These grade crossings also include nearby illumination to provide

² “Two of these incidents were caused by pedestrians ignoring the flashing light signals and audible warnings (one each at the SE Salmon Street and SE Clay Street crossings), while the third was a reported pedestrian suicide at the SE Salmon Street crossing.” Record 1565.

1 light during hours of darkness. Exhibit H-52, at 4. Exhibits H-49, H-
2 50, H-51 show that visibility at night in the surrounding area and at
3 the site are not impaired and include nearby illumination. Exhibit H-
4 52 (at. p. 2) further demonstrates that rail crossings do not pose
5 operational safety concerns.” Record 37.

6 Petitioner argues that the TIS At-Grade Study Rail Crossing Safety
7 Assessment “appears directed solely at vehicles and does not appear to take into
8 account any changes in the volume of pedestrians or bicyclists, much less the
9 need for additional warnings or protections.” Petition for Review 24. Petitioner
10 also contends that the described crossing protective warnings and gates provide
11 safety features for vehicles and not pedestrians.

12 Intervenor responds that a DKS Associates Technical Memorandum (DKS
13 Rail Crossing Memo) in the record further addresses rail crossings and
14 demonstrates that existing rail crossing safety devices indicate the crossing and
15 trains to motorists, bicyclists, and pedestrians. Record 1565. The city’s findings
16 with respect to rail crossing safety are adequate and supported by substantial
17 evidence.

18 **D. Street Lighting**

19 Opponents raised safety concerns about the lack of adequate street lighting
20 to allow pedestrians to safely access transit, parking, and rideshare resources.
21 Record 1686. Intervenor responded by submitting photographs of the area in the
22 evening showing sidewalks and streetlights. Record 1547-1561. The city found:

23 “[T]here is sufficient street lighting in the area surrounding the site
24 and along the streets which provide pedestrian access to the site, as
25 demonstrated by the photographs of the area taken on 7/23/24 at

1 approximately 10pm. See Exhibits H-49, H-50, H-51. Further,
2 development of the proposed venue will result in new street lighting
3 improvements to city standards immediately adjacent to the site,
4 further ensuring an adequately lit and safe experience for venue
5 patrons.” Record 37.

6 Petitioner observes that the photographs were taken in the summer and
7 contends that no reasonable person would conclude that those photographs
8 demonstrate adequate lighting on a rainy winter night. Petitioner also points out
9 that the photographs are not labeled with locations.

10 Many of the photos include street intersection signs and petitioner does not
11 dispute that the photographs depict street lighting in the area surrounding the site
12 and along the streets which provide pedestrian access to the site. We conclude
13 that a reasonable person could rely on the photographs in the record to conclude
14 that there is adequate lighting to allow for safe pedestrian transportation in the
15 vicinity of the venue.

16 In sum, the city’s transportation safety evaluation and conclusion that “the
17 transportation system is capable of supporting the proposed use in addition to the
18 existing uses in the area” plausibly interprets the city standard and is supported
19 by adequate findings and substantial evidence. PCC 33.815.215(A)(3)(a).

20 The second assignment of error is denied.

21 **FIRST ASSIGNMENT OF ERROR**

22 Petitioner argues that the city’s conclusion that “the transportation system
23 is capable of supporting the proposed use in addition to the existing uses in the
24 area” considering pedestrian facilities and transit connection is unsupported by

1 adequate findings and substantial evidence. PCC 33.815.215(A)(3)(a). Petitioner
2 emphasizes the undisputed fact that the entertainment venue will increase
3 pedestrian traffic in an industrially zoned area. No bus or other transit service
4 passes directly by the venue site. Nearby transit stops are three to four blocks
5 away from the site and some are up flights of stairs that are not accessible in
6 compliance with the Americans with Disabilities Act (ADA). 42 U.S.C. § 12101
7 et seq. (1990). Those individuals who are unable to utilize the stairs must travel
8 a four to five-block route that crosses train tracks to reach SE MLK Boulevard
9 and SE Grand Avenue.

10 The city found:

11 “Pedestrian, Cycling, and Transit Availability: The proposed venue
12 is very accessible to pedestrians and bicyclists and is well-served by
13 a network of continuous sidewalks and bike facilities on the
14 surrounding streets between nearby existing private vehicle parking,
15 bike parking, ride hailing or transit stops. Exhibit A-10, at 11. The
16 proposed venue is also adjacent to existing bikeways along the
17 Eastbank Esplanade, SE Water Avenue and SE Salmon Street.
18 Exhibit A-10, at 7. Current transit service near the proposed venue
19 is primarily accessed via stops located on SE Grand Avenue and SE
20 Martin Luther King Jr Boulevard between SE Salmon Street and SE
21 Taylor Street, on the SE Madison Street and SE Hawthorne
22 Boulevard viaducts (accessed via stairs from SE Water Avenue), on
23 the SE Morrison Street and SE Belmont Street viaducts (accessed
24 via stairs from SE Water Avenue), along SW 1st Avenue in
25 downtown Portland across the Morrison Bridge, and near SE
26 Tilikum Way. Exhibit A-10, at 7-8, 58. Event attendees and
27 employees who utilize transit for travel to and from the venue would
28 primarily utilize SE Water Avenue, SE Salmon Street and the
29 Eastbank Esplanade to access transit services before and after
30 events. Exhibit A-10, at 58. Current schedules indicate that the

1 TriMet Routes 6, 14 and 15 and MAX light-rail service near the
2 proposed venue extends beyond the conclusion of a typical event
3 (i.e., expected to be 11:00 p.m. or later for most events). Exhibit A-
4 10, at 58.” Record 39.

5 Petitioner argues that the city failed to analyze whether the existing
6 sidewalk system is adequate by finding it is safe and accessible for all users.³ The
7 TIS includes a table of Existing Roadway Characteristics Near the Proposed
8 Venue that states that there are sidewalks on both sides of the street on roadway
9 segments directly adjacent to the site. Record 519. Petitioner argues that limited
10 assessment is inadequate. Petitioner points out that PBOT did not evaluate or
11 provide any independent evidence of the availability or condition of pedestrian
12 routes to transit stops. Petitioner argues that a finding that PCC
13 33.815.215(A)(3)(a) is satisfied requires “evidence in the form of a sidewalk
14 inventory and conditions study that evaluates the condition of sidewalks on the
15 multiple blocks that intervenor admits are necessary for concert-goers to reach
16 transit stops and parking lots[.]” Petition for Review 11.

17 Petitioner argues that the evidence in the record demonstrates that the
18 pedestrian routes are inadequate because they are not connected, well lit, or ADA
19 accessible. For example, petitioner points out that transit on the SE Madison
20 Street, SE Hawthorne Boulevard, SE Morrison Street and SE Belmont Street

³ Intervenor argues that petitioner has failed to establish that the arguments raised in the first assignment of error are preserved. We reject that waiver argument using the same reasoning explained in rejecting intervenor’s waiver argument under the second assignment of error.

1 viaducts are accessed via stairs from SE Water Avenue, and those stairs are not
2 ADA accessible. Petitioner also points to a photograph showing that the sidewalk
3 on the northeast corner of SE Water Avenue/SE Salmon Street intersection (study
4 intersection 3) has no ramp access and is not ADA accessible. Petitioner explains
5 that this sidewalk corner is diagonally across the street from the primary venue
6 entrance and, without any planned or required sidewalk improvements, a
7 wheelchair user heading in an easterly direction along SE Salmon Street would
8 be forced to proceed in the vehicle travel lane. Petitioner argues these deficiencies
9 preclude a conclusion that PCC 33.815.215(A)(3)(a) is satisfied.

10 The city responds by acknowledging that the federal ADA requires the city
11 to provide a program or service for an accessible pedestrian path of travel.
12 However, the city responds that PCC 33.815.215(A)(3)(a) does not require the
13 city to find compliance with the ADA in the challenged land use decision. The
14 city cites *Rogue Advocates v. Josephine County*, 72 Or LUBA 275, 292 (2015)
15 and *Kenney v. Tillamook County*, LUBA No 2020-117 (Apr 26, 2021) for the
16 proposition that, absent a land use regulation or other applicable law that requires
17 the city to address compliance with state and federal laws in approving the
18 application, the city's failure to adopt such findings or impose conditions is not
19 legal error. Thus, here, the city was not required to adopt findings addressing the
20 ADA because it is not an applicable approval standard.

21 The city emphasizes that intervenor is required to dedicate and improve
22 the frontages on its property, and those improvements must comply with ADA

standards.⁴ The city also points out that corners on the sidewalks adjacent to the site already include curb cuts. Record 1035; 1036; 1038; 1039. The city argues that, viewing the record as whole, a reasonable person could conclude that the pedestrian network is capable of supporting the proposed use. We agree. The city's reasoning in its response brief is also implicit in the city council's decision. While "availability of pedestrian and bicycle network" could be interpreted to include all pedestrians and cyclists, including those with limited mobility, that provision does not require the applicant to demonstrate or the city to find that all pedestrian and bicycle routes to the venue are ADA accessible. The fact that some sidewalks or access points in the area do not conform to ADA standards does not undermine the city's conclusion that PCC 33.815.215(A)(3)(a) is satisfied with respect to "availability of pedestrian and bicycle network," or demonstrate that that finding is not supported by substantial evidence.

With respect to transit, the city points out that the venue site is located in the central city area and is served by multiple public transit modes, including TriMet bus service, the Portland Streetcar, and the MAX line, with routes that "provide transfer opportunities to other MAX light-rail and TriMet bus routes in downtown Portland." Record 521-22. In response to petitioner's argument that some of the nearby transit stops are not ADA accessible due to stairs, the city

⁴ The city explains that it will not require intervenor to construct a new sidewalk on a vacant lot that the intervenor does not own as a condition of approval. Respondent's Brief 10.

1 explains that “a pedestrian can avoid the stairs and access many of those same
2 transit stops by traveling a few additional blocks.” Respondent’s Brief 11.

3 Petitioner argues that the city’s findings are inadequate because the
4 decision does not include findings responding to testimony that the venue and
5 nearby transit stops are not wheelchair accessible. The city responds, and we
6 agree, that the city is not required to address all comments. *See Oregon Coast*
7 *Alliance v. City of Bandon*, LUBA No 2024-020 (Sept 5, 2024) (slip op at 11)
8 (“While a local government is required to identify the facts it relied upon in
9 reaching its decision, it is not required to explain why it chose to balance
10 conflicting evidence in a particular way, or to identify evidence it chose not to
11 rely on.”). The city’s findings address the central issue raised by the comments—
12 whether the transportation system is capable of supporting the proposed use
13 considering the availability of pedestrian and bicycle networks. PCC
14 33.815.215(A)(3)(a).

15 Petitioner also argues that, for the same reasons petitioner argues that the
16 pedestrian, bicycle, and transit networks are not capable of supporting the
17 proposed use, the evidence does not support the “connectivity” factor in PCC
18 33.815.215(A)(3)(a). The city found that the connectivity consideration is
19 satisfied by satisfaction of the street connectivity access standards in PCC
20 17.88.040. Record 39. Petitioner does not challenge that finding and
21 interpretation. Accordingly, petitioner’s PCC 33.815.215(A)(3)(a) connectivity
22 factor argument provides no basis for remand.

1 The first assignment of error is denied.

2 **THIRD ASSIGNMENT OF ERROR**

3 To approve a Major Event Entertainment use, the city must find that
4 “[p]ublic benefits of the proposed use outweigh any impacts that cannot be
5 mitigated.” PCC 33.815.215(C). We refer to that criterion as the benefit standard.
6 Petitioner argues that the city council failed to interpret the benefit standard and,
7 to the extent the city did interpret the standard, the city’s interpretation is
8 inconsistent with the express language of PCC 33.815.215(C) and the city’s
9 comprehensive plan.

10 **A. The city council interpreted and applied PCC 33.815.215(C).**

11 Petitioner argues that the city council misunderstood its scope of review in
12 the local appeal as limited to reviewing the hearings officer’s interpretation and,
13 thus, the city council failed to interpret the benefit standard in the first instance.
14 In support of that argument, petitioner quotes the mayor’s opening statements at
15 the public hearing. The city responds, and we agree, that we review the city’s
16 final written decision, not statements made during the proceedings. *Toth v. Curry*
17 *County*, 22 Or LUBA 488, 492 (1991). The final decision includes the city
18 council’s interpretation and application of the benefit standard, as examined
19 further below.

1 **B. The city council’s interpretation of PCC 33.815.215(C) is**
2 **plausible and entitled to deference.**

3 The city found the proposed use would result in the following public
4 benefits: (1) increased activity on a historically vacant lot will deter crime; (2)
5 infrastructure improvements; and (3) induced economic activity will have a
6 positive effect on surrounding businesses. The city found that the only impact is
7 the number of trips the venue use generates but that mitigations reduce those
8 impacts. Record 44. The city found:

9 “The concert venue would create a higher level of activity in the
10 evenings to deter crime and support nearby bars and restaurants
11 without interfering with industrial businesses that operate primarily
12 in the daytime. In addition, the applicant would be required to install
13 public improvements such as wider sidewalks and street trees
14 around the development site. As explained in the Staff Report, such
15 public infrastructure improvements surrounding the block will
16 improve the safety and security of the pedestrian environment for
17 people who live and work in the area. Exhibit A-12, at 9; see also,
18 Exhibit H-16.

19 “Additionally, as further reflected in the Economic Impacts
20 Analysis, the proposed use provides extensive public benefits that
21 positively contribute to the area. Exhibit H-36, at 4-37. As described
22 in detail in the analysis, these benefits include: new employment,
23 payroll, spending with local vendors on construction and operations,
24 new tax revenue, and indirect and induced economic activity to the
25 surrounding area. *Id.*

26 “Further, Council finds that the only impact relevant to the land use
27 review approval criteria are impacts to the surrounding
28 neighborhood. Here, the impacts are the amount of trips the site
29 generates, summarized in the TIS. Mitigations are summarized in
30 the TIS and transportation and parking demand management (TDM)
31 and include public frontage improvements and TDM methods. See

1 Exhibit A-10, Section 1; see also, Exhibit H-54. As explained in the
2 Staff Report, there are no identified negative impacts from the
3 proposed use that cannot be mitigated. Exhibit H-5, at 11. As noted
4 above, the venue would largely operate outside the hours of
5 operation of most businesses in the industrial area, and as stated in
6 the findings above for criterion A above, public services, including
7 the transportation system, are adequate to accommodate the
8 proposed use.” Record 44.

9 During the local proceeding, opponents argued that the public benefits of
10 the proposed entertainment venue are not outweighed by the impacts that cannot
11 be mitigated. In response to opponents’ testimony, the city found:

12 “[S]ome testifiers including the appellant posed concerns regarding
13 the tenant/operator of the proposed venue (Live Nation) and alleged
14 that the operator and its business practices would negatively impact
15 the local music and entertainment industry by squeezing out local
16 promoters and artists. See Exhibit H-35; see also, appellant’s
17 memorandum to Council dated September 18, 2024. Such
18 interpretations by testifiers and the appellant appear to focus on the
19 ‘benefit’ standard, which states ‘Public benefits of the proposed use
20 outweigh any impacts that cannot be mitigated.’ The thrust of these
21 arguments is that Council should interpret the phrase ‘any impact’
22 as broadly as possible to include considerations about future
23 economic impacts on venues and the local music and entertainment
24 industry. Council rejects these contentions because Council’s
25 review is limited to application of the Zoning Code, not speculative
26 and generalized market impacts.

27 “Specifically, such an overbroad interpretation is inconsistent with
28 the purpose of the Major Event Entertainment conditional use
29 standards, which is to ensure that the impacts of such uses ‘are not
30 harmful to surrounding areas and that transportation services are or
31 will be sufficient to serve the use.’ PCC 33.815.215. Consistent with
32 this purpose statement, Council finds that the term ‘impacts’ as used
33 in PCC 33.815.215.C means impacts to the surrounding area and
34 transportation services are land use impacts applying a

1 geographically constrained analysis related to land use impacts such
2 as noise, light, traffic, etc. In contrast, opponents interpret the
3 criteria to regulate uncertain economic outcomes that would occur
4 at an unknown time and place and are not directly caused by holding
5 events at the proposed venue. Further, while the appellant cites to
6 *Belluschi v. City of Portland*, 53 OR LUBA 455 (2007) as
7 informative to the interpretation of this standard, it is not controlling
8 for the reasons discussed above. Moreover, the use being proposed
9 is a Major Event Entertainment use, which does not include
10 consideration of the proposed operator (public, private, large, or
11 small). PCC 33.920.230. Therefore, Council rejects these arguments
12 because such contentions are unrelated to the approval criteria, and
13 finds that substantial evidence in the record demonstrates that there
14 are no impacts that cannot be mitigated.

15 “Because there are no negative impacts identified that cannot be
16 mitigated and which public benefits must outweigh, Council finds
17 that criterion C is met based on substantial evidence in the record.”
18 Record 44-45.

19 Petitioner argues that the city council’s interpretation of PCC
20 33.815.215(C) is inconsistent with the express language of that regulation.
21 Petitioner argues that the city limiting its consideration to only those impacts
22 affecting the surrounding area is inconsistent with the meaning of the term “any.”
23 The term “any” is not defined in for purposes of PCC 33.815.215(C), so we look
24 to the plain meaning of that word. Petitioner provides the following definition:
25 “one, no matter what one: Every - used as a function word esp. in assertions and
26 denials to indicate one that is selected without restriction or limitation of choice.”
27 *Webster’s Third New Int’l Dictionary* 97 (unabridged ed 2002).

28 The city responds, and we agree, that the city’s interpretation of “any
29 impacts” as referring to impacts “to surrounding areas” based on the purpose

1 statement of PCC 33.815.215 is not inconsistent with the plain meaning of “any”
2 and is consistent with the purpose of the regulation. Thus, we must defer to the
3 city’s interpretation. ORS 197.829(1); *Siporen*, 349 Or at 259.

4 Petitioner argues that the city council failed to adequately describe the
5 “surrounding area.” The city responds, and we agree, that PCC 33.815.215(C)
6 does not specify the scope of the surrounding area and the city plausibly
7 implicitly interpreted the surrounding area to include adjacent and nearby
8 existing uses and evaluated benefits and impacts within the TIS study area. The
9 city rejected opponents’ proffered interpretation that the city should evaluate the
10 benefit and impacts on a city-wide scale.

11 Petitioner argues that the city’s “surrounding area” interpretation “fails to
12 require any meaningful industrial benefit and the industrial benefits that are
13 identified are not supported by substantial evidence.” Petition for Review 37.
14 Petitioner argues that the city must interpret the public benefit criterion in context
15 of the purpose of the General Industrial zone, as set out in PCC 33.140.030(C):

16 “The General Industrial zones are two of the three zones that
17 implement the Industrial Sanctuary map designation of the
18 Comprehensive Plan. The zones provide areas where most industrial
19 uses may locate, while other uses are restricted to prevent potential
20 conflicts and to preserve land for industry. The development
21 standards for each zone are intended to allow new development
22 which is similar in character to existing development. The intent is
23 to promote viable and attractive industrial areas.”

24 Petitioner also quotes Comprehensive Plan Policy 6.37, which is to “[p]rotect
25 industrial land as industrial sanctuaries identified on the Comprehensive Plan

1 Map primarily for manufacturing and distribution uses and to encourage the
2 growth of industrial activities in the city.”

3 In response to this argument below, the city found:

4 “The appellant (Exhibit H-35) contended that there are no public
5 benefits that flow to industrial uses and such use improperly
6 develops an industrial lot as a non-industrial use. These contentions
7 are misplaced. Without the proposal, the lot would remain vacant
8 and unproductive as it has been since July 2007, and would continue
9 to consist of unimproved roads. See Exhibit H-45, at 1-2; see also
10 Exhibit H-48. With the proposal however, as noted above, the
11 proposed use provides extensive public benefits to the surrounding
12 uses and area including public infrastructure improvements and
13 benefits to local industry activity (e.g. employment, income, or
14 business revenues). Exhibit H-36, at 4-37; see also, Exhibit H-16. A
15 use like the proposed venue use is expected to revitalize the Central
16 City by generating more activation points and increased foot traffic.
17 See Exhibit H-47. The proposed venue is also not inconsistent with
18 industrial uses. All employment and industrial zones in the City
19 conditionally allow Major Event Entertainment uses (PCC Chapter
20 33.140 Table 140-1), and as explained above, the proposed use will
21 operate outside of the hours of nearby businesses.” Record 44.

22 On appeal, the city responds, and we agree, that the city council decided
23 to allow Major Event Entertainment as conditional uses in industrial zones and
24 adopted the Major Event Entertainment use criteria to prevent conflicts with
25 industrial uses. Under petitioner’s interpretive argument, any Major Event
26 Entertainment use in an industrial zone would conflict with the comprehensive
27 plan. The city’s interpretation that a Major Event Entertainment use is an allowed
28 conditional use in the IG1 zone, so long as it complies with the applicable criteria,

1 is not inconsistent with the comprehensive plan and is plausible and entitled to
2 deference.

3 The third assignment of error is denied.

4 The city's decision is affirmed.