BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

CENTRAL EASTSIDE INDUSTRIAL COUNCIL,
Petitioner,

and

EAST SIDE PLATING, INC., KILLIAN PACIFIC and MARQUEZ PROPERTIES PDX, LLC,
Intervenors-Petitioners,

vs.

CITY OF PORTLAND,
Respondent,

and

RIGHT 2 DREAM TOO,
Intervenor-Respondent.

LUBA No. 2016-027

FINAL OPINION
AND ORDER

Appeal from City of Portland.

Christe White, Portland, filed a joint petition for review and argued on behalf of petitioner. With her on the brief were Zoee Powers and Radler White Parks & Alexander LLP.

Eric C. Hartwig, Portland, filed a joint petition for review on behalf of intervenor-petitioner East Side Plating, Inc. With him on the brief were David J. Zarosinski and Zarosinski Hartwig PC.

Seth J. King, Portland, filed a joint petition for review and argued on

behalf of intervenor-petitioner Killian Pacific. With him on the brief was Perkins Coie LLP.

David P. Weiner, Portland, filed a joint petition for review on behalf of intervenor-petitioner Marquez Properties PDX, LLC.

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

Mark Kramer, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Kramer & Associates.

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

HOLSTUN, Board Chair, concurred in the decision.

RYAN, Board Member, concurred in the decision.

REVERSED 08/30/2016

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 council decision concluding that a rest area and tent camp[1] for houseless persons is a permitted Community Service use in the General Industrial (IG1) zone.

MOTION TO TAKE EVIDENCE

Petitioner and intervenors-petitioners (hereafter, petitioners) move to take evidence outside the record pursuant to OAR 661-010-0045, in the form of calendar entries for City Commissioner Amanda Fritz and a blog post.[2] The extra-record evidence is offered in support of petitioners' fourth assignment of error, which alleges that undisclosed ex parte communications occurred between Fritz and intervenor-respondent Right 2 Dream Too (R2DToo).

The city argues that LUBA should not consider the proffered evidence because, as a matter of law, the statutes governing ex parte communications do not apply to the city council decision, and therefore there is no point to

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[1] The city's decision describes the proposed use as a "rest area with tents for overnight and day use shelter for individuals experiencing houselessness[.]" Record 1. As shorthand, the parties argue for either "rest area" or "tent camp." Neither shorthand description is entirely satisfactory, but in this opinion we will generally use "tent camp" because the proposed tent accommodations seem most at issue in this appeal.

[2] OAR 661-010-0045(1) authorizes LUBA to consider extra-record evidence in the case of disputed factual allegations concerning "ex parte contacts[.]"

LUBA's consideration of the proffered evidence. The city's response goes to the merits of the fourth assignment of error, which we address below. The city offers no other reason to deny the motion to take evidence. Accordingly, we grant the motion and will consider the calendar entries, for what they are worth, in resolving the fourth assignment of error.

FACTS

R2DToo is a non-profit agency that provides services to people experiencing homelessness, at a tent camp in downtown Portland. R2DToo proposes to relocate the tent camp to a 20,000-square-foot vacant parcel owned by the city, at SE 3rd Avenue and SE Harrison Street, in the Central Eastside Industrial Area. The subject property is within a designated industrial sanctuary, and is zoned IG1. R2DToo requested a "zoning confirmation" letter from the city, to determine whether the proposed tent camp is a permitted, conditionally permitted, or prohibited use in the IG1 zone. R2DToo submitted site plans and other information describing the proposed use.

As proposed, the tent camp consists of (1) rows of tents of different sizes that can accommodate from one to 10 persons, with a maximum site capacity of 100 persons, and (2) a central service area that includes an office, storage, laundry, restrooms and showers, and a kitchen, located in small buildings, totaling 2,100 square feet of building area. As depicted on site plans and drawings, the site would be bordered by a fence structure made in part of vertically mounted paneled doors, to provide privacy for the people within.

Operationally, no R2DToo employees would be located on site, but the tent camp would be run by at least 14 "Dreamers," volunteers who stay at the camp on an indefinite basis to manage the facility and provide services to the campers. The proposal anticipates that campers would stay one night or more, but there is no minimum or maximum stay period, and it is anticipated that some campers will stay at the camp for more than a month.

The Portland Zoning Code "classifies land uses and activities into use categories on the basis of common functional, product, or physical characteristics." Portland City Code (PCC) 33.920.010. There are five broad groups of use categories: Residential, Commercial, Industrial, Institutional, and Other. The PCC breaks those five broad groups of use categories down into more specific use categories. For example the broad Residential use category is broken down into the more specific Group Living and Household Living use categories. Finally the "[c]haracteristics" of each use category are described, followed by a listing of "[a]ccessory [u]ses," "[e]xamples" of uses in those more specific use categories and "[e]xceptions" to those more specific use categories.

The IG1 zone does not allow any type of residential use as a permitted use, and allows only one residential use as a conditional use: Household Living on houseboats. Another residential use category, Group Living, is prohibited entirely. PCC 33.140.100, Table 140-1. Under the Institutional grouping is the Community Service use category, a broad category of uses that

is allowed in the IG1 zone as a permitted use if under 3,000 square feet of net building area, otherwise as a conditional use. PCC 33.140.100.B.11. However, two types of Community Service uses, mass shelters and short-term housing of any size, are prohibited entirely. *Id.*

R2DToo submitted its zoning confirmation request on January 21, 2016. A day later, on January 22, 2016, city planning staff issued a 13-page zoning confirmation letter. The January 22, 2016 letter concludes that the proposed tent camp is (1) a Community Services use, but not a prohibited mass shelter or short-term housing use, and (2) a permitted rather than conditionally permitted Community Service use, because the net building area is less than 3,000 square feet. The January 22, 2016 letter also identified the few development standards that would apply to the proposed use in the IG1 zone, noting that four bicycle parking spaces would be required and that the fence must be less than eight feet in height.

However, the January 22, 2016 letter stated that because "there is great public interest in the proposed use of the site[,]" the city commissioner in charge of the planning bureau directed staff to prepare only an advisory response, and to submit the response to the city council for review and a final decision.

Accordingly, the zoning confirmation request was placed on the city council's agenda for its February 18, 2016 meeting. The agenda for the February 18, 2016 meeting included three items, two of which related to

R2DToo's request. Item 162 was a proposed resolution to approve and adopt the January 22, 2016 staff letter. Item 163 was a resolution to affirm the city council's intent to allow R2DToo to relocate its existing tent camp operation to the SE 3rd and Harrison site. The city council considered both agenda items together.

After a staff presentation on the advisory zoning confirmation letter, the city council invited a panel of R2DToo's representatives to speak in favor of the resolutions. The city council then invited a second panel that included a representative of petitioner Central Eastside Industrial Council, who spoke in opposition to the resolutions. Finally, the city council opened up the meeting to public testimony, some in favor and some against. Several speakers requested that the city conduct the proceeding as a land use hearing pursuant to ORS 197.763, and requested that the city grant a continuance or hold the record open to accept additional argument and evidence, one of the procedures required by ORS 197.763. The city council closed the public testimony portion of the meeting, and sought advice from its attorney, who advised that ORS 197.763 did not apply to the city's proceedings on the request for a zoning confirmation. After discussion of the merits of the resolutions, the city council postponed the final decisions to the February 24, 2016 meeting. At the February 24, 2016 meeting, the city council approved Resolution No. 37192, which approves and adopts the staff's January 22, 2016 zoning confirmation letter as the city's final decision, without any changes.

This appeal followed.

INTRODUCTION

The third and fourth assignments of error allege that the city council committed several procedural errors and were required to, but failed, to disclose ex parte communications at the February 18, 2016 meeting. The first and second assignments of error challenge the merits of the city's conclusion that the proposed tent camp is a permitted use in the IG1 zone. We first resolve the procedural assignments of error.

THIRD ASSIGNMENT OF ERROR

Petitioners argue that the city erred in failing to conduct its proceedings on R2DToo's zoning confirmation request pursuant to the statutory procedures for a quasi-judicial land use hearing at ORS 197.763, as required for a statutory "permit" under ORS 227.160(2), or as a quasi-judicial land use decision under PCC 33.800.030. The city responds, and we agree, that the city's zoning confirmation decision was not a "permit" decision as defined at ORS 227.160(2), and that the decision was not subject to ORS 197.763 or similar PCC provisions.

A. The zoning confirmation decision is not a "permit" as defined at ORS 227.160(2).

ORS 227.160(2) defines a "permit" as the "discretionary approval of a proposed development of land, under ORS 227.215 or city legislation or

regulation."[3] ORS 227.175(3) and (5) require that, with an exception not relevant here, the city must provide at least one hearing on an application for a permit or zone change and that the hearing on the permit or zone change must be "conducted in conformance with the provisions of ORS 197.763." Petitioners argue that the city's zoning confirmation decision is a "permit" decision, because it constitutes the "discretionary approval of a proposed development of land," and therefore the city was required to provide a hearing on the zoning confirmation request pursuant to the procedures at ORS 197.763.

Petitioners recognize that ORS 227.160(2)(b) excludes from the statutory definition of "permit" a "zoning classification" decision, that is, a decision that "determines the appropriate zoning classification for a particular use by applying criteria or performance standards defining the uses permitted within the zone[.]" *See* n 3. Zoning classification decisions are not subject to the procedures and requirements that apply to permit and zone change decisions,

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[3] ORS 227.160(2) provides, in relevant part:

> "'Permit' means discretionary approval of a proposed development of land, under ORS 227.215 or city legislation or regulation. 'Permit' does not include:
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> "(a) A limited land use decision as defined in ORS 197.015;
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> "(b) A decision which determines the appropriate zoning classification for a particular use by applying criteria or performance standards defining the uses permitted within the zone, and the determination applies only to land within an urban growth boundary[.]"

set out in ORS 227.175(1) through (10). The only procedural elements that any statute expressly provides for zoning classification decisions are set out in ORS 227.175(11) and (12).[4]

Nonetheless, petitioners argue that, while the city's zoning confirmation letter purports to be a zoning classification decision as described in ORS 227.160(2)(b), in fact the zoning confirmation letter constitutes a discretionary approval of proposed development, and thus fits squarely within the ORS

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[4] ORS 227.175 provides, in relevant part:

"(11) A decision described in ORS 227.160 (2)(b) shall:

"(a) Be entered in a registry available to the public setting forth:

"(A) The street address or other easily understood geographic reference to the subject property;

"(B) The date of the decision; and

"(C) A description of the decision made.

"(b) Be subject to the jurisdiction of the Land Use Board of Appeals in the same manner as a limited land use decision.

"(c) Be subject to the appeal period described in ORS 197.830 (5)(b).

"(12) At the option of the applicant, the local government shall provide notice of the decision described in ORS 227.160 (2)(b) in the manner required by ORS 197.763 (2), in which case an appeal to the board shall be filed within 21 days of the decision. The notice shall include an explanation of appeal rights."

227.160 definition of "permit." Petitioners cite *State ex rel. Schrodt v. Jackson County*, 262 Or App 437, 324 P3d 615 (2014), for the proposition that the exercise of discretion in determining whether a proposed use is allowed results in a "permit" decision under the county analogue to ORS 227.160. Because the city's zoning confirmation letter exercised discretion in interpreting the PCC to determine that the proposed tent camp is an allowed use in the IG1 zone, petitioners argue the decision is a permit as defined at ORS 227.160(2), and therefore the city was required to conduct a hearing under the procedures specified in ORS 197.763. According to petitioners, the scope of zoning classification decisions described in ORS 227.160(2)(b) is limited to non-discretionary decisions that determine the appropriate zoning classification for a proposed use. If the city exercises interpretation or discretion in purporting to make a zoning classification decision, petitioners argue, the decision thereby becomes a permit decision.

Petitioners are incorrect, for several reasons. First, the city's zoning confirmation decision is a zoning classification decision described in ORS 227.160(2)(b), because it accomplishes *only* what ORS 227.160(2)(b) authorizes: it determines the appropriate zoning classification for a proposed use, *i.e.*, how to categorize the proposed use under the city's land use codes, as a permitted use, conditional use, prohibited use, etc. A zoning classification decision, so limited, does not *approve* any development of land, even if the ultimate conclusion of the zoning classification decision is that the proposed

use is a use that is permitted without further discretionary land use review.[5] The city's zoning confirmation decision concludes that the proposed use is permitted outright in the IG1 zone. While it identifies the few development standards that will apply to development of a permitted use, *e.g.*, construction of four bicycle parking spaces, and an eight-foot limit on any fence, the decision does not *apply* those standards (or any standards) to *approve* development. For that reason alone, the city's zoning confirmation letter is not a permit decision.[6]

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[5] In this respect, a zoning classification decision is similar to a land use compatibility statement (LUCS). Like a zoning classification decision, a LUCS categorizes a proposed use under the jurisdiction's land use regulations, and determines if the proposed use is allowed without land use review, allowed with land use review, prohibited, etc. A LUCS decision that accomplishes only that task—categorizing the proposed use—is not a permit decision. *Curl v. Deschutes County*, 69 Or LUBA 186 (2014). However, a LUCS decision that goes further, for example, that determines that a proposed use requires a certain type of land use review under certain land use standards, and then applies those standards to approve the use, has exceeded the permissible scope of a LUCS decision, and has probably resulted in a permit decision. *Campbell v. Columbia County*, 67 Or LUBA 53 (2013). Similarly, a zoning classification decision that not only (1) decides how to categorize the proposed use and identifies the approval criteria, but also (2) *applies* those criteria and *approves* the proposed use, could constitute the "approval of the proposed development of land" and thus constitute a permit decision (assuming the approval criteria require the exercise of discretion).

[6] An important caveat here is that the exclusions at ORS 227.160(2)(b) and its analogue applicable to counties at ORS 215.402(4) to the definition of "permit" apply only to zoning classification decisions concerning land within an urban growth boundary. *See* n 3. Zoning classification decisions

In addition, we disagree with petitioners that zoning classification decisions as described in ORS 227.160(2)(b) are limited to ministerial decisions that do not involve the exercise of any judgment or discretion. Zoning classification decisions, like their close cousins LUCS decisions, frequently if not invariably require the local government to interpret its land use regulations to determine the correct categorization of a proposed use. That interpretative task frequently if not invariably will require the exercise of some legal judgment, and such an exercise of judgment will necessarily render the decision a non-ministerial decision.[7]

In *Buckman Community Ass'n v. City of Portland*, 36 Or LUBA 630, *aff'd* 168 Or App 243, 5 P3d 1203 (2000), LUBA rejected a similar argument that zoning classification decisions that involve the exercise of judgment and interpretative discretion are permit decisions, noting legislative history indicating that the legislature intended ORS 227.160(2)(b) and ORS 215.402(4) to overrule a line of cases holding precisely that.[8]

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concerning land outside urban growth boundaries may well be permit decisions, if they otherwise meet the applicable definition of a permit decision.

[7] For that reason, zoning classification decisions are typically not subject to the exclusion to LUBA's jurisdiction, at ORS 197.015(10)(b)(A), for local government land use decisions that are "made under land use standards that do not require interpretation or the exercise of policy or legal judgment[.]"

[8] Petitioners argue that on appeal of LUBA's decision in *Buckman Community Ass'n* the Court of Appeals, while affirming the decision, signaled disagreement with LUBA's conclusion that zoning classification decisions are not permit decisions, even if they involve the exercise of judgment or

That said, petitioners are correct that the kind of complex interpretative judgment exercised in the present case to determine which land use category or use most closely describes the proposed tent camp requires the kind of discretion that is consistent with that exercised in a permit decision. In *Tirumali v. City of Portland*, 41 Or LUBA 231, *aff'd* 180 Or App 613, 45 P3d 519 (2002), we concluded that a decision approving a building permit for a use permitted outright was not a ORS 227.160 "permit" decision, notwithstanding that the approval standards applied included an ambiguity that required interpretation, and the resulting decision was thus not a ministerial decision excluded from our jurisdiction under ORS 197.015(10)(b)(A) or (B). We analyzed a number of cases addressing the kinds of discretion characteristic of permit decisions, and concluded that the discretion exercised in permit decisions include "circumstances where there is some question as to the nature of the proposed use or whether the use is permitted at all in the zone." *Id.* at 240. That same type of question is, of course, at the heart of a zoning classification decision. However, as discussed above the critical distinction is that a zoning classification decision answers that question as an *advisory* decision, based on a set of assumed facts submitted by the applicant, without

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discretion. We disagree. The court noted that the petitioner did not challenge LUBA's holding on that point, and concluded that, absent such a challenge, the challenges the petitioner did advance could not provide a basis for reversal or remand. We see nothing in the court's decision signaling disagreement with LUBA's main holding in *Buckman Community Ass'n*, or our understanding of the legislative history behind ORS 227.160(2)(b) and 215.402(4).

actually *approving* any proposed development of land. Petitioners are correct though that a purported zoning classification decision that exceeds the limited scope of ORS 227.160(2)(b), and actually applies approval standards to approve the proposed development of land, may well be a permit decision.

An excellent example of the latter circumstance is provided by a case that petitioners cite and rely upon: *State ex rel Schrodt v. Jackson County*, 262 Or App 437, 447, 324 P3d 615 (2014). The facts and procedural posture at issue in *Schrodt* are quite different from the present case, but the essence is instructive. The applicant in *Schrodt* owned a warehouse in a rural residential zone with a conditional use permit for a former commercial/manufacturing use that was, in essence, a non-conforming use in the residential zone. The applicant asked the county to approve a range of new commercial uses for the warehouse to replace the former use. Based on initial staff advice, the request was filed in the form of a request for an interpretation of the code, or of the conditional permit, as to what other uses were allowed on the property, a request that, if so limited, would be similar in nature to a zoning classification decision. Eventually, the county came to recognize that the request was more in the nature of an application to alter or expand a non-conforming use, which is subject to standards that require, for example, a finding that the altered use has no greater impact on the surrounding uses. Neighbors appealed the county's initial staff decision approving a range of new uses to the hearings officer, where the appeal languished for years. Eventually, the applicant sought

a mandamus remedy in circuit court pursuant to ORS 215.429, which allows an applicant to seek approval of the application from the circuit court where a county fails to issue a decision on a permit application within 150 days. The circuit court agreed with the applicant that the application was for a "permit" as defined at ORS 215.402, and granted the requested relief, approving new uses of the warehouse that the court found had no greater impact than the former nonconforming use. On the neighbors' appeal to the Court of Appeals, the court affirmed the circuit court's conclusion that the ultimate decision approving various uses as lawful nonconforming uses of the warehouse constituted the discretionary approval of a proposed development of land, and hence was a permit.

Nothing in *Schrodt* is contrary to our above conclusion that the city's zoning confirmation letter is only a zoning classification decision as described in ORS 227.160(2)(b), and therefore not a permit decision described in ORS 227.160. While the application in *Schrodt* was initially framed as seeking only a code interpretation, something akin to a zoning classification, the ultimate decision approved the proposed development of land, under discretionary approval standards. In the present case, the city council's decision is limited to a zoning classification decision, and does not *approve* proposed development of land.

B. The PCC Requires No Process For a Zoning Classification Decision

As an alternative, petitioners argue that, even if the ORS 227.175 requirements for a permit decision do not apply, the city's development code requires that zoning classification decisions like the present one, which requires the exercise of discretion, be processed under PCC procedures that apply to permits.

Petitioners acknowledge that the city categorized R2DToo's request for a zoning confirmation letter as a "Tier 3 Complex Zoning Analysis," which is one of a number of services that the city provides as part of its "Early Assistance Services." Zoning confirmation letters, as well as other early assistance services, are not assigned any quasi-judicial permit procedures under the PCC or any city legislation. However, petitioners argue that when the city decided to elevate the final decision on the zoning classification to the city council, the only vehicle to do so under the PCC was one of the quasi-judicial permit procedures set out in the PCC that implement ORS 227.175 and ORS 197.763. Specifically, petitioners argue that the appropriate procedure for a discretionary land use review by the city council is the city's Type III procedure, which requires notice and an evidentiary hearing consistent with the requirements of ORS 227.175 and ORS 197.763.

However, petitioners do not identify anything in the PCC or elsewhere providing that, where the city council decides to make the city's final decision on a zoning classification decision, the city council proceedings to reach the

decision *must be* conducted pursuant to local land use procedures that implement ORS 227.175 and ORS 197.763. No statute cited to us requires that a city council proceeding on a zoning classification decision be conducted as a quasi-judicial land use hearing subject to ORS 197.763. And petitioners do not cite any PCC or local legislation requiring that where the city council chooses to make the city's final decision on a zoning classification request, the city council proceedings must comply with its Type III or any other type of land use procedures that apply to permit decisions or similar quasi-judicial land use approvals.

In addition, we do not see what purpose would be served by subjecting a true zoning classification decision to a full-blown evidentiary hearing, with notice, staff report, preservation of issues, the taking and consideration of evidence, fact-finding, a determination that the proposed use complies with applicable approval standards, etc. As explained earlier, a zoning classification decision that is in fact limited to determining the appropriate zoning classification of a contemplated land use does not *approve* anything. It is an advisory interpretative exercise based on a set of assumed facts, submitted by the applicant. There is typically no fact-finding or weighing of conflicting evidence, and no approval criteria applied to found facts to determine whether the use should be approved. At best, there is legal argument regarding the interpretation of use categories (which petitioners had an opportunity to make in the present case). And, indeed, there may even be no specific property in

mind. An applicant might request classification of a hypothetical use, and simply ask in which city zones the use would be allowed, conditionally allowed, etc. For these reasons, interpreting ORS 197.763 or PCC provisions that implement the statute to require that a city council proceeding on a zoning classification decision must be conducted as a full quasi-judicial evidentiary land use hearing makes little sense.

The city council meeting on the zoning classification decision was conducted according to the statutes and implementing PCC provisions governing public meetings, which provide for public testimony. In addition, the city provided notice of the decision to all surrounding property owners and those who participated in the proceeding, consistent with ORS 227.175(12). *See* n 4. Petitioners have not established that any statute or PCC provision required more procedure or process, in reaching the city's final decision on R2DToo's request for zoning confirmation.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

ORS 197.835(12) provides that LUBA "may reverse or remand a land use decision under review due to ex parte contacts or bias resulting from ex parte contacts with a member of the decision-making body, only if the member of the decision-making body did not comply with [ORS 227.180(3).]"[9]

[9] We assume for purposes of this opinion that the city's decision is a land use decision, not a limited land use decision. *But see* ORS 227.175(11)(b),

ORS 227.180(3) provides:

> "No decision or action of a planning commission or city governing body shall be invalid due to ex parte contact or bias resulting from ex parte contact with a member of the decision-making body, if the member of the decision-making body receiving the contact:
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> "(a) Places on the record the substance of any written or oral ex parte communications concerning the decision or action; and
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> "(b) Has a public announcement of the content of the communication and of the parties' right to rebut the substance of the communication made at the first hearing following the communication where action will be considered or taken on the subject to which the communication related."

Petitioners argue that the city council violated ORS 227.180(3) by failing to disclose ex parte communications between city councilors and R2DToo representatives. According to petitioners, city commissioner Amanda Fritz had a number of meetings with representatives of R2DToo prior to the city council's February 18, 2016 meeting on R2DToo's zoning confirmation request, and that it is reasonable to assume that the meetings concerned the zoning confirmation request then pending before the city council. Petitioners argue that Fritz failed to disclose at the February 18, 2016 meeting the substance of communications at the meetings that concerned the zoning

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quoted at n 4 (a zoning classification decision is subject to LUBA's jurisdiction "in the same manner as a limited land use decision").

confirmation request, and to offer the parties a chance to rebut the substance of those communications, as required by ORS 227.180(3).

The city responds that the requirements of ORS 227.180(3) do not apply to zoning classification decisions. According to the city, ORS 227.180(3) is limited to decisions or actions by a planning commission or governing body on an application for a permit or zone change.

We agree with the city. In *Carlsen v. City of Portland*, 39 Or LUBA 93, 101, *aff'd in relevant part*, 169 Or App 1, 8 P3d 234 (2000), we held that a city council decision that in relevant part determined that a proposed memorial is a permitted use in a city park is properly viewed as a zoning classification decision, and hence not a permit decision.[10] Because the city's decision was not a permit decision, we further held, the requirements of ORS 227.180(3) did not apply, and rejected the petitioners' arguments, similar to that advanced in the present case, that city council members should have disclosed the content of alleged ex parte communications with the applicant. *Id.* at 102-03.

Our *Carlsen* decision did not provide much analysis for our conclusion that ORS 227.180(3) does not apply to a city council's proceedings on a zoning classification decision. While ORS 227.180(3) refers to "decision or action,"

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[10] The city council decision went on to approve a specific location for the proposed memorial pursuant to guidelines in a siting policy. However, the siting policy was not a land use regulation of any kind, and its application did not constitute approval of a proposed development of land. *Carlsen v. City of Portland*, 169 Or App 1, 14-15, 8 P3d 234 (2000).

and is not expressly limited to decisions on permits or zone changes, it is part of a statutory section, ORS 227.180, that otherwise seems exclusively concerned with local appeals of lower body decisions on permits and zone changes.[11] In addition, ORS 227.180(3) requires that disclosures will be made and rebuttal offered at the next "hearing" following the ex parte contact. In context, it is reasonably clear that the contemplated "hearing" is a quasi-judicial hearing on a local appeal of a permit or zone change. As explained above, there are no statutory provisions requiring that the local government conduct a hearing on a zoning classification decision as defined at ORS 227.160(2)(b).[12] Accordingly, we conclude, as we did in *Carlsen*, that the requirements of ORS 227.180(3) do not apply to a city council's zoning classification decision.

The fourth assignment of error is denied.

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[11] ORS 227.180 is entitled "Review of action on permit application; fees." Subsection (1) authorizes and prescribes standards for local appeals of an "action of a hearings officer," and provides among other things that a city council may provide that the decision of the hearings officer "in a proceeding for a discretionary permit or zone change is the final determination of the city." Subsection (2) states that a party aggrieved by the city's final determination in a proceeding for a discretionary permit or zone change may appeal the final determination to LUBA.

[12] Again, an important caveat here is that zoning classification decisions concerning land outside urban growth boundaries are not categorically excluded from the ORS 227.160 definition of "permit," and such decisions could, potentially, constitute permit decisions subject to the procedural requirements that apply to permits, including the requirement to conduct a hearing, if they otherwise fall within the applicable definition of "permit."

FIRST ASSIGNMENT OF ERROR

As noted, the Community Service use category lists a "mass shelter" as an example of a specific Community Service use. Community Service uses are generally allowed in industrial zones, but mass shelters and short-term housing are expressly prohibited in industrial zones, and a number of other city zones. The city's decision concludes that the proposed tent camp use is not a mass shelter as that use is defined under the PCC. After evaluating a number of specific uses and use categories, the city ultimately concluded that the proposed tent camp is allowed in the IG1 zone as a general Community Service use. In their first assignment of error, petitioners challenge the city's conclusion that the tent camp is not a mass shelter. In their second assignment of error, petitioners argue in the alternative that the proposed tent camp offers tenancy in excess of one month, and thus is categorically excluded from the Community Service use category, pursuant to PCC 33.920.420.D.3.

We first describe the city's method and PCC standards for classifying uses, then we describe the Community Service use category, and then we address petitioners' challenges to the city's findings that the proposed tent camp is not a mass shelter.

A. Classification of Uses

As explained earlier, PCC Chapter 33 does not set out a list of specific uses allowed in particular zones, but divides the universe of land uses first into five broad groupings: Residential, Commercial, Industrial, Institutional, and

Other. Within each grouping are a number of use categories. For example, under the group heading of Institutional, PCC 33.920 places eight different "use categories," including the Community Service use category. For each use category, PCC 33.920 includes four subsections: (1) characteristics, (2) accessory uses, (3) examples, and (4) exceptions.

PCC 33.920 describes the city's land use categorization scheme. The purpose statement, at PCC 33.920.010, states that PCC Chapter 33.920 "classifies land uses and activities into use categories on the basis of common functional, product, or physical characteristics."[13] PCC 33.920.030.A sets out the considerations that the city uses to classify uses, and states that "[u]ses are assigned to the category whose description most closely describes the nature of the primary use."[14] PCC 33.920.030.D explains that the "'Examples'

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[13] PCC 33.920.010 states:

> "This Chapter classifies land uses and activities into use categories on the basis of common functional, product, or physical characteristics. Characteristics include the type and amount of activity, the type of customers or residents, how goods or services are sold or delivered, and certain site factors. The use categories provide a systematic basis for assignment of present and future uses to zones. The decision to allow or prohibit the use categories in the various zones is based on the goals and policies of the Comprehensive Plan."

[14] PCC 33.920.030.A sets out the following standard and considerations for classification of uses:

> "1. Uses are assigned to the category whose description most closely describes the nature of the primary use. The

subsection of each use category provides a list of examples of uses that are included in the use category."[15]

In the challenged decision, the city applied the PCC 33.920.030 considerations to determine which use category or specific use "most closely describes" the nature of the proposed tent camp. The city concluded that the most relevant considerations are (1) comparing the activities of the tent camp to the characteristics of possible land use categories, (2) the site arrangement, and

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'Characteristics' subsection of each use category describes the characteristics of each use category. Developments may have more than one primary use. Developments may also have one or more accessory uses. * * *

"2. The following items are considered to determine what use category the use is in, and whether the activities constitute primary uses or accessory uses:

"[a] The description of the activity(ies) in relationship to the characteristics of each use category;
"[b] The relative amount of site or floor space and equipment devoted to the activity;
"* * * * *
"[d] The customer type from each activity;
"[e] The relative number of employees in each activity;
"[f] Hours of operation;
"[g] Building and site arrangement;
"* * * * *"

[15] PCC 33.920.030.D states, in relevant part:

"Use of examples. The 'Examples' subsection of each use category provides a list of examples of uses that are included in the use category. The names of uses on the lists are generic. They are based on the common meaning of the terms and not on what a specific use may call itself. * * *"

(3) how the use will operate. The city's analysis focused on three potential use categories: Community Service, Retail Sales and Service, and Group Living, and several specific uses within those use categories. In concluding that the Community Service use category most closely describes the proposed tent camp, the city also concluded the proposed tent camp is not a mass shelter. This assignment of error challenges the city's finding in support of its conclusion that the tent camp is not a mass shelter and therefore not a prohibited use in the IG1 zone.

B. Community Service Use Category

PCC 33.920.420 describes the general characteristics of the Community Service use category.[16] PCC 33.920.420.C provides a non-exclusive list of examples of uses that fall within the Community Service use category.[17]

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[16] PCC 33.920.420.A states:

> "Characteristics. Community Services are uses of a public, nonprofit, or charitable nature generally providing a local service to people of the community. Generally, they provide the service on the site or have employees at the site on a regular basis. The service is ongoing, not just for special events. Community centers or facilities that have membership provisions are open to the general public to join at any time, (for instance, any senior citizen could join a senior center). *The use may provide mass shelter or short-term housing where tenancy may be arranged for periods of less than one month when operated by a public or non-profit agency.* The use may also provide special counseling, education, or training of a public, nonprofit or charitable nature." (Emphasis added.)

[17] PCC 33.920.420.C states:

The city found that the proposed tent camp fits within the described characteristics of the Community Service Use category, because the tent camp will be operated by a non-profit and provide a local charitable service on an ongoing basis.[18] The city found that the services provided (a temporary place

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> "Examples [of Community Service uses] include libraries, museums, senior centers, community centers, publicly owned swimming pools, youth club facilities, hospices, ambulance stations, drug and alcohol centers, social service facilities, *mass shelters or short-term housing when operated by a public or non-profit agency*, vocational training for the physically or mentally disabled, crematoriums, columbariums, mausoleums, soup kitchens, park-and-ride facilities for mass transit, and surplus food distribution centers." (Emphasis added.)

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

> "In terms of characteristics, the proposed rest area will be operated by a nonprofit and provides a local service (a temporary place to rest and sleep overnight in tents with shower, toilet, meeting and laundry facilities) for houseless people in the community. This service will be provided on a continual basis and not just for special events. The customers (i.e. those who will use the service) are similar to those utilizing the services provided in a number of the examples listed in PCC 33.920.[420].C. [R2DToo] has no employees, but individuals staying at the rest area may volunteer their time without payment. These volunteers may help others at the site with sanitation, food, clothing, and pursuing social services with appropriate social service agencies. This facility itself and these volunteer activities can be considered charitable in nature. [R2DToo] is not a public agency. There are no membership requirements and any member of the public may seek to use this rest area on an as-needed basis. All of these characteristics are consistent with the characteristics of a Community Service use. [R2DToo] has not indicated that the rest

to rest and sleep at night in tents, with shower, toilet, meeting and laundry facilities) are similar to those services provided in a number of examples listed in PCC 33.920.420.C.

One listed example of a Community Service use is "mass shelters or short term housing when operated by a public or non-profit agency[.]" PCC 33.010.030 defines "Mass Shelter" as:

> "A structure that contains one or more open sleeping areas, or is divided only by nonpermanent partitions, furnished with cots, floor mats, or bunks. Individual sleeping rooms are not provided. The shelter may or may not have food preparation or shower facilities. The shelter is managed by a public or non-profit agency to provide shelter, with or without a fee, on a daily basis."

PCC 33.010.030 defines "Mass Shelter Beds" as "[a]ccommodation provided in a mass shelter. The number of beds is determined by the maximum number of people who can be given overnight accommodations at one time on the site."

Mass shelters and a closely related use, Short-Term Housing, are subject to a set of special regulations and limitations set out at PCC 33.285. PCC 33.285.050.B includes a number of limitations, including (1) a limitation of one mass shelter bed per 35 square feet of floor area, and (2) a density limit placed on the maximum number of mass shelter beds allowed within a facility and within 1300 feet of the facility. PCC 33.285.050.B.2 and Table 285-1. For

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> area will offer formal counseling, education, or training of a public, nonprofit or charitable nature, which are possible and permissive elements of a community service use, but not required." Record 8.

example, in the Central Employment (CX) zone where a mass shelter is allowed as a permitted use, a maximum of 100 mass shelter beds are allowed within the facility, and within 1300 feet of the facility. Adjustments to these limitations are prohibited. Further, the development standards for residential development in the base or overlay zones generally apply to mass shelters. PCC 33.285.050.B.7.

A mass shelter and the proposed tent camp appear to provide the same basic function: overnight shelter and related services for houseless persons who otherwise have no place to sleep. Despite that functional similarity, the findings conclude that the tent camp is not a mass shelter.[19] The findings focus on several differences between the proposed tent camp and the definition of mass shelter at PCC 33.910.030, and first conclude that, while the proposed tent camp features a number of "structures," there is no proposed structure that "contains" sleeping areas, and the residents will not be "occupying a structure, which is an essential element of a 'mass shelter.'"[20] The city also considered

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[19] This finding is critical to the city's decision. Although mass shelters are a listed Community Service use and most Community Service uses are allowed in the IG1 zone, mass shelters are specifically prohibited in the IG1 and other industrial zones. PCC 33.140.100.B.11.

[20] The findings state, in relevant part:

> "The definition [of mass shelter at PCC 33.910.030] refers to a structure, furnished with cots, floor mats or bunks. The zoning code defines a 'structure' as 'Any object constructed in or on the ground. Structure includes buildings, decks, fences, towers, flag

and rejected an argument that the proposed fence around the property, which is also a structure as defined under the code, "contains" the tent sleeping areas. Finally, the findings note that the standards for a mass shelter at PCC 33.285 appear to contemplate that the sleeping areas of a mass shelter will be located

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> poles, signs, and other similar objects. Structure does not include paved areas or vegetative landscaping materials.' The examples given are all things that are semi-permanent. The tents individuals will erect at the rest area, whether one-person, two-person or small group (up to 10-person) tents, are temporary in nature and are not 'structures' as defined in the Zoning Code. Examples of structures describe those that are supported by one or more footings or foundations. The types of tents proposed are easily assembled and taken down.
>
> "There are proposed structures on the site. However, sleeping is also not allowed in these structures. As a result, the individuals at the rest area will not be occupying a structure, which is an essential element of a 'mass shelter.' The toilet, shower, kitchen, and laundry facilities, meeting and office structure, and storage structure are accessory to the proposed use and therefore do not constitute additional primary uses of the site. Additionally, [R2DToo] will not provide furnishings such as cots, floor mats or bunks, nor will there be an open sleeping area or areas divided by partitions. * * *.
>
> "Since a fence is also a structure, it was considered whether the proposed rest area surrounded by fences is 'a structure that contains one or more sleeping areas' that is characteristic of a mass shelter. Although a fence is a structure, a mass shelter contemplates that the structure will actually serve to contain the sleeping areas in the sense that it will provide indoor space. Therefore, the advisory recommendation is that the presence of a fence does not cause the proposal to become a mass shelter." Record 9.

indoors, within a building.[21] For these reasons, the findings conclude that the proposed tent camp "has none of the characteristics of a 'mass shelter.'" Record 9.

C. Petitioners' Challenges

Petitioners challenge the code interpretations embedded in the city's findings. LUBA's standard of review over a governing body's code interpretations, including staff interpretations adopted or incorporated by a governing body, is set out in ORS 197.829.[22] Generally, LUBA must affirm a

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[21] The findings continue:

> "Multiple temporary tents and accessory structures on the site are not like a single open sleeping area or multiple sleeping areas separated by non-permanent partitions that are characteristic of a mass shelter. The standards for mass shelters in PCC Chapter 33.285 refer to a building and net building area, and differentiate between indoor and outdoor activities. The concept of a 'structure' that contains sleeping areas separated by non-permanent partitions expressed in the definition of 'mass shelter' is more characteristic of a shelter in a building, like the Portland Rescue Mission, than a site with a collection of tents and accessory structures surrounded by a fence. Additionally, the tents do not function solely as sleeping areas, but as a place that individuals use for other daily activities as well. Based on these considerations, the proposed rest area has none of the characteristics of a 'mass shelter.'" Record 9.

[22] ORS 197.829 provides, in relevant part:

> "(1) [LUBA] shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:

governing body's code interpretation, unless it is inconsistent with the express language of the provision, or the purpose or policy underlying the code provision. Stated differently, LUBA must affirm a governing body's code interpretation that is "plausible," considering the text, context, purpose and policy underlying the code provision, even if the code could be plausibly interpreted in other ways. *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010).

Petitioners argue that the city's interpretations leading to its conclusion that the tent camp is not a mass shelter use are inconsistent with the express language, purpose for, and policy underlying the relevant code provisions. Specifically, under the first subassignment of error petitioners argue that the city's interpretation is inconsistent with the express language of the relevant

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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
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> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation; [or]
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; * * *
>
> "* * * * *
>
> "(2) If a local government fails to interpret a provision of its comprehensive plan or land use regulations, or if such interpretation is inadequate for review, the board may make its own determination of whether the local government decision is correct."

code provisions. ORS 197.829(1)(a). Under the second subassignment, petitioners argue that the interpretation is inconsistent with the purpose and the policy underlying the restrictions on uses in the IG1 zone, which we understand is a zone applied to land designated as an industrial sanctuary on the city's comprehensive plan map. ORS 197.829(1)(b) and (c).

For the reasons explained in detail below, we generally agree with petitioners. We first address consistency with the express language of the relevant PCC language, and then consider consistency with the purpose of, or policies underlying, the relevant PCC language.

1. Express Language of Relevant PCC Provisions

The city's findings considering the mass shelter use category focus almost exclusively on several purported differences in physical characteristics between the proposed tent camp and the definition of "Mass Shelter." We repeat the PCC 33.910.030 definition of "Mass Shelter":

> "A structure that contains one or more open sleeping areas, or is divided only by nonpermanent partitions, furnished with cots, floor mats, or bunks. Individual sleeping rooms are not provided. The shelter may or may not have food preparation or shower facilities. The shelter is managed by a public or non-profit agency to provide shelter, with or without a fee, on a daily basis."

As noted, the city concluded that the definition of mass shelter contemplates that a mass shelter's sleeping areas are located indoors, inside a permanent building. *See* ns 20, 21. Further, the city concluded that the proposed privacy fence around the facility, while a "structure," does not

"contain" the tented sleeping areas. *Id.* The findings also note that the definition states that the sleeping areas are "furnished with cots, floor mats or bunks," and concludes that the proposed tent camp is not a mass shelter in part because facility customers will provide their own sleeping pads. *Id*. The findings also conclude that the tented sleeping areas are not like the single open sleeping area, or multiple sleeping areas separated by non-permanent partitions, described in the PCC 33.910.030 definition of "mass shelter." *See* n 20. Based on these different physical characteristics, the city concludes that the proposed tent camp "has none of the characteristics of a 'mass shelter.'" *See* n 21.

We agree with petitioners that the interpretations embedded in the foregoing findings are inconsistent with the relevant PCC text and not affirmable under ORS 197.829(1)(a).

The city ultimately concluded that the general Community Service use category most closely describes the proposed tent camp, based on a set of generic qualities that are common to all of the specific Community Service examples listed in PCC 33.920.420.C, including mass shelters. Thus, the city's conclusion that the tent camp is not a mass shelter rests entirely on the conclusion that the tent camp has some arguably different physical characteristics than those described in the definition of "Mass Shelter" at PCC 33.910.030. As noted, the city's decision does not identify any functional differences between the proposed tent camp and a mass shelter. With that

preamble, we turn to petitioners' challenges to specific interpretations embedded in the findings.

a. Structure that Contains Sleeping Areas

As noted, PCC 33.910.030 defines "Mass Shelter" in relevant part to mean a "[s]tructure that contains one or more open sleeping areas, or is divided by non-permanent partitions[.]" PCC 33.910.030 defines "Structure" to include "[a]ny object constructed in or on the ground. Structure includes buildings, decks, fences, towers, flag poles, signs, and other similar objects." "Building" is defined as a "structure that has a roof and is enclosed on at least 50 percent of the area of its sides." *Id.*

The city's decision concludes that "[t]he concept of a 'structure' that contains sleeping areas separated by non-permanent partitions expressed in the definition of 'mass shelter' is more characteristic of a shelter in a building." Record 9, *see* n 21. Petitioners argue, and we agree, that to the extent the city interpreted the relevant code provisions to substitute the term "building" for the term "structure" in the definition of "mass shelter," the city's interpretation is inconsistent with the express language of that definition. If the city intended to limit the definition of mass shelters to facilities operated within buildings, it would have used the word "building" in the PCC 33.910.030 definition of "Mass Shelter" rather than the word "Structure."

As the findings note, the use regulations that govern mass shelters at PCC 33.285.040.B include several regulations that apply when the mass shelter

will be located within a building. However, the regulations do not *require* that a mass shelter be located within a building. To the extent the PCC 33.285.040.B regulations can be read to implicitly require that a mass shelter be located within a building, it may be that the proposed tent camp could not satisfy those regulations, and would be denied for that reason, if applied for. However, that a proposed use that is otherwise identical to a mass shelter does not comply with an applicable regulation for a mass shelter does not mean that the proposed use is not properly viewed as a mass shelter.

The city concluded that the proposed privacy fence that borders the property, while a "structure" as defined at PCC 33.910.030, is not a structure that "contains" sleeping areas within the meaning of the definition of "mass shelter," because it does not provide "indoor space" for sleeping areas. Record 9. However, nothing in the definition of "mass shelter" requires that sleeping areas be provided "indoors." Although the expectation may well have been that mass shelters would be located in buildings or other structures with roofs that provide "indoor space," nothing cited to us in the text of the relevant code provisions indicate that locating sleeping areas "indoors" is a definitional prerequisite to a mass shelter.

The relevant text aside, the city's narrow view of "structure" is also inconsistent with the apparent purpose of the prohibition on mass shelters in industrial zones. As discussed below, the apparent purpose of prohibiting mass shelters and short-term housing in the industrial sanctuary is part of the policy

to protect industrial uses from uses that are residential or quasi-residential in nature. In this context, it is not the *structure* associated with the mass shelter that is inconsistent with the policy to protect industrial areas from residential uses, but rather the operation of the mass shelter use itself. Similarly, in the present case, narrowly limiting the "structure" associated with a mass shelter to buildings and structures that provide sleeping accommodations within "indoor space" cannot possibly be consistent with the purpose and policy underlying protection of industrial areas from mass shelters and similar quasi-residential uses, if it allows within an industrial area a use that is functionally indistinguishable from a mass shelter.[23]

b. Tents as Structures

The findings also conclude that the tents erected at the site to provide sleeping areas, which include large 10-person tents 12-feet by 14-feet in size, are not "structures" as defined at PCC 33.910.030, because tents are temporary in nature and not supported by a foundation. Record 9. Petitioners argue that

[23] As petitioners argue, a mass shelter use or similar use offering sleeping accommodations that is located within a building would probably have *fewer* conflicts with nearby industrial uses, compared to a mass shelter use or similar use that is located within an open-air tent camp, as in the present case. Conversely, people accommodated in tents would likely be more impacted by nearby industrial activities than people accommodated within a building. However, under the city's interpretation, providing sleeping accommodations within a building is prohibited within the industrial area, while providing sleeping accommodations in an open-air tent camp is allowed outright in industrial areas.

the definition of "structure" at PCC 33.910.030 broadly includes "[a]ny object constructed in or on the ground[,]" and is not limited to permanent constructions or ones that require a foundation. Petitioners note that PCC 33.281.150 provides that "[t]emporary, portable, or relocatable structures are treated as any other type of structure."

We agree with petitioners that limiting the scope of "structure" to permanent construction with foundations, as a basis to conclude that the proposed tent camp is not a mass shelter, is inconsistent with the express language of the definitions of "structure" and "mass shelter." Nothing in the relevant definitions suggests that "structure" includes only permanent constructions with foundations. As we understand it, the large 10-person tents in particular will require framing and likely will be anchored to the ground, and otherwise seem to qualify as "object[s] constructed in or on the ground." Moreover, we understand that all of the tents, while easily taken down, are intended to remain more or less permanently in place and in use as part of the permanent tent camp facility. Even if "structure" excludes "temporary" structures, the city cites no basis to assume that the tents will in fact be in place and used only temporarily.

Again, for the reasons set out below we also think the purpose of the prohibition on mass shelters in industrial zones has a bearing on the interpretative issue of whether the proposed tents are "structures that contain" sleeping areas. Under the city's interpretation, constructing a 12-foot by 14-

foot cabin to provide sleeping accommodations for 10 persons would be a structure that houses a prohibited mass shelter, but erecting a 12-foot by 14-foot framed tent for the same purpose is an outright permitted use in the industrial zone, even though the underlying function, providing sleeping accommodations, is the same, and would present similar, if not more significant, conflicts with industrial uses.

c. Furnished With Cots, Floor Mats or Bunks

The definition of "mass shelter" includes structures that are "furnished with cots, floor mats, or bunks." The city's decision interpreted this language to require that the facility itself must "furnish" cots, sleeping pads, etc., and noted that R2DToo did not propose to provide anything for campers to sleep on within the tents. Apparently, R2DToo anticipates that each camper would provide their own sleeping pad. For this additional reason, the city concluded that the proposed tent camp does not fall within the definition of "mass shelter."

Petitioners argue that the "mass shelter" definition does not state, or necessarily imply, that the facility operator, as opposed to someone else, must supply cots, floor mats or similar surfaces to sleep on, in order to qualify the facility as a "mass shelter." According to petitioners, the trivial question of *who* provides the sleeping surfaces cannot possibly be a key distinguishing feature between a mass shelter and some other use category.

Again, we agree with petitioners. The city cites no reason or basis in the code to conclude that the question of whether the proposed tent camp is a mass shelter turns on the *identity* of the person or entity that furnishes the sleeping surfaces. It is simply implausible that the city would conclude that a use that would otherwise be categorized as a prohibited mass shelter should instead be categorized as a different use permitted outright, based on the fact that the participants rather than the shelter operator furnish sleeping pads or floor mats. And, again, we think that any interpretation to that effect, even if it were plausible as a textual matter, would be inconsistent with the purpose and policy underlying the prohibition on mass shelters in industrial areas.

d. Multiple Sleeping Areas Separated by Non-Permanent Partitions

The city's decision also concludes that the proposed tent camp is not characteristic of a mass shelter because it provides sleeping areas in multiple tents on the site, and does not provide either an open sleeping area or "multiple sleeping areas separated by non-permanent partitions[.]" Record 9.[24] Petitioners argue, however, that the tents provide "multiple sleeping areas," or

[24] The presence of a single sleeping area or multiple sleeping areas separated by non-permanent partitions is the key distinguishing feature between mass shelters and short-term housing. As the two use categories are defined at PCC 33.910.030, a mass shelter cannot have individual sleeping rooms, while such rooms are a defining characteristic of short-term housing. PCC 33.910.030 defines "Short Term Housing" to include, as an example, emergency shelters where individual rooms are provided, and states that "[w]here individual rooms are not provided, the facility may be a mass shelter."

that the tent walls are "non-permanent partitions" that separate what would otherwise be a single open sleeping area.

The city's interpretation that multiple tented sleeping areas are not like multiple sleeping areas separated by non-permanent partitions appears to be based on the interpretation, rejected above, that mass shelters must be located within buildings. Absent that premise, the city does not explain why the provision of multiple sleeping areas in tents does not strongly resemble, at least, the provision of "multiple sleeping areas separated by non-permanent partitions[.]" That sleeping areas are separated by the canvas walls of a tent rather than by a canvas partition does not mean that the proposed use does not provide "multiple sleeping areas separated by non-permanent partitions[.]"

It is simply implausible to conclude that providing separate private sleeping areas using tents rather than a canvas or similar partition makes the tent camp something other than a prohibited mass shelter and instead is a use permitted outright in industrial zones. And, as explained below, we believe that any interpretation to the contrary, even if plausible as a textual matter, simply cannot be consistent with the purpose and policy underlying the prohibition on mass shelters in industrial areas.

e. Non-Sleeping Activities in Tents

Finally, the city's decision states that "the tents do not function solely as sleeping areas, but as a place that individuals use for other daily activities as well." Record 9. The apparent implication is that sleeping is the only activity

allowed in mass shelter sleeping areas, not "other daily activities," but the decision cites nothing in the PCC to support that implication. As petitioners argue, a resident of a mass shelter is presumably permitted to read, eat, talk, etc. in their assigned sleeping area, or at least nothing in the definition of mass shelter or the regulations that govern mass shelters suggest otherwise.[25] We agree with petitioners the above-quoted interpretation does nothing to support the city's conclusion that the proposed tent camp is not a mass shelter.

f. Operation by a Non-Profit Organization

Notably, one of the few characteristics the city cites as an indication that the tent camp falls within the general Community Service use category is that the tent camp will be operated by a non-profit organization. Record 8 (citing operation by a non-profit as one of the characteristics of a Community Services use); *see* n 18. But we note that, while operation by public or non-profit agency may be a common element to many Community Service uses, operation by a public or non-profit agency is actually a particular *requirement* for mass

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[25] If there were some PCC restriction on "daily activities" that can occur in mass shelter sleeping areas, that restriction would presumably be intended to ensure that a mass shelter is limited to providing sleeping accommodations in order to avoid becoming a *de facto* residential use. If the city is seriously attempting to distinguish the proposed tent camp from mass shelters based on unrestricted use of sleeping areas for a wide range of domestic activities, it would make it that much harder for the city to conclude that the proposed tent camp is not a residential use, also prohibited in the industrial zone. We address below, under the second assignment of error, petitioners' arguments that the proposed tent camp is a prohibited residential use in the industrial zone.

shelters and short-term housing. *See* PCC 33.920.420.A (Community Service uses include "mass shelter or short-term housing where tenancy may be arranged for periods of less than one month when operated by a public or non-profit agency"); PCC 33.920.420.C (examples of Community Service uses, including "mass shelters or short-term housing when operated by a public or non-profit agency"); PCC 33.910.030 (defining mass shelter as one that is "managed by a public or non-profit agency"). By contrast, none of the other examples of Community Service uses *require* operation by a public or non-profit agency, and such operation is apparently not a necessary characteristic of the Community Service use category itself. In short, the city has not only failed to identify any characteristics of general Community Service uses shared by the proposed tent camp that are not also characteristic of mass shelters, but the city's decision ignores the fact that the non-profit operation of the proposed tent camp fulfills an express requirement that is unique to mass shelters and short-term housing.

g. Conclusion

For the foregoing reasons, the city's interpretations are inconsistent with the express language of the relevant PCC provisions and for that reason alone cannot be affirmed. However, we also consider whether the city's interpretations are consistent with the purpose of and policies underlying that prohibition. *See Keep Keizer Livable v. City of Keizer*, 64 Or LUBA 53, 62,

aff'd, 246 Or App 788, 268 P3d 162 (2011) (the ORS 197.829(1)(b) "purpose" test is independent of the ORS 197.829(1)(a) "express language" test).

2. Purpose and Policy Underlying Prohibition on Mass Shelters in Industrial Zones

As noted, almost all residential uses are prohibited in the IG1 zone, and industrial zones generally. That is consistent with city comprehensive plan policies and implementing regulations that strictly limit residential development in industrial sanctuaries in order to preserve industrial land primarily for manufacturing uses.[26] The IG1 zone does allow Community Service Uses, but expressly prohibits two listed types of Community Service Uses: mass shelters and short-term housing. Given the functional similarity

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[26] City of Portland Comprehensive Plan (PCP) Goal 4, Housing, Policy 4.1.J, provides that it is city policy to "limit residential development in areas designated as industrial sanctuaries." PCP Goal 2, Urban Development, Policy 2.14, provides that it is city policy to "[e]ncourage the growth of industrial activities in the city by preserving industrial land primarily for manufacturing purposes."

PCC 33.140.030.C describes the characteristics of the city's General Industrial zones, including the IG1 zone:

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

between the proposed tent camp and mass shelters, the purpose and policy underlying that prohibition on mass shelters in the IG1 zone would seem to be a key consideration in determining whether the tent camp is accurately characterized as a mass shelter. However, the city's decision does not address the purpose or policy underlying that mass shelter prohibition at all.

As we explain under the second assignment of error, mass shelters and their close cousins short-term housing are characterized by tenancy arranged for periods less than one month, which is a key characteristic that distinguishes them from residential uses, where tenancy is arranged for periods of a month or more. In that sense, mass shelters and short-term housing could be viewed as "quasi-residential" uses; uses that, but for the limited duration tenancy, would be considered residential in nature. As noted, PCC 33.285.050.B.7 subjects mass shelters (in the zones where they are allowed) to development standards for residential development. It seems evident to us that the reason mass shelters (along with short-term housing) are singled out among all Community Service Uses for prohibition within industrial zones is that mass shelters are one key distinguishing characteristic away from the residential uses that are prohibited in industrial zones. In other words, it is the near residential character of mass shelters (and short-term housing) that is the reason the city has legislatively deemed those uses to be incompatible with an industrial sanctuary, because allowing them in industrial lands presents the same kind of

risk to protected industrial sanctuaries as does residential uses.[27] If there are other purpose or policy reasons to prohibit mass shelters (but not other Community Service Uses) in industrial zones, neither the city's decision nor the city's brief cites them.

On its face, the proposed tent camp appears to provide essentially the same or at least very similar type of community service as a mass shelter: both facilities provide accommodations for persons who otherwise have no place to sleep or stay. The functional similarity of the proposed tent camp and mass shelters is a relevant consideration under PCC 33.920.010 and PCC 33.920.030. If a mass shelter is prohibited in the industrial zones because it is a quasi-residential use, the proposed tent camp would seem to present the same kind of threat to the industrial sanctuary as do mass shelters. Yet, the city's decision does not address the functional similarities of the two uses, in determining whether the proposed tent camp qualifies as a mass shelter use.

That omission is striking, because as noted mass shelters are subject to a number of restrictions even in the zones where they are allowed, including limitations on the number of beds and the overall density of mass shelters within a certain distance of each other. Yet, the city's decision concludes that the proposed tent camp, which functionally provides the same or nearly same

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[27] Mass shelters are also prohibited in the Open Space (OS) and Employment General (EG) zones, both of which prohibit or restrict residential uses. PCC 33.285.040.B.4.

community service as a mass shelter, is an outright permitted use in the industrial sanctuary, where mass shelters are prohibited, and thus is not subject to limitations on the density or other restrictions the code places on mass shelters. Taken to an extreme, under the city's interpretation an unlimited number of tent camp facilities in close proximity, offering an unlimited number of accommodations to houseless persons, could be approved in any industrial zone.[28]

If the purpose of the prohibition on mass shelters in industrial zones is to protect industrial uses from quasi-residential uses represented by mass shelters and their close cousins, short-term housing, then it seems utterly inconsistent with that purpose to allow within industrial zones—as an unlimited, unregulated and outright permitted use—a use that is functionally identical to a mass shelter. Neither the city's decision nor the city's brief addresses (1) the functional similarity between a mass shelter use and the proposed tent camp, (2) the purpose of prohibiting mass shelters in industrial zones, or (3) whether allowing tent camps in industrial zones presents the same conflicts with industrial uses as do mass shelters.

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[28] Indeed, under the city's interpretation—that the proposed tent camp is a Community Service use, separate and distinct from a mass shelter use—facilities like the proposed tent camp could be approved in *any* city zone. As far as we can tell, "Community Service" uses are allowed in all city zones as either permitted or conditional uses, while many of those zones prohibit mass shelters and short-term housing.

In our view, it cannot possibly be consistent with the purpose and policy of protecting industrial sanctuaries from residential and similar uses incompatible with those sanctuaries, to categorize as an outright permitted use a use that is functionally similar, if not functionally identical, to a use that is prohibited outright in the city's industrial zones because of its quasi-residential character. Accordingly, we conclude that the city council's interpretation to that effect is inconsistent with the purpose and policy underlying the prohibition on mass shelters in industrial zones, and the protection of industrial areas from quasi-residential uses such as mass shelters. ORS 197.829(1)(b) and (c).

3. Conclusion

As explained above, the distinctions the city attempts to draw between the proposed use and the mass shelter use are inconsistent with the express language of the relevant code provisions, and inconsistent with the purpose and policies underlying the prohibition on mass shelters in the IG1 zone. In our view, the city's interpretations of the relevant code provisions to the effect that the proposed tent camp is not a mass shelter are simply implausible, and cannot be affirmed. ORS 197.829(1)(a), (b), (c).

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

As an alternative to the first assignment of error, petitioners argue that even if LUBA affirms the city's interpretation that the proposed tent camp is

not a mass shelter, PCC 33.920.420.D.3 applies to exclude the proposed use from the Community Service use category. Sustaining the first assignment of error arguably makes it unnecessary to reach the second assignment of error, but to provide a complete decision in the event of appeal and avoid unnecessary trips up and down the appellate ladder, we believe it is appropriate to resolve petitioners' alternative argument under PCC 33.920.420.D.3.

PCC 33.920.420.D.3 lists several exceptions to the general Community Services use category, including "Uses where tenancy is arranged on a month-to-month basis, or for a longer period are residential, and are classified as Household or Group Living." Thus no Community Service use can have a tenancy arrangement that lasts longer than a month. If so, the use must be treated as a type of residential use. As noted, residential uses are generally prohibited in the IG1 zone.

According to petitioners, the proposed use must be categorized as a residential use pursuant to PCC 33.920.420.D.3, because the tent camp allows participants to stay at the camp longer than 30 days. In addition, petitioners note that the tent camp will include at least 14 Resident "Dreamers," who manage the camp and who will live at the facility on "a more permanent basis." Record 46 (testimony of R2DToo's architect identifying tents to be used by the "Dreamers," "who are the people who will manage the camp and live here in a more permanent basis"). Petitioners contend that the proposal to allow participants to stay at the camp indefinitely, for periods exceeding 30 days, and

allowing Resident Dreamers to stay on a semi-permanent basis, constitutes an arranged tenancy for periods longer than a month, and therefore the proposed tent camp is categorically excluded by PCC 33.920.420.D.3 from the Community Service use category, and must be treated as a residential use.

We agree with petitioners. The city's code, similar to the statutes governing landlord-tenant relations, distinguishes residential uses from non-residential transient-lodging-type uses (e.g. a hotel or motel) based on the length of tenancy. The city's two major residential land use categories are Household Living and Group Living.[29] Both types are distinguished from non-residential types of tenancy by the length of the tenancy. For example, PCC 33.920.100.A includes the following characteristic of Group Living:

> "Tenancy is arranged on a month to-month basis, or for a longer period. Uses where tenancy may be arranged for a shorter period are not considered residential. They are considered to be a form of transient lodging (see the Retail Sales and Service and Community Service categories)."

Consistent with the foregoing, PCC 33.920.100.D excludes from the category of Group Living:

> "Lodging where tenancy may be arranged for periods less than one month is considered a hotel or motel use and is classified in the Retail Sales And Service category. However, in certain situations, lodging where tenancy may be arranged for periods less than one

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[29] As we understand it, the main difference between the two residential use categories is that Household Living category includes persons who are related and thus form a "household" as defined in the PCC, while Group Living includes groups of persons who do not constitute a "household."

> month may be classified as a Community Service use such as short-term housing or mass shelters."

Thus, under the PCC's use category structure, uses where tenancy is arranged for periods less than one month, for example, day to day tenancies at a hotel or motel, or tenancy at a mass shelter, are treated as non-residential uses. But if the period of tenancy extends beyond one month, then pursuant to PCC 33.920.420.D.3 the use must be treated as a residential use, and is excluded from the category of Community Service.

The city's decision states that the "length of time individuals will stay at the rest area may vary from one day to longer than a month." Record 13. The findings do not consider the Resident Dreamers, but the city does not dispute that the Dreamers will likely stay longer than participants, and may stay on "a more permanent basis" at the facility. To address the exception at PCC 33.920.420.D.3, the decision states that the proposed tent camp "does not include arranging tenancy, whether on a month-to-month basis or longer." Record 10, 13-14. Relatedly, in addressing whether the proposed tent camp should be categorized as a Group Living use, the city states that:

> "The length of time individuals will stay at the rest area may vary from one day to longer than a month. * * * There is no requirement in the proposed operation of the rest area for houseless people to commit to stay for any specific period of time (such as on a month-to-month basis) or to sign a lease or any other form of tenancy agreement. These factors indicate the proposed rest area is a form of transient lodging, but is not a Group Living use, hotel or motel." Record 13.

However, the above-quoted finding does not explain why the fact that no lease for a specific period of time is signed between the participants and R2DToo leads to the conclusion that allowing participants to stay indefinitely at the tent camp, admittedly for periods potentially longer than a month, means that the proposed use is a "form of transient lodging." Nor does it explain how allowing the Resident Dreamers to stay at the facility on a "more permanent basis" could possibly be consistent with the conclusion that the proposed tent camp is "a form of transient lodging." Under the PCC, transient lodging, a label that apparently includes hotels, motels, mass shelters and short-term housing, is necessarily limited to stays less than one month in duration.[30]

In its brief, the city argues that an "arranged" "tenancy" for purposes of the exception at PCC 33.920.420.D.3 is limited to agreements to occupy space for a fixed period of time, such as a month-to-month lease. Because participants and volunteers can stay at the tent camp indefinitely, without any fixed term or month-to-month arrangement, the city argues that there is no "arranged" "tenancy." However, the city does not cite anything in the PCC that supports that limited view of tenancy and arrangement. Neither term is defined in the PCC. We note that both PCC 33.920.100.A and PCC 33.920.100.D refer to circumstances where "tenancy may be arranged" for periods of less than one

[30] We note that an analogous statute, the Oregon Residential Landlord and Tenant Act, defines "transient occupancy" for purposes of that Act as lodging on a day to day basis where the period of occupancy does not exceed 30 days. ORS 90.100(49).

month, in which case the use is categorized either as transient lodging or a Community Service use such as a mass shelter or short-term housing. Thus, under the PCC "tenancy" may be "arranged" in transient lodging or in Community Service facilities such as a mass shelter on a day to day basis. As used in the PCC, the terms "arranged" and "tenancy" clearly are not limited to month-to-month leases or fixed periods of a particular duration.

In the present case, the tent camp apparently offers accommodations on a day to day basis, but will allow occupancy of tents for periods longer than 30 days and, in the case of the Dreamers, even longer and perhaps "more permanent" occupancy. The question under PCC 33.920.420.D.3 is whether a use that offers tenancy for an indefinite period or on a permanent basis is a use "where tenancy is arranged on a month-to-month basis, or for a longer period[.]" If so, the use is excluded from the Community Service use category, and must be treated as a residential use.

In our view, it is implausible to characterize a tenancy offered on a semi-permanent basis or for an indefinite period exceeding 30 days as anything other than a tenancy that is arranged for a "longer period" than one month, as "tenancy" is used in the relevant code provisions. To the extent the city has interpreted PCC 33.920.420.D.3 to the contrary, the interpretation is inconsistent with the express language of that provision, read in context. The city's use categorization scheme carefully distinguishes between quasi-residential occupancies that last less than 30 days, and residential occupancies

that are month-to-month or for a longer period. The latter are entirely excluded from the Community Service use category, and must be categorized and regulated as residential uses. Such residential uses are generally prohibited in the IG1 zone. Read in this context, it is inconsistent with the express language of PCC 33.920.420.D.3 to interpret the exclusion not to apply to tenancies that allow permanent occupancy or occupancy for a period longer than 30 days.

Even if the city's interpretation were plausible considering only text and context, an interpretation that allows individuals or groups to live at the subject site on an indefinite or semi-permanent basis cannot possibly be consistent with the purpose of the general prohibition on residential uses in the IG1 zone, which is plainly to protect industrial areas from residential uses. Nor can it be consistent with the purpose of the PCC 33.920.420.D.3 exclusion from the Community Service use category, which is presumably intended in part to ensure the integrity of the city's land use categorization scheme. The city's position, that the proposed tent camp is an unlisted Community Service use that nonetheless allows individuals to live at the site for an unlimited duration, renders meaningless a key distinction between the Community Service use category and the Residential use category. The interpretations embodied in that position are inconsistent with the express language and purpose of the relevant code provisions, and cannot be affirmed.

The second assignment of error is sustained.

DISPOSITION

In sustaining the first assignment of error, we agreed with petitioners that the city's decision does not comply with the applicable PCC provisions, specifically that the city misconstrued the relevant PCC provisions in concluding that the proposed tent camp is not a mass shelter use, which is prohibited in the IG1 zone. The city's interpretation, we held, is inconsistent with the express language of the relevant code provisions, and also inconsistent with the purpose and apparent policy underlying protection of industrial sanctuary areas from Community Service uses, like mass shelters and short-term housing, that potentially introduce residential or quasi-residential uses to an industrial area. Under that disposition, the city's decision must be reversed. OAR 661-010-0073(1)(c).[31]

We also sustained the second assignment of error, petitioners' alternative argument that the proposed tent camp is excluded from the Community Service

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[31] ORS 227.175(11)(b) provides that an appeal of a zoning classification decision is subject to LUBA's jurisdiction "in the same manner as a limited land use decision." *See* n 4. We presume that ORS 227.175(11)(b) requires LUBA to dispose of the appeal of a zoning classification decision in the same manner as a limited land use decision. OAR 661-010-0073(1)(c) provides that LUBA shall reverse a limited land use decision when the "decision violates a provision of applicable law and is prohibited as a matter of law." Conversely, OAR 661-010-0073(2)(d) provides that LUBA shall remand a limited land use decision for further proceedings when the "decision misconstrues the applicable law, but is not prohibited as a matter of law[.]" Under our resolution of either the first or second assignments of error, the proposed tent camp is a prohibited use in the IG1 zone. Thus the city's decision to the contrary appears to be one that "violates the applicable law and is prohibited as a matter of law."

use category, and must be treated as a residential use of some kind. Because all residential uses (with an exception not relevant here) are prohibited in the IG1 zone, our resolution of the second assignment of error also requires reversal. OAR 661-010-0073(1)(c).

Accordingly, the city's decision is reversed.

RYAN, Board Member, concurring.

I agree with the resolution of the first, second, and fourth assignments of error. For the reasons explained below, I would sustain the third assignment of error. In my view, the city council proceeding on R2DToo's application was subject to the requirements and procedures in ORS 197.763 and the city committed a procedural error that prejudiced the substantial rights of the petitioners when it failed to follow the procedure set out in ORS 197.763.

The question presented in this appeal is the breadth or meaning of the statutory exemption from the definition of "[p]ermit" in ORS 227.160(2)(b) for zoning classification decisions. In other words, what does it mean when the legislature says a land use decision is "not a permit?" In my view, the meaning of "not a permit" means that the land use decision is not subject to the notice and hearing requirements of ORS 227.175(5) or (10), and it does not mean anything more than that.

The city takes the position that because zoning classification decisions are not permits, all zoning classification decisions, including a decision by the city's governing body on an application for a zoning classification decision, are

exempt from the requirements and procedures in ORS 197.763. The majority agrees and concludes that because zoning classification decisions are not statutory permits, they are also exempt from the notice and hearing procedures in ORS 197.763. I agree with the city that zoning classification decisions are not subject to the hearing requirements in ORS 227.175(5) or the notice requirements in ORS 227.175(10) because they are not permits. I do not agree, however, that the zoning classification decision that the city made in this case is exempt from the requirements of ORS 197.763. As I explain below, the plain language of ORS 197.763 supports the conclusion that the city council proceeding on R2DToo's application for a zoning classification decision should have been conducted according to ORS 197.763, and nothing in the language of ORS 227.160(2)(b) or any other statutory language that the majority relies on supports a contrary view.

Similar provisions to the current ORS 197.763 notice and hearing requirements and procedures were originally enacted in 1987, as Oregon Laws 197, chapter 729, §15. That legislation was codified at ORS 197.762 (1987). As relevant here, ORS 197.762 provided:

> "The following shall apply to land use hearings on applications for development of property entirely within an urban growth boundary to be conducted by a local governing body: * * *"

ORS 197.762 (1987) attempted to standardize, to some extent, notice requirements and hearing procedures.[32] But the notice and hearing requirements applied only to "applications for development of property entirely within an urban growth boundary," i.e., applications for permits in urban growth boundaries.

During the 1989 legislative session, the language that was codified at ORS 197.762 was replaced in its entirety with new ORS 197.763. ORS 197.763 provided and provides today in relevant part:

> "The following procedures shall govern the conduct of quasi-judicial land use hearings conducted before a local governing body, planning commission, hearings body or hearings officer on application for a land use decision and shall be incorporated into the comprehensive plan and land use regulations[.]"

Oregon Laws 1989, chapter 761, §10a.[33] Importantly, instead of applying only to "applications for development of property entirely within an urban growth

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[32] Prior to that time, the statutes governing decisions on permits allowed a hearings officer to make a decision on a permit without holding a hearing if the hearings officer gave notice of the decision to "those persons who would have had a right to notice if a hearing had been scheduled or who are adversely affected or aggrieved by the decision" and allowed those persons to appeal the decision to the hearings officer. The statutes allowed local governments to specify the hearing procedures and the hearing procedures varied from local government to local government.

[33] The same legislation made conforming changes to the statutes applicable to city and county permit decisions to subject hearings on those permits to ORS 197.763.

boundary," as ORS 197.762 did, and only to hearings conducted by a local governing body, the new notice requirements and hearing procedures now applied to (1) "quasi-judicial land use hearings" (2) "conducted before a local governing body, planning commission, hearings body or hearings officer;" and (3) "on application for a land use decision[.]"

Two years later, in 1991, the legislature enacted legislation that (1) created a new type of decision, the "limited land use decision," and (2) exempted zoning classification decisions from the definition of "permit" in ORS 227.160(2). Oregon Laws 1991, chapter 817, §8. The legislation that created the limited land use decision specifically exempted those decisions from "the requirements of ORS 197.763." ORS 197.195(2). However, although ORS 227.160(2)(b) was enacted in the very same legislation that created limited land use decisions and exempted those decisions from ORS 197.763, nothing in ORS 227.160(2)(b) includes any express exemption from the requirements of ORS 197.763 for zoning classification decisions.[34] The limited

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Oregon Laws 1989, chapter 761, §12 also amended ORS 197.830 to add a requirement that "a local government shall maintain a registry, available to the public, of decisions made in the preceding 12 months [that are made without a hearing]." That section was deleted in 1991. Oregon Laws 1991, chapter 817, §7

[34] That is probably because, based on testimony presented by proponents of the legislation, the legislature simply did not consider whether such decisions would be made by anyone other than planners. The legislative history of Oregon Laws 1991, chapter 817, §8 includes testimony from the City of

land use decision is the only category of decision that the legislature has expressly exempted from the requirements of ORS 197.763. So the legislature certainly knows how to exempt a type of land use decision from the requirements of ORS 197.763 when it wants to.[35]

The majority reasons that nothing in ORS 197.763, ORS 227.160(2)(b) or ORS 227.175(5) or (10) *required* the city council to hold a hearing on R2DToo's application. I agree with that conclusion. There is no statute that compelled the city council to make the city's decision on R2DToo's application.

Portland planning director explaining the situation that the proposed language sought to address:

> "Every day a planning agency's staff makes decisions about the appropriate zoning classification for a proposed use – many times a day in larger urban areas. Most of these decisions would seem trivial. In the review of building plans, for example, the planner determines that the proposed use – a restaurant, say – is one that's permitted in the zone which has been applied to the site." Testimony, House Energy and Environment Committee, HB 2261, January 30, 1991, Exhibit C; Petition for Review 45-46.

[35] The ORS 197.195(2) exemption from ORS 197.763 is not as broad as the language suggests, however. ORS 197.195(5) provides that if a local government decides to hold a hearing on an appeal of a limited land use decision and that hearing allows for the introduction of new evidence or testimony, that hearing "shall comply with the requirements of ORS 197.763."

This exception to the exemption suggests that the legislature views the procedural requirements and protections of ORS 197.763 as being important when new testimony, arguments, and evidence are introduced at a hearing.

However, that conclusion does not address the issue petitioners present. Petitioners argue that when the city council decided to make the decision on R2DToo's application for a land use decision after a public proceeding on the application, ORS 197.763 required the city council to conduct the public proceeding as a "quasi-judicial land use hearing conducted before [the] local governing body * * * on application for a land use decision * * *." Petition for Review 51-52. I agree with petitioners.

First, the city does not appear to dispute that the city council's decision is a "land use decision," or that the land use decision resulted from R2DToo's application for a zoning confirmation determination. The ORS 197.763 requirement for "an application for a land use decision" is met.

Second, I believe the city council's decision was a "quasi-judicial" decision, so that the city council was obligated to conduct a "quasi-judicial land use hearing" within the meaning of ORS 197.763. The phrase "quasi-judicial" is not defined in ORS 197.763 or any other statute. The meaning of the phrase "quasi-judicial land use hearing" is a question of state law. City legislation that defines the phrase, or city legislation that determines when the city's procedures for quasi-judicial land use reviews apply, is not relevant in determining what is meant by the phrase "quasi-judicial land use hearing." It is reasonable to assume that in using the phrase "quasi-judicial," the legislature intended to distinguish between quasi-judicial decisions and legislative decisions, and make only the former subject to ORS 197.763.

The distinction between quasi-judicial and legislative decisions was first articulated by the Supreme Court in 1979 in *Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 602-03, 601 P2d 769 (1979).[36] The legislature is presumed to have been aware of the Supreme Court's 1979 decision when it enacted ORS 197.763 in 1989. *State v. Clevenger*, 297 Or 234, 244, 683 P2d 1360 (1984).

The three *Strawberry Hill* factors are whether (1) the process is bound to result in a decision, (2) the decision is bound to apply preexisting criteria to concrete facts, and (3) the decision is directed at a closely circumscribed factual situation or a relatively small number of persons. The three *Strawberry Hill* factors are weighed together, and no one factor is determinative. *Estate of Paul Gold v. City of Portland*, 87 Or App 45, 740 P2d 812 (1987). In my view, the last two *Strawberry Hill* factors are present here. In order to address R2DToo's application, the city was bound to apply the PCC provisions that are discussed below in our resolution of the first and second assignments of error. The decision is also directed at a specific factual situation, given the identification of a specific piece of property and its zoning, and the

[36] During the February 18, 2016 city council proceeding, the city attorney advised the city council that, based on the state law definition of quasi-judicial and the *Strawberry Hill* factors, her opinion was that ORS 197.763 did not apply because the decision was not "quasi judicial." Record 73-74; Petition for Review 63.

particularity of the application and use, even accompanied by a specific site plan.

The first factor is also arguably present in this case. At least, the city does not explain by what authority it could have declined to respond to R2DToo's application for a zoning classification decision. The city also does not take the position that the decision is a legislative decision.

Under the majority's reasoning, ORS 197.763 does not apply either because the city did not process the decision according to the PCC procedures for a quasi-judicial land use decision, or because the city did not conduct a hearing before the city council that complied with the procedures and requirements of ORS 197.763. The circularity of that reasoning is apparent, and to endorse it would allow local governments to decide when to comply with the statute's requirements, or in effect, convert a mandatory statute into a hortatory one. That position is also inconsistent with the requirement in ORS 197.763 that the procedures and requirements of the statute "shall be incorporated into the comprehensive plan and land use regulations of local governments." If the city has not incorporated into its zoning code the procedures in ORS 197.763 for zoning classification decisions that are made by the local governing body after a public proceeding in response to an application for a land use decision, that failure does not exempt the city from the statute. Rather, it means that until that incorporation occurs, the statute applies directly.

The majority also reasons that ORS 197.763's requirements and procedures do not fit very well with zoning classification decisions because the statute provides for the introduction of evidence, an item that is not always necessary in order to make a zoning classification decision. However, as this case exemplifies, applications for a zoning classification decision can and do involve evidence within the meaning of ORS 197.763(9)(a), and certainly involve applicable criteria from the PCC, discussed in detail above in our resolution of the first and second assignments of error. More importantly, zoning classification decision applications such as the present one involve "testimony," "documents," "arguments," and "staff reports," other subjects of the hearings that are referenced in ORS 197.763. Finally, as noted, the legislature knows how to exempt decisions from ORS 197.763 when it wants to. ORS 197.195(2).

The majority also relies on the requirement in ORS 227.175(11) that zoning classification decisions must be recorded in a registry and notice of the decision can be provided if the applicant desires, in order to create a time limit on appeals of those decisions, and sees that requirement as evidence of an exemption from ORS 197.763's procedures and requirements. In my view, at best, the registry requirement will be potentially redundant on the likely rare occasion when a zoning classification decision is made by a local governing body, planning commission, hearings body or hearings officer, and nothing in it conflicts with ORS 197.763. In other words, nothing prevents the city from

continuing to record zoning classification decisions made with or without a hearing in the registry, but nothing in the registry requirement exempts the city council proceeding on a zoning classification decision from ORS 197.763.

The city's response that no procedural error occurred because petitioners were not prejudiced, because some or all of them appeared at the February 18, 2016 city council meeting and provided written and oral testimony and argument at that meeting, fails to establish that its procedural error did not prejudice the substantial rights of the parties. ORS 197.835(9)(a)(B). The city's response ignores the well settled principle that parties have the right to an adequate opportunity to prepare and submit their quasi-judicial land use case to a full and fair hearing. That includes adequate time to prepare and present their case after notice of a hearing to be conducted. *Muller v. Polk County*, 16 Or LUBA 771, 775 (1988) ("Under ORS 197.835[(9)(a)(B)] the 'substantial rights' of parties that may be prejudiced by failure to observe applicable procedures are the rights to an adequate opportunity to prepare and submit their case and a full and fair hearing"). Reading in the newspaper or otherwise learning from neighbors about a possible public proceeding before the city council on a land use application is not the same as receiving the notice that is required under ORS 197.763. In addition, a hearing conducted according to the procedures and requirements in ORS 197.763 would have allowed either an automatic continuance of the hearing upon request, or the record to be left open to respond to new information submitted during the hearing, a right that

petitioners here were deprived of when the city council failed to follow the procedures in ORS 197.763.

The city controlled its own destiny here. The city could have chosen to have the planning director make its zoning classification decision without holding any public proceeding on the application prior to issuing a decision. The procedures of ORS 197.763 would not apply to that decision. But in my view, when the city council, by some source of authority that is never identified by the city in its brief or in the decision, chose to make the decision on R2DToo's application after a public proceeding on the application, the procedures that are required for "quasi-judicial land use hearings * * * on application for a land use decision" applied. Having failed to comply with the requirements and procedures in ORS 197.763, the city committed a procedural error that prejudiced the substantial rights of petitioners (and R2DToo) to a full and fair hearing in accordance with the procedural protections afforded by ORS 197.763.

For the reasons set forth above, I would sustain the third assignment of error.

HOLSTUN, Board Chair, concurring.

I agree with the resolution of most of the first assignment of error and the third and fourth assignments of error. I do not agree with the majority's resolution of the second assignment of error.

With regard to the first assignment of error, under ORS 197.829(1) LUBA is required to affirm the city council's interpretation of its land use regulations unless LUBA determines that the city council's interpretation:

> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
>
> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

I agree with the majority that the city's interpretation that the proposed tent camp is properly viewed as something other than a "mass shelter," a use that is prohibited in the IG1 zone, is inconsistent with the relevant "express language" of the PCC, and for that reason should be reversed under ORS 197.829(1)(a). I do not agree with the majority's reliance on what it identifies as a city purpose or underlying policy against allowing "quasi-residential" uses in industrial zones generally and the IG1 zone in particular. There is no reason to invoke the far more subjective standards of review set out in ORS 197.829(1)(b) and (c) to reverse the city's decision in this matter, and doing so on its own, as the majority does here, poses the danger that this Board may misread or assign unwarranted emphasis to generally worded city purposes and policies. The majority finds a purpose and policy against allowing quasi-residential uses in industrial sanctuaries in PCP Goal 4 Housing, Policy 4.1.J, which provides that

it is city policy to "Limit residential development in areas designated as industrial sanctuaries[,]" and PCP Goal 2, Urban Development, Policy 2.14, which provides that it is city policy to "[e]ncourage the growth of industrial activities in the city by preserving industrial land primarily for manufacturing purposes." PCP Goal 2 Urban Development, Policy 4.1.J establishes a policy to "[l]imit residential development[,]" in industrial sanctuaries rather than to *exclude all* residential development. And that policy says nothing about "quasi-residential" uses. So the extension of that policy to be inconsistent with allowing tent camps that the majority characterizes as "quasi-residential" is the majority's interpretation, not the city council's.[37] PCP Goal 2, Policy 2.14 provides even less support for the majority's purpose or underlying policy against allowing quasi-residential uses in industrial sanctuaries.

The second assignment of error turns on the meaning of the PCC 33.920.420.D.3 exception from the Community Services use category which provides: "[u]ses where tenancy is arranged on a month-to-month basis, or for a longer period are residential, and are classified as Household or Group Living." Because some visitors to the tent camp may stay more than a month, the majority concludes the tent camp is a use "where tenancy is arranged on a month-to-month basis, or for a longer period." As far as the record shows, the

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[37] The description of the Group Living use category, the only residential use category that could possibly apply to the disputed tent camp, makes it clear that uses providing short-term occupancy are not even considered "residential" uses. PCC 33.920.100.

persons using the tent camp will not be signing leases or paying rent and will be free to come and go as they wish, although individual campers may stay longer than 30 days. The 14 "Dreamers" similarly might stay for more than 30 days, but are also free to come and go as they wish. I question whether such an arrangement is accurately described as a "tenancy" of any kind. That some of the campers might stay for more than a month, if they follow the camp rules and are not asked to leave sooner, certainly does not create a "tenancy" that "is arranged on a month-to-month basis, or for a longer period[.]" I would deny the second assignment of error.