

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 N.W.D.A., THE COMMUNITY ASSOCIATION
5 OF NORTHWEST PORTLAND, INC.,
6 and CARMELLA ETTINGER,
7 *Petitioners,*

8
9 vs.

10
11 CITY OF PORTLAND,
12 *Respondent,*

13
14 and

15
16 SINGER PROPERTIES,
17 *Intervenor-Respondent.*

18
19 LUBA No. 2008-212

20
21 FINAL OPINION
22 AND ORDER

23
24 Appeal from City of Portland.

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26 Daniel Kearns, Portland, filed the petition for review and argued on behalf of
27 petitioners. With him on the brief was Reeve Kearns, PC.

28
29 Peter A. Kasting, Chief Deputy City Attorney, Portland, filed a joint response brief
30 and represented respondent. With him on the brief were Timothy V. Ramis and Jordan
31 Schrader Ramis PC.

32
33 Timothy V. Ramis, Portland, filed a joint response brief on behalf of intervenor-
34 respondent. With him on the brief were Jordan Schrader Ramis PC and Peter A. Kasting.
35 Timothy V. Ramis and Christen C. White argued on behalf of intervenor-respondent.

36
37 HOLSTUN, Board Member; BASSHAM, Board Chair; RYAN, Board Member,
38 participated in the decision.

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40 AFFIRMED 03/31/2009

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

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NATURE OF THE DECISION

Petitioners appeal a city decision approving historic design review for a commercial parking garage.

MOTION TO INTERVENE

Singer Properties (intervenor), the applicant below, moves to intervene on the side of respondent in this appeal. There is no opposition to the motion, and it is allowed.

FACTS

Intervenor proposes to build an 87-space parking garage. The subject property is split-zoned storefront commercial (CS) and multi-dwelling residential (R1). The property is located in Northwest Portland. In 1977 the city adopted the Northwest District Policy Plan as part of the city comprehensive plan. The area subject to that plan included the subject property. In 2003 the city adopted a number of ordinances to replace the Northwest District Policy Plan with a new area plan, called the Northwest District Plan. Those 2003 ordinances also adopted amendments to the Portland Zoning Code to implement the Northwest District Plan.¹ Petitioner NWDA and others appealed the 2003 ordinances to LUBA. Two of those ordinances are relevant to the present appeal: Ordinance No. 177920 and Ordinance No. 178020. We described the ordinances in our final decision in those consolidated appeals:

“Ordinance 177920 adopts the Northwest District Plan (NDP), replacing the 1977 Northwest District Policy Plan. As relevant in this appeal, [Ordinance 177920] rezones a number of acres in the Northwest District, including a ‘Transition Area’ south of NW Vaughn Street where a number of parcels zoned for industrial uses are placed into employment zone designations allowing commercial, office and residential uses. Ordinance 177920 also

¹ The similarity of the names of key plan documents and zoning mechanisms in this appeal can be confusing. The 1977 plan for Northwest Portland was titled the Northwest District Policy Plan. The plan that was adopted to replace the Northwest District Policy Plan in 2003 is titled the Northwest District Plan. As already noted, both of those plans were adopted as part of the city’s comprehensive plan. The special zoning overlay district that the city has adopted to assist in implementing those plans for Northwest Portland is titled the Northwest Plan District. The Northwest Plan District is part of the Portland Zoning Code (PZC), not part of the comprehensive plan. PZC Chapter 33.562.

1 amends (1) the Central City Plan by rezoning a number of properties along the
2 Burnside Corridor, south of the Northwest [Plan] District, and (2) the Guild’s
3 Lake Industrial Sanctuary Plan to redesignate 16 acres within the sanctuary
4 north of NW Vaughn from industrial to employment comprehensive plan map
5 designations.

6 “Ordinance 178020 adopts city code amendments governing parking in the
7 Northwest [Plan] District. As relevant here, Ordinance 178020 authorizes
8 construction of six commercial parking structures on specifically identified
9 sites that are either zoned residential or split-zoned for residential and
10 commercial uses. Five of the six sites are currently used as surface parking
11 lots. Design review is required for all six parking structures. Four of the
12 parking structures would provide between 75 and 110 spaces each and would
13 be allowed outright as permitted uses in the pertinent zones. Two structures
14 would require conditional use approval. Ordinance 178020 exempts three of
15 the parking structures from applicable setback requirements and allows zero
16 setbacks. If constructed, the six parking structures would result in a net
17 increase of 402 off-street commercial parking spaces. Ordinance 178020 also
18 allows commercial parking on private accessory use parking spaces in
19 residential areas.” *NWDA v. City of Portland*, 47 Or LUBA 533, 538-39
20 (2004) (*NWDA I*) (footnote omitted).

21 In *NWDA I*, LUBA affirmed Ordinance No. 178020 and remanded Ordinance No.
22 177920. The remand of Ordinance No. 177920 was based on arguments wholly unrelated to
23 the parking provisions at issue in Ordinance No. 178020 and the present appeal. LUBA’s
24 decision in *NWDA I* was appealed to the Court of Appeals, which affirmed in part and
25 remanded in part. *NWDA v. City of Portland*, 198 Or App 286, 108 P3d 589, *rev den* 338 Or
26 681, 115 P3d 246 (2005) (*NWDA II*). The Court of Appeals remanded our decision in
27 *NWDA I* to reconsider a portion of our decision that rejected petitioners’ arguments that in
28 authorizing commercial parking structures the 2003 amendments violated Statewide Planning
29 Goal 5 (Natural Resources, Scenic and Historic Areas and Open Spaces). On remand from
30 the Court of Appeals, we addressed and again rejected petitioners’ Goal 5 arguments. Based
31 on the portion of our decision in *NWDA I* that was affirmed by the Court of Appeals, we
32 remanded Ordinance No. 177920 and stated that we need not “reconsider any other portion
33 of our initial [*NWDA I*] decision.” *NWDA v. City of Portland*, 50 Or LUBA 310, 342 (2005)
34 (*NWDA III*). Although Ordinance No. 177920 was remanded for the city to correct an error

1 in a relatively small and geographically specific part of the NDP, the city has not yet taken
2 any final action on remand regarding Ordinance No. 177920.

3 Our decision in *NWDA I* and *NWDA III* affirmed Ordinance No. 178020. Ordinance
4 No. 178020 included both NDP and Portland Zoning Code (PZC) amendments that explicitly
5 allow parking garages in certain residential zones and specifically authorized a commercial
6 parking garage on the subject property. Without these amendments, a commercial parking
7 garage would not be allowed on the R1-zoned portion of the property. As explained in more
8 detail below, Ordinance No. 178020 adopted an amended version of NDP Parking Policy 4,
9 which had been first adopted by Ordinance No. 177920. Ordinance No. 178020 also adopted
10 PZC amendments that now appear at PZC 33.562.130 and Map 562-3, which allow parking
11 garages on certain residential/commercial split zoned lots and allow commercial parking on
12 the subject property specifically.² Pursuant to ORS 197.625, the NDP and PZC amendments
13 adopted by Ordinance No. 178020 are now deemed acknowledged.³

14 To summarize, in 2003 Ordinance No. 177920 replaced the 1977 Northwest District
15 Policy Plan with the Northwest District Plan. Ordinance No. 177920 was remanded by
16 LUBA in *NWDA III* to correct a part of the NDP that has nothing to do with the parking
17 garage that is at issue in this appeal. The city has not yet taken action to correct the error
18 identified in LUBA's *NWDA I* and *NWDA III* decisions. Ordinance No. 178020 adopted
19 NDP Parking Policy 4 and amended the PZC to authorize parking on the subject property.
20 Ordinance No. 178020 was affirmed by LUBA and the NDP Parking Policy 4 and PZC
21 amendments that were adopted by Ordinance No. 178020 are now acknowledged.

² PZC 33.562.130 authorizes commercial parking in certain Multi-Dwelling zones. PCZ 33.562.130 specifically provides that "[t]he regulations of this Section apply to * * * parking sites shown on Map 562-3." The subject property is parking site number 1 on Map 562-3.

³ We discuss ORS 197.625 further later in this opinion.

1 **ASSIGNMENT OF ERROR**

2 **A. Petitioners’ Argument**

3 Petitioners do not argue that the challenge decision fails to demonstrate that the
4 relevant PZC commercial parking garage approval criteria are satisfied. We do not
5 understand petitioners to question that PZC 33.562.130 and PZC Map 562-3 authorize the
6 city to approve a commercial parking garage on the subject property. Instead, petitioners
7 argue that the PZC provisions that authorize the proposed use are invalid because Ordinance
8 No. 177920 was remanded and the city has not yet adopted an ordinance to readopt the NDP
9 since LUBA issued its decision in *NWDA III*:

10 “[T]he NDP provisions that authorize [T] commercial parking structures on R1
11 zoned parcels in the Northwest District Plan Area [were] the comprehensive
12 planning predicate upon which the PZC provisions and the challenged
13 decision are based. Without Ordinance [No.] 177920, the underlying NDP is
14 not valid, nor are any of the PZC amendments it purported to authorize, nor is
15 the challenged decision, which approves a commercial parking garage on a R1
16 zoned lot.” Petition for Review 4.

17 Petitioners argue that the amendments adopted by Ordinance No. 178020 were amendments
18 to the NDP that was previously adopted by Ordinance No. 177920 and that amendments to a
19 comprehensive plan whose enacting ordinance has been remanded are simply ineffective.
20 According to petitioners, an amendment to the NDP allowing parking garages cannot be
21 valid when there is no longer any valid NDP to amend. In other words, petitioners contend
22 that the only authority for allowing a parking garage on the subject property is Ordinance No.
23 177920, which is ineffective and invalid, and because Ordinance No. 178020 simply added
24 to the plan and land use regulations that were adopted by Ordinance No. 177920 those
25 amendments cannot stand alone and operate by themselves to authorize the disputed
26 commercial parking garage.

27 **B. Ordinance No. 177920 and Ordinance No. 178020**

28 Although Ordinance No. 177920 first adopted the NDP, Ordinance No. 177920 did
29 not adopt the PZC amendments that authorized development of a commercial parking garage

1 on the subject property. Ordinance No. 177920 provides the following explanation for what
2 the ordinance adopts and does not adopt:

3 “[The PZC] is amended as shown in Exhibit A and as amended in Exhibit D,
4 *with the exception of* Section 33.562.130, Commercial Parking in Multi-
5 Dwelling Zones, Section 33.562.290, Use of Accessory Parking for
6 Commercial Parking, Map 562-3, Section 33.815.308, Commercial Parking in
7 Multi-Dwelling Zones in the Northwest Plan District, and Definitions
8 amendments to 33.910, and references to these sections and maps in the Table
9 of Contents. These sections and map will be adopted by a separate Ordinance
10 and become effective on a date subsequent to the effective date of this
11 Ordinance.” Petition for Review Appendix 2, Page 4 of 4 (emphasis added).

12 While the PZC amendments that specifically authorize the city to approve a commercial
13 parking garage on the subject property appear in Exhibit A to Ordinance No. 177920, the
14 above language in Ordinance No. 177920 makes it clear that Ordinance No. 177920 did not
15 adopt those PZC amendments.

16 Ordinance No. 178020, which was adopted approximately a month and a half after
17 Ordinance No. 177920, provided the following explanation of its relationship to Ordinance
18 No. 177920:

19 “* * * The Northwest District Plan was adopted on September 24, 2003, to
20 replace the Northwest District Policy Plan. The Northwest District Plan
21 Parking Policy and Regulations (Parking Policy and Regulations) are being
22 adopted separately from the rest of the Northwest District Plan, due to issue
23 complexity and implementation strategy coordination, but will be
24 incorporated into the rest of the plan upon adoption. * * *” Respondent’s and
25 Intervenor-Respondent’s Brief Appendix A-1 through A-2.

26 Although the quoted language from Ordinance No. 178020 seems to say that the NDP
27 that was adopted by Ordinance No. 177920 did not include Parking Policy 4, it appears to us
28 that it did. Ordinance No. 177920 is attached as an appendix to the petition for review. The
29 NDP that was adopted by Ordinance No. 177920 is attached as Exhibit A to Ordinance No.
30 177920. Parking Policy 4 appears at pages E-18 through E-22 of Exhibit A. Although it
31 appears that the NDP as originally adopted by Ordinance No. 177920 included NDP Parking
32 Policy 4, Ordinance No. 178020 also adopted NDP Parking Policy 4 with minor and

1 apparently immaterial changes. Respondent's and Intervenor-Respondent's Brief Appendix
2 A-13 through A-18.

3 **C. The City's Findings**

4 The city's findings state:

5 "The appellant argued that the zoning regulations authorizing commercial
6 parking on the proposed site have not been adopted and/or are not valid. The
7 Council finds this argument is not correct for the following reasons. The
8 Council previously adopted the Northwest District Plan by Ordinance No.
9 177920 and, in a separate ordinance (Ordinance No. 178020), designated six
10 parking structure sites within the plan area, including the proposed parking
11 garage site. Both ordinances were appealed to LUBA and the Court of
12 Appeals. Ordinance No. 178020 was upheld in its entirety and is effective. It
13 is this ordinance that permits a commercial parking structure to be located on
14 the proposed site and requires design review for the proposed structure.
15 *Ordinance No. 177920 was sustained against all challenges except one*
16 *concerning compliance with the Transportation Planning Rule for a small*
17 *area at the intersection of NW 23rd and NW Vaughn. LUBA remanded the*
18 *ordinance to the City for further analysis under the TPR and that analysis is*
19 *underway. Ordinance No. 177920 remains a final Council action and is*
20 *effective, except with respect to the area subject to remand at NW 23rd/NW*
21 *Vaughn Streets. The Council finds that **Ordinance No. 177920**, which*
22 *adopted the zoning code changes applicable to this proposal, is the most*
23 *relevant of the ordinances to the proposed parking garage."* Record 48-49
24 (italics, underlining and bold lettering added).

25 We understand the above-quoted findings to give two reasons for rejecting
26 petitioners' argument that approval of the disputed commercial parking garage is inconsistent
27 with the city's comprehensive plan. First, in the underlined findings, we understand the city
28 to have found that, separately from and independently of Ordinance No. 177920, Ordinance
29 No. 178020 adopted a comprehensive plan amendment and PZC amendments that
30 specifically authorize the city to approve a commercial parking garage on the subject
31 property. Second, in the italicized findings above, the city found that although LUBA
32 remanded Ordinance No. 177920, the NDP that was adopted by Ordinance No. 177920
33 nevertheless remains in effect at the present time and authorizes the disputed parking garage.

1 Although we ultimately conclude below that the underlined findings above provide
2 an adequate response to petitioners’ argument, we first discuss the reasoning expressed in the
3 city’s italicized findings, *i.e.*, that the NDP adopted by Ordinance No. 177920 remained in
4 effect notwithstanding LUBA’s remand in *NWDA III*.

5 **D. The NDP Adopted by Ordinance No. 177920 Remains in Effect**

6 As an initial point, the city’s reference to Ordinance No. 177920 in the last sentence
7 of the italicized findings, which is in bold lettering above, was almost certainly intended to
8 be a reference to Ordinance No. 178020. As we have already explained Ordinance No.
9 177920 did not adopt the “zoning code changes applicable to this proposal,” Ordinance No.
10 178020 adopted those PZC amendments. Be that as it may, the city is almost certainly
11 wrong in its position that the NDP adopted by Ordinance No. 177920 remains effective
12 today, notwithstanding that LUBA’s decision in *NWDA III* remanded Ordinance No. 177920
13 and the city has not taken any action since LUBA’s decision in *NWDA III* to readopt the
14 NDP.

15 Based on the arguments in Respondent’s and Intervenor-Respondent’s Brief, we
16 understand the city and intervenor-respondent to contend that the position stated in the
17 italicized findings is supported by ORS 197.625(3). Under ORS 197.625, post-
18 acknowledgment actions by local governments to adopt or amend comprehensive plans or
19 land use regulations are deemed acknowledged if they are not appealed to LUBA or those
20 post-acknowledgment actions are affirmed on appeal. ORS 197.625(1) and (2).⁴ ORS

⁴ ORS 197.625 provides in part:

“(1) If a notice of intent to appeal is not filed within the 21-day period set out in ORS 197.830 (9), the amendment to the acknowledged comprehensive plan or land use regulation or the new land use regulation shall be considered acknowledged upon the expiration of the 21-day period. An amendment to an acknowledged comprehensive plan or land use regulation is not considered acknowledged unless the notices required under ORS 197.610 and 197.615 have been submitted to the Director of the Department of Land Conservation and Development and:

1 197.625(3) was added to ORS 197.625 in 1993. Oregon Laws 1993, ch 792, § 44. In
2 particular respondent and intervenor-respondent rely on ORS 197.625(3)(a), which provides:

3 “Prior to its acknowledgment, the adoption of a new comprehensive plan
4 provision or land use regulation or an amendment to a comprehensive plan or
5 land use regulation is effective at the time specified by local government
6 charter or ordinance and is applicable to land use decisions, expedited land
7 divisions and limited land use decisions if the amendment was adopted in
8 substantial compliance with ORS 197.610 and 197.615 unless a stay is
9 granted under ORS 197.845.”⁵

10 Although we conclude below that the underlined findings are a sufficient answer to
11 petitioners’ argument, and it therefore is unnecessary for us to decide the question here, we
12 believe the city’s and intervenor-respondent’s reading of ORS 197.625(3) is almost certainly
13 incorrect. ORS 197.625(3) was adopted in response to the Court of Appeals’ decision in *Von*
14 *Lubken v. Hood River County*, 118 Or App 246, 249, 846 P2d 1178 (1993).⁶ Under *Von*
15 *Lubken*, a post-acknowledgment action that adopts a new comprehensive plan or land use
16 regulation or amends an acknowledged comprehensive plan or land use regulation did not

“(a) The 21-day appeal period has expired; or

“(b) If an appeal is timely filed, the board affirms the decision or the appellate courts affirm the decision.

“(2) If the decision adopting an amendment to an acknowledged comprehensive plan or land use regulation or a new land use regulation is affirmed on appeal under ORS 197.830 to 197.855, the amendment or new regulation shall be considered acknowledged upon the date the appellate decision becomes final.”

⁵ Subsequent subsections of ORS 197.625(3) provide that land use decisions rendered under effective but not-yet-acknowledged comprehensive plans or land use regulations must be supported by statewide planning goal findings and development pursuant to such decisions may not be allowed to remain if the unacknowledged comprehensive plan or land use regulations the decision relies on are not ultimately acknowledged. ORS 197.625(3)(b) and (c). ORS 197.625(3)(d) limits application of ORS 197.625(3) to “applications for land use decisions * * * submitted after February 17, 1993[.]”

⁶ Minutes, House Committee on Natural Resources, Environment and Energy Subcommittee, HB 3661, (May 19, 1993, p 8); (May 26, 1993, p 3); (June 29, 1993, p 3); (July 23, 1993, p 12); (July 28, 1993, p 18). Testimony House Committee on Natural Resources, Environment and Energy Subcommittee, HB 3661, June 29, 1993, Ex C (Statement of James M. Coleman). Testimony House Committee on Natural Resources, Environment and Energy Subcommittee, HB 3661, July 16, 1993, Ex A (Statement of Gary Conkling). Testimony House Committee on Natural Resources, Environment and Energy Subcommittee, HB 3661, July 16, 1993, Ex B (Statement of Christine C. Cook).

1 become effective until it was acknowledged. 118 Or App at 249. Therefore, if such a post-
2 acknowledgment action was appealed to LUBA, any permit applications that were submitted
3 while that LUBA appeal and any appeals beyond LUBA were pending remained subject to
4 the pre-existing acknowledged comprehensive plan and land use regulation rather than the
5 new or amended comprehensive plan or land use regulation. ORS 197.625(3) was adopted to
6 allow post-acknowledgment comprehensive plan and land use regulation amendments to
7 become effective immediately while any appeals of those post-acknowledgment actions were
8 pending. We believe it is highly doubtful that ORS 197.625(3)(a) was adopted to preserve
9 the effectiveness of such amended comprehensive plans and land use regulations after LUBA
10 or the appellate courts have remanded the enacting ordinance following a finding that there
11 are legal errors in the new or amended plans or land use regulations. In *Western States v.*
12 *Multnomah County*, 37 Or LUBA 835 (2000), a case that is neither cited nor discussed by the
13 parties, we concluded, contrary to intervenor-respondent's and the city's position in this
14 appeal, that "land use regulations that were adopted by [a] remanded ordinance cease to be
15 'effective,' within the meaning of ORS 197.625(3)(a)." *Western States*, 37 Or LUBA at 842.

16 It is possible to read the language of ORS 197.625(3) literally and in isolation to
17 support the much more radical result that a new or amended comprehensive plan or land use
18 regulation remains effective indefinitely, notwithstanding that LUBA or the Oregon
19 Appellate Courts have found legal error in the new or amended comprehensive plan or land
20 use regulation amendment and remanded the ordinance that adopted them. However, our
21 decision in *Western States* rejects that interpretation of ORS 197.625(3). If we did not
22 conclude below that the underlined findings quoted above provide an adequate response to
23 petitioners' argument, we would almost certainly follow our decision in *Western States* and
24 reverse the city's decision.

1 **E. Ordinance No. 178020 Provides the Necessary Comprehensive Plan and**
2 **Zoning Authority for the Garage**

3 It is not entirely clear to us whether petitioners understand that Ordinance No. 178020
4 adopted not only the PZC amendments that specifically authorize approval of a commercial
5 parking garage on the subject property, but also readopted NDP Parking Policy 4. As far as
6 we can tell, NDP Parking Policy 4 supplies the comprehensive planning predicate for the
7 PZC measures that petitioners concede are sufficient to authorize approval of commercial
8 parking on the subject property.⁷ We will assume that petitioners are aware that Ordinance
9 No. 178020 readopted NDP Policy 4, but maintain that NDP Parking Policy 4 cannot be
10 effective to authorize the PZC provisions that authorize the disputed garage unless and until
11 the remaining parts of the NDP are also effective. We understand petitioners to contend that
12 notwithstanding ORS 197.625(3), the portions of the NDP that were only adopted by
13 Ordinance No. 177920 ceased to be effective when LUBA issued its decision in *NWDA III*
14 and will not become effective again until the city takes action to readopt those portions of the
15 NDP.

16 Because *NWDA III* affirmed Ordinance No. 178020, pursuant to ORS 197.625(1)(b)
17 NDP Parking Policy 4 is not only effective; it is now also acknowledged. *See* n 4. Perhaps if
18 our decision in *NWDA III* had been appealed the Court of Appeals might have concluded that
19 NDP Parking Policy 4 and the PZC amendments adopted by Ordinance No. 178020 cannot
20 operate independently from the parts of the NDP and PZC amendments that were adopted by
21 Ordinance No. 177920 and remanded without causing a internal conflict in the city’s

⁷ NDP Parking Policy 4 provides in part:

“The implementation approach would allow for the development of new off-street parking in a very controlled way, through a limited number of small parking structures that would be allowed on specifically identified sites. (See Zoning Code amendments to Sections 33.562.130, Map 562-3, and 33.815.308).” Respondent’s and Intervenor-Respondent’s Brief Appendix A-14 through A-15.

As previously noted, the subject property is a listed parking site on Map 562-3.

1 comprehensive plan or land use regulations. If that were the case, the Court of Appeals
2 would likely have reversed or remanded our decision in *NWDA III*. But as we have already
3 explained, our decision in *NWDA III* was not appealed. By operation of ORS 197.625(1)(b),
4 NDP Parking Policy 4 is both effective and acknowledged.

5 As we have already explained, we tend to agree with petitioners that the portions of
6 the NDP that were adopted by Ordinance No. 177920 and were not adopted by Ordinance
7 No. 178020 are no longer effective. If that is the case, in the abstract, this leaves the
8 comprehensive planning for the Northwest District in a state of some uncertainty until the
9 city takes action to adopt a new decision to respond to our remand in *NWDA III* or to adopt
10 an ordinance that simply readopts the portions of the NDP that were unaffected by our
11 remand.⁸ For example if the 1977 Northwest District Policy Plan was revived in whole or in
12 part by our remand in *NWDA III*, the 1977 Northwest District Policy Plan might include
13 policies that conflict with NDP Parking Policy 4 or the PZC amendments in ways that would
14 preclude approval of the disputed garage. But while petitioners claim throughout their
15 petition for review that the PZC amendments that were adopted by Ordinance No. 178020
16 and specifically authorize the disputed parking garage are inconsistent with the city's
17 comprehensive plan, at no point do they identify any part of the 1977 Northwest District
18 Policy Plan or any other part of the city's comprehensive plan that is consistent with those
19 PZC provisions. It follows that petitioners' assignment of error provides no basis for
20 reversal or remand.

21 The city's decision is affirmed.

⁸ If it is possible to separate the part of the NDP that was affected by our remand in *NWDA III* from the part that was not, an ordinance that readopted the parts of the NDP that were unaffected by *NWDA III* would almost certainly be invulnerable in any appeal. See *Beck v. City of Tillamook*, 313 Or 148, 831 P2d 678 (1992) (issues that were resolved in an earlier appeal to LUBA, or could have been raised but were not, cannot be raised on a subsequent appeal of the decision on remand).