



1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city decision denying approval of  
4 a Division of Motor Vehicles (DMV) wrecking certificate.

5 **INTRODUCTION**

6 To lawfully engage in the business of motor vehicle  
7 wrecking, one must possess a wrecker certificate issued by  
8 the DMV pursuant to ORS 822.100 to 822.150. Under ORS  
9 822.110(4) and 822.140, before the DMV will issue a wrecker  
10 certificate one must obtain, and submit to the DMV, local  
11 government approval for the wrecker certificate.  
12 ORS 822.140(2) provides in relevant part:

13 "A city \* \* \* governing body shall grant approval  
14 of a wrecker certificate \* \* \* when requested  
15 under this section if the governing body:

16 "(a) Approves the applicant as being suitable to  
17 establish, maintain or operate a wrecker yard  
18 or business;

19 "(b) Determines that the location or proposed  
20 location meets the requirements for location  
21 under ORS 822.110;

22 "(c) Determines that the location does not violate  
23 any prohibition under ORS 822.135; and

24 "(d) Approves the location and determines that the  
25 location complies with any regulations  
26 adopted by a city or county under this  
27 section."

28 The location requirements of ORS 822.110 referenced in  
29 ORS 822.140(2)(b), supra, are as follows:

30 "(1) [T]he area approved under the wrecker  
31 certificate for use in the wrecking business

1 [must meet] one of the following criteria:

2 "(a) The area is more than 1,100 feet from  
3 the nearest edge of the right of way of  
4 any state highway.

5 "(b) The business conducted within the area  
6 is hidden or adequately screened by the  
7 terrain or other natural objects or by  
8 plantings, fences or other appropriate  
9 means, so as not to be visible from the  
10 main traveled way of the highway, in  
11 accordance with rules adopted by the  
12 State Highway Engineer or a duly  
13 authorized representative of the highway  
14 engineer.

15 "(c) The area and the business thereon are  
16 located in an area zoned for industrial  
17 use under authority of the laws of this  
18 state." (Emphasis supplied.)

19 **FACTS**

20 The subject parcel is 1.3 acres in size and is zoned  
21 light industrial (IL). Wrecking yards are listed as a  
22 permitted use in the IL zone. In addition, the subject  
23 property is designated in the city's comprehensive plan as  
24 Industrial.

25 In a previous order concerning this appeal, we stated  
26 the following additional relevant facts:

27 "This is the second time a decision denying  
28 petitioner's application for city approval of a  
29 DMV wrecking certificate has been appealed to this  
30 Board. We remanded the first city decision  
31 denying petitioner's application in Bradbury v.  
32 City of Independence, 18 Or LUBA 552 (1989)  
33 (Bradbury I), aff'd 100 Or App 749 (1990). In  
34 that case we stated:

35 "The record is not particularly helpful  
36 in determining what regulations, if any,

1 the city did apply because there is no  
2 written order either identifying the  
3 criteria applied or explaining how the  
4 city reached its decision.  
5 Additionally, the minutes do not  
6 specifically identify what regulations  
7 the city applied to deny petitioner's  
8 application. However, the only  
9 regulations the record shows the city  
10 council addressed in its discussions  
11 regarding petitioner's application are  
12 unidentified 'regulations' and 'zoning  
13 and the comprehensive plan.'\* \* \*"  
14 (Emphasis in original.) Bradbury I, 18  
15 Or LUBA at 559.

16 "After this Board remanded the city's decision in  
17 Bradbury I, the city council conducted an  
18 executive session (September 11, 1990) and a  
19 public meeting (January 22, 1991) concerning  
20 petitioner's application for wrecking certificate.  
21 However, the city conducted no public hearings and  
22 provided petitioner no opportunity to submit  
23 additional evidence or argument concerning his  
24 application." Bradbury v. City of Independence,  
25 \_\_\_ Or LUBA \_\_\_ (LUBA No. 91-008, Order on Motion  
26 for Evidentiary Hearing, September 20, 1991), slip  
27 op 1-2.

28 After the city council's January 22, 1991 meeting, it  
29 adopted an order denying petitioner's request for a wrecker  
30 certificate. This appeal followed.

31 **FIRST ASSIGNMENT OF ERROR**

32 "Respondent violated the provisions of ORS 197.763  
33 and 227.175; decided this case without necessary  
34 public hearing and adopted inadequate findings all  
35 to the substantial prejudice of the petitioner."

36 **THIRD ASSIGNMENT OF ERROR**

37 "Respondent's decision that petitioner is  
38 unsuitable to hold a wrecking certificate is  
39 unconstitutional for want of an appropriate  
40 definition or standards upon which the city could

1 judge suitability, and that decision is entered  
2 without notice and opportunity to be heard, and is  
3 not based on substantial evidence in this record."

4 **FIFTH ASSIGNMENT OF ERROR**

5 "Respondent's decision is not supported by  
6 substantial evidence in the record."

7 In a previous order, parts of which are quoted above,  
8 we agreed with petitioner that the procedures employed by  
9 the city below were erroneous. We stated:

10 "\* \* \* The city argues that after remand by this  
11 Board, there was no requirement that the  
12 applicable standards be specifically identified by  
13 the city. According to the city, it is enough  
14 that the applicable requirements are located in  
15 the city's code and in ORS chapter 822. The city  
16 also argues that petitioner had no right after  
17 remand to present additional evidence or argument.  
18 The city maintains that after remand, all it was  
19 required to do was to adopt findings based on the  
20 record made during the hearings held on  
21 petitioner's application in 1989.

22 "ORS 197.763(3)(b) and (5)(a) require the city to  
23 identify the standards the city believes to be  
24 applicable to an application for quasi-judicial  
25 land use approval prior to its hearings on such an  
26 application. We are required to reverse or  
27 remand the city's decision if the city failed to  
28 follow applicable procedures in a manner that  
29 prejudices petitioner's substantial rights. ORS  
30 197.835(7)(a)(B). We have stated the substantial  
31 rights of parties referred to by  
32 ORS 197.835(7)(a)(B) include the 'rights to an  
33 adequate opportunity to prepare and submit their  
34 case and a full and fair hearing.' Muller v. Polk  
35 County, 16 Or LUBA 771, 775 (1988).

36 "As far as we can tell, the first and only time  
37 the city identified the standards it considered  
38 relevant to petitioner's application was in the  
39 January 22, 1991 decision challenged in this  
40 appeal. Further, there is no dispute that the

1 record establishes the city failed to conduct an  
2 evidentiary hearing, and failed to allow  
3 petitioner an opportunity to provide additional  
4 argument concerning petitioner's application,  
5 during its proceedings after this Board's remand  
6 in Bradbury I.

7 "Where as here, it was not reasonably possible for  
8 petitioner to ascertain what standards the city  
9 would apply to his particular application,  
10 petitioner's substantial right to submit his case  
11 was prejudiced by the city's failure to identify  
12 the applicable standards. In this case, in the  
13 absence of the relevant standards being identified  
14 by the city, petitioner was in no position to  
15 present evidence establishing that he met the  
16 approval standards which the city believed applied  
17 to his application. In these circumstances, we  
18 believe the city was not only required to identify  
19 the relevant standards after this Board's remand  
20 in Bradbury I, but also was also required to hold  
21 an evidentiary hearing to allow petitioner to  
22 present evidence and argument concerning the  
23 proper interpretation and application of those  
24 standards to his application. See Morrison v.  
25 City of Portland, 70 Or App 437, 689 P2d 1027  
26 (1984).

27 "In sum, we agree with petitioner that the city  
28 committed errors below. \* \* \* The alleged errors  
29 foreclosed petitioner's ability to present  
30 evidence and argument concerning the compliance of  
31 his application with relevant approval standards.  
32 These circumstances are sufficient to establish  
33 prejudice to petitioner's substantial rights.

34 "\* \* \* Remand is required to correct the city's  
35 errors, and such errors are shown in the record.  
36 \* \* \*" Bradbury v. City of Independence, \_\_\_ Or  
37 LUBA \_\_\_ (LUBA No. 91-008, Order on Motion for  
38 Evidentiary Hearing, September 20, 1991), slip op  
39 3-5.

40 Essentially, we determined that (1) the city's  
41 procedures below were flawed, (2) such errors caused

1 prejudice to petitioner's substantial rights, and (3) remand  
2 is required. Consequently, we sustain the first assignment  
3 of error which alleges various errors in the procedures  
4 employed below. On remand the city will be required to  
5 conduct an evidentiary hearing concerning petitioner's  
6 application for a wrecking certificate. Under these  
7 circumstances, no purpose is served in reviewing the  
8 evidentiary support for the challenged decision.

9 Finally, because we decide the city's decision is  
10 erroneous under applicable state statutes, we need not also  
11 determine whether the decision is constitutionally flawed.

12 The first assignment of error is sustained. The third  
13 and fifth assignments of error are denied.

14 **SECOND ASSIGNMENT OF ERROR**

15 "Respondent improperly construed the provisions of  
16 ORS 822.140 to inject in this proceeding approval  
17 criteria not intended by the statute."

18 **FOURTH ASSIGNMENT OF ERROR**

19 "Respondent improperly construed its regulations  
20 in identifying general standards as approval  
21 criteria; improperly construing the city's wrecked  
22 vehicle ordinance; and implying prospective and  
23 speculative violations against a new applicant."

24 In these assignments of error, petitioner argues the  
25 city applied inapplicable standards to deny his request for  
26 a wrecking certificate. While we determine above that the  
27 challenged decision must be remanded, we address these  
28 assignments of error to the extent it may be useful to the  
29 parties to do so. ORS 197.835(9)(a).

1           The city denied petitioner's application for a wrecking  
2 certificate on five bases. First, the city determined that  
3 the proposal does not satisfy four of the six factors set  
4 forth in ORS 822.140(3). Second, the city concluded under  
5 ORS 822.140(2)(a) that petitioner is not "suitable" to  
6 operate a wrecking yard. Third, the city concluded the  
7 proposal violates the comprehensive plan goals and policies  
8 "to protect life and property from natural hazards and  
9 disasters," "to maintain a viable and diverse economy while  
10 preserving the present sense of community and high level of  
11 environmental quality," and "to encourage efficient land  
12 use, maintain land use designations appropriate to the City  
13 of Independence and meet future land use needs." Record 9.  
14 Fourth, the city determined the proposal (1) does not  
15 include a building within which wrecked automobiles will be  
16 stored, (2) will cause substantial noise in a residential  
17 area, and (3) creates a "risk of water contamination."  
18 Record 10. Finally, the city determined the proposal  
19 violates the "Industrial Access Ordinance." Id. We address  
20 each of these bases separately below.

21           **A.    Statutes**

22                   **1.    ORS 822.140(3)**

23           ORS 822.140(3) provides:

24           "The governing body of a city \* \* \* may regulate  
25 the expansion of premises or the establishment of  
26 premises at a new location under a wrecker  
27 certificate. An applicant must comply with the  
28 regulations before the division may issue a

1 supplemental wrecker certificate. In adopting  
2 regulations under this subsection, a governing  
3 body:

4 "(a) Shall consider the extent of development of  
5 surrounding property in a residential area;

6 "(b) Shall consider the proximity of churches,  
7 schools, hospitals, public buildings or other  
8 places of public gathering;

9 "(c) Shall consider the sufficiency in number of  
10 other wrecking businesses in the vicinity;

11 "(d) Shall consider the health, safety and general  
12 welfare of the public;

13 "(e) May establish zones in which wrecking  
14 businesses are permissible and other zones  
15 where they are prohibited; and

16 "(f) May prescribe limitations on the dimensions  
17 of the premises on which wrecking businesses  
18 are conducted."

19 This statute authorizes a city to adopt regulations  
20 governing the expansion of existing, or the establishment of  
21 new, wrecking yards. It also lists factors which a city  
22 must consider in adopting such regulations. In this case,  
23 the only regulations the city has adopted specifically  
24 relating to wrecking yards, is to make them a permitted use  
25 in the IL industrial zone which is the zoning designation  
26 applied to the subject property. The city has not adopted  
27 any specific ordinances regulating either the siting or  
28 expansion of wrecking yards pursuant to ORS 822.140. The  
29 factors listed in ORS 822.140(3)(a)-(f) are considerations  
30 for the adoption of such regulations, not approval standards  
31 for individual wrecking certificates. In the absence of

1 such locally adopted regulations, ORS 822.140(3) does not  
2 provide a basis for the city to deny the proposal.

3 This subassignment of error is sustained.

4 **2. ORS 822.140(2)(a)**

5 ORS 822.140(2)(a) provides:

6 "A city \* \* \* shall grant approval of a wrecker  
7 certificate or renewal \* \* \* if the governing  
8 body:

9 "(a) Approves the applicant as being suitable to  
10 establish, maintain or operate a wrecker yard  
11 or business."

12 The findings concerning petitioner's compliance with  
13 ORS 822.140(2)(a) state:

14 "There is substantial evidence in the record that  
15 applicant is unsuitable to maintain and operate an  
16 auto wrecking yard in that applicant failed to  
17 comply with sight-obscuring requirements at  
18 another wrecking yard owned by applicant in  
19 another community." Record 8.

20 ORS 822.140(2)(a) authorizes the city to consider  
21 whether the applicant is "suitable" to "establish, maintain  
22 or operate a wrecker yard or business." The fact that the  
23 applicant for the subject wrecking certificate may own  
24 property in another jurisdiction occupied by a wrecking yard  
25 which violates certain sight obscuring requirements, does  
26 not answer the inquiry posed by ORS 822.140(2)(a). While  
27 ownership of the property occupied by an existing wrecking  
28 yard located elsewhere may have some bearing on determining  
29 the applicant's suitability, the findings do not explain why  
30 such is the case here. The above quoted findings fail to

1 state whether the applicant (petitioner) either established,  
2 maintains or operates the wrecking yard referred to in the  
3 findings as being out of compliance with certain  
4 unidentified standards. Further, the findings fail to  
5 identify the wrecking yard referred to or the  
6 "sight-obscuring requirements" allegedly not satisfied, and  
7 what jurisdiction is referred to. Consequently, the  
8 findings are inadequate to establish the applicant is not  
9 "suitable" under ORS 822.140(2)(a).<sup>1</sup>

10 This subassignment of error is sustained.

11 **B. Local Regulations**

12 Petitioner contends the city's comprehensive plan and  
13 land use regulations do not apply to applications for  
14 wrecking certificates. Petitioner argues the city may only  
15 apply local regulations enacted pursuant to ORS 822.140(3)  
16 in considering an application for local approval of a  
17 wrecking certificate.

18 We disagree. ORS 197.175(2)(d) requires the city to  
19 make all "land use decisions in compliance with the  
20 acknowledged plan and land use regulations." There is no  
21 dispute that the challenged decision is a land use decision.  
22 Consequently, the city is required to apply applicable  
23 provisions of its plan and land use regulations.

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<sup>1</sup>Because we conclude the city did not properly apply ORS 822.140(2)(a) in its decision, we do not consider petitioner's argument that the "suitability" requirement of ORS 822.140(2)(a) is unconstitutionally vague.

1                   **1. Applicability of Particular Plan Provisions**

2           The city's plan is divided into two parts. One part is  
3 called "Plan Policies" and the other is called  
4 "Comprehensive Plan Background Information" (plan  
5 background). However, some of the information contained in  
6 the plan background is more than simply information. It  
7 includes sections governing the procedures to employ in  
8 amending the plan and a section entitled "Implementation."  
9 In the "Implementation" section the plan states:

10           "As a guide for decision making in land use  
11 matters, the Comprehensive Plan outlines problems  
12 the city is facing and offers solutions to avoid  
13 them in the future. However, the Plan is too  
14 general in its treatment of problems to effectuate  
15 corrective measures without the use of the  
16 specific ordinances \* \* \* designed to implement  
17 the plan's policies. The most common  
18 implementation tools available are the zoning and  
19 subdivision ordinances, building and health codes,  
20 and capital improvements and community renewal  
21 programs. Of these, the zoning and subdivision  
22 ordinances and the building codes are the most  
23 important to implement this plan. The State  
24 health requirements suffice to monitor and  
25 regulate the city utilities and other health  
26 standards. \* \* \*" Plan 126.

27           We have previously stated that where a comprehensive  
28 plan makes it clear that plan policies are intended to guide  
29 development actions and decisions, and that the plan is  
30 implemented through local code provisions, such plan  
31 policies are not approval standards for individual  
32 conditional use decisions. Schellenberg v. Polk County, \_\_\_  
33 Or LUBA \_\_\_\_\_ (LUBA No. 91-018, August 2, 1991), slip op 4-

1 9. However, here, the organizational structure of the plan  
2 is not consistent with the language employed in the plan.  
3 Specifically, as stated above, while the plan states that  
4 provisions in a particular section are simply "background"  
5 information," that background information section contains  
6 the implementation language above quoted and the procedures  
7 for amendment of the plan. Similarly, while the plan  
8 implementation language quoted above strongly suggests the  
9 plan is not intended to contain independent approval  
10 standards for individual development applications, some of  
11 the plan policies are nevertheless worded as mandatory  
12 approval standards apparently applicable to individual  
13 development applications. Consequently, we analyze the  
14 particular plan policies applied by the city to deny the  
15 proposed wrecking yard, to determine whether they are  
16 applicable to the subject development application.

17 **a. Natural Hazards and Disasters**

18 The plan's Natural Hazards and Disasters section  
19 contains the following plan goal statement which the city  
20 applied to deny the proposal:

21 "Goal: To protect life and property from  
22 natural disasters." Plan i.

23 The city also applied the following plan policy from the  
24 Natural Hazards and Disasters section:

25 "3. Independence shall postpone development of  
26 soils with severe ratings due to poor  
27 drainage classes or a seasonally high water  
28 table until needed and then only if

1 protective measures are taken to avoid future  
2 problems stemming from those limitations."  
3 (Emphasis in original.) Plan i.

4 The city determined:

5 "The \* \* \* plan goal and policy to protect life  
6 and property from natural hazards and disasters  
7 would be violated in that chemicals would  
8 contaminate private water wells and natural animal  
9 and bird refuges because of the poor drainage  
10 capabilities, high water table and ponding caused  
11 by the surrounding soils." Record 9.

12 We do not believe the Natural Hazards and Disasters  
13 goal is a mandatory approval standard applicable to  
14 particular development applications. It is simply an  
15 aspirational statement which does not purport to be  
16 mandatory.

17 With regard to plan Natural Hazards and Disasters  
18 policy 3, this policy does appear to be a mandatory standard  
19 which is to be applied to development proposed on lands  
20 containing soils with "severe" ratings. However, the city's  
21 findings are inadequate in that they fail to state whether  
22 or on what basis the city concludes that the soils on the  
23 property have "severe" ratings. The background information  
24 section of the plan is the only part of the plan we have  
25 found which contains any provisions either defining or  
26 addressing what soils are considered to be rated as  
27 "severe." Plan 2-16. In addition, we note the plan states  
28 that "severe soil limitation is the rating given to soils  
29 that have one or more properties unfavorable for the rated  
30 use \* \* \*." (Emphasis supplied.) Plan 9. It appears that

1 the only use for which soils are rated in this section is  
2 dwellings, not industrial uses. Further, policy 3 does not  
3 require a proposal be denied if proposed development is  
4 "needed" on land with soils having "severe ratings."  
5 Rather, it envisions that "protective measures" be taken to  
6 avoid "future problems stemming from" the limitations of the  
7 severely rated soils.<sup>2</sup>

8 This subassignment of error is sustained.

9 **b. Economy**

10 The city also adopted the following findings concerning  
11 the plan "goal and policy to maintain a viable and diverse  
12 economy."<sup>3</sup>

13 We have examined the plan's "Economy" goal and  
14 policies. Plan xi. The Economy goal is generally worded  
15 and aspirational and the Economy policies are stated in  
16 precatory rather than mandatory terms. The Economy goal and

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<sup>2</sup>To determine appropriate "protective measures," at a minimum the city must explain what the "future problems stemming" from the limitations of the severely rated soils are, and evaluate proposals advanced by the applicant to mitigate such "future problems."

<sup>3</sup>The city's findings concerning plan "goal and policy to maintain a viable and diverse economy" state:

"The comprehensive plan and goal to maintain a viable and diverse economy while preserving the present sense of community and high level of environmental quality would be violated in that the proposed site would destroy the sense of community in the present residential area surrounding the proposed site and would reduce the level of environmental quality through increased noise, traffic, and seepage of hazardous chemicals into the water source." Record 9.

1 policies do not contain independent approval standards  
2 applicable to the proposed wrecking yard.

3 This subassignment of error is sustained.

4 **c. Land Use**

5 The city also adopted findings that the proposal  
6 violates the plan's "goal and policy to encourage efficient  
7 land use, maintain land use designations appropriate to the  
8 character of Independence and meet future land use needs."<sup>4</sup>  
9 Record 9.

10 This finding appears to apply primarily the goal of the  
11 "Land Use" section of the plan, rather than the policies of  
12 that plan section.<sup>5</sup> However, the plan's "Land Use" goal is

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<sup>4</sup>The city's findings concerning the plan "Land Use" provisions state:

"The comprehensive plan goal and policy to encourage efficient land use, maintain land use designations appropriate to the character of Independence and meet future land use needs would be violated in that establishment of a new industrial use in the area would not be compatible with surrounding residential uses." Record 9.

<sup>5</sup>The plan goal and policies concerning "Land Use" are as follows:

"GOAL: To encourage efficient land use, maintain, land use designations appropriate to the character of Independence and meet future land use needs.

"Policies:

- "1. Independence shall update and revise land use designations when necessary to accommodate demonstrated need or changing circumstances.
- "2. Independence shall establish and utilize low, medium and high density residential land use designations.

1 not worded as a mandatory approval standard. Rather, it is  
2 simply an aspirational statement of the objectives to be  
3 achieved through implementation of the plan.

4 Further, it is not clear whether the city also believed  
5 it was applying the "Land Use" policies as a basis to deny  
6 the proposal. However, we note that while all of the "Land  
7 Use" policies are worded in mandatory language, nearly all  
8 of the policies require only that the city adopt  
9 implementing ordinances. All but one of the "Land Use"  
10 policies do not purport to apply to individual development  
11 applications. The only plan "Land Use" policy which  
12 arguably could be interpreted to apply to individual  
13 development applications is policy 5, which requires the  
14 city to "insure that new industrial uses will be compatible  
15 with surrounding areas." However, when policy 5 is viewed  
16 in context with the remaining "Land Use" policies, as well

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"3. Independence shall establish and utilize a commercial land use designation.

"4. Independence shall establish and utilize an industrial land use designation.

"5. Independence shall insure that new industrial uses will be compatible with surrounding uses.

"6. Independence shall, by use of land use designations and proper zoning techniques establish the downtown Central Business District as the primary commercial area within the city and encourage it's continuation as such.

"7. Independence shall designate annexed land as residential land unless presently designated otherwise." Plan xv.

1 as the city's zoning ordinance which implements the plan, we  
2 conclude it was not intended to apply to individual  
3 development applications.<sup>6</sup>

4 This subassignment of error is sustained.

5 **2. Ordinance No. 1154**

6 The city also denied the proposal on the basis that it  
7 would violate unspecified requirements that "wrecked"  
8 automobiles be enclosed within a building. However, the  
9 decision lists as an applicable standard the requirement of  
10 Ordinance No. 1154 that "all dismantled, inoperative or  
11 abandoned vehicles be completely enclosed within a building  
12 within 72 hours[.]"<sup>7</sup> Record 8. This apparently refers to

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<sup>6</sup>While there are no specific provisions in the IL zone requiring all industrial uses to be "compatible with surrounding areas," we note that the IL zone distinguishes between conditional and permitted uses, and requires that all conditional uses satisfy the Independence Zoning Ordinance (IZO) requirements for conditional uses. IZO 71.015 requires that conditional uses "not be materially detrimental to the public welfare or to improvements or residents in the neighborhood."

<sup>7</sup>Ordinance No. 1154 provides in part:

"Chapter 43 Section 110, of the Independence City Code is amended to read:

"43.110. Vehicles Affected. It shall be unlawful to park, store or leave or permit the parking, storing or leaving of any licensed or unlicensed motor vehicle of any kind for a period of time in excess of 72 hours, which is in a rusted, wrecked, junked or partially dismantled or inoperative or abandoned condition, whether attended or not, upon any public or private property within the City of Independence, unless the same is completely enclosed within a building.

\*\* \* \* Chapter 43 of the Independence City Code is amended by adding:

1 the amended city code section 43.110 set out in Ordinance  
2 No. 1154, quoted in n 7.

3 We agree with petitioner that the amended city code  
4 section 43.110 set out in Ordinance No. 1154 is  
5 inapplicable. Section 43.110 applies generally to the  
6 parking or storage of wrecked vehicles. However, Ordinance  
7 No. 1154 also added city code section 43.115, which contains  
8 specific requirements applicable to "Junked Motor Vehicles  
9 Used in a Business." Here, the wrecked vehicles which will  
10 be stored at the proposed location will be used in  
11 connection with the proposed wrecking business. We believe  
12 that the more specific requirements of section 43.115 would  
13 apply, rather than the more general requirements of section  
14 43.110.

15 This subassignment of error is sustained.

16 **3. Industrial Access Ordinance**

17 IZO Subchapter 40 governs the IL zone. IZO 40.045  
18 provides:

19 "Access points to property from a street shall be  
20 located to minimize traffic congestion, and

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"43.115. Junked Motor Vehicles Used in a Business. When used in connection with a business enterprise properly operated in the appropriate business zone pursuant to the zoning laws of Independence, it shall be unlawful to park, store or leave or permit the parking, storing or leaving of any unlicensed or unlicensed motor vehicle of any kind for a period of time in excess of fifteen days, which is in a rusted, wrecked, junked or partially dismantled or inoperative condition, whether attended or not, upon any public or private property within the City of Independence, unless the same is completely enclosed within a building."

1 maximum effort shall be made to avoid directing  
2 traffic into residential areas. Existing access  
3 roads and access points shall be used to the  
4 maximum extent possible to serve the greatest  
5 number of uses. Access roads and driveways shall  
6 be surfaced with asphaltic concrete or similar  
7 permanent surfacing."

8 The city's findings state:

9 "Industrial Access Ordinance. Applicant's  
10 property is surrounded by residential property,  
11 therefore, it is impossible to avoid directing  
12 traffic into residential areas. That portion of  
13 Stryker Road abutting applicant's property and the  
14 surrounding residences is a county road and is  
15 presently unpaved."<sup>8</sup> Record 10.

16 We agree with petitioner that the part of IZO 40.045  
17 concerning directing traffic into residential areas does not  
18 provide a basis to deny the proposed wrecking yard. Rather,  
19 it requires the city to utilize "maximum effort" to avoid  
20 directing traffic into residential areas.<sup>9</sup> However, if it  
21 is impossible to avoid having traffic go into residential  
22 areas, then IZO 40.045 does not require that a proposed use  
23 be denied.

24 It is not clear whether or how the city interpreted the  
25 provision in IZO 40.045 concerning the paving of "access  
26 roads." We are cited to no ordinance or local legislative

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<sup>8</sup>Petitioner disputes that the subject property is surrounded by residential development. We express no position on whether the evidence in the record supports the city's assertion that the subject property is surrounded by residential development.

<sup>9</sup>The parties also dispute the meaning of the term "access points" as used in IZO 40.045. However, we believe the city should interpret its ordinance in this regard in the first instance.

1 history which provides a definition of the term "access  
2 roads." We leave it to the city to interpret this provision  
3 of IZO 40.045 in the first instance.

4 This subassignment of error is sustained.

5 **C. Noise and Water Pollution**

6 The challenged decision states the proposal would  
7 violate "noise regulations" and poses an "environmental risk  
8 of water contamination." Record 10. However, we cannot  
9 tell from the findings what particular city regulations  
10 governing noise and water pollution are violated.  
11 Accordingly, the city's findings do not state an adequate  
12 basis for denial.

13 We note that in the city's brief, it argues that the  
14 findings regarding water pollution are based upon  
15 ORS 468.720.<sup>10</sup>

16 ORS 468.720 is a part of ORS chapter 468, which is entitled  
17 "Pollution Control," and is within a section of the Oregon  
18 Revised Statutes concerning "Public Health and Safety."  
19 ORS chapter 468 delegates to the Oregon Department of  
20 Environmental Quality the authority to administer ORS  
21 chapter 468.

22 We are aware of no city standard in the plan or  
23 elsewhere, and no provision in ORS chapter 468 requiring the  
24 city to determine that a development proposal will not

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<sup>10</sup>ORS 468.720 essentially provides that it is unlawful to pollute the waters of the state.

1 violate provisions of ORS chapter 468. Further, we believe  
2 the statement in the "Implementation" portion of the plan  
3 that "[t]he State health requirements suffice to monitor and  
4 regulate the city utilities and other health standards"  
5 (plan 126), makes it reasonably clear that ORS chapter 468  
6 is not intended to contain independent approval standards  
7 applicable to development applications submitted to the  
8 city. Rather, it appears that the city has decided that  
9 state programs and requirements, including presumably those  
10 in ORS chapter 468, are appropriate to regulate health  
11 issues.

12 In addition, we note that we have been cited to no  
13 applicable regulations having to do with noise to serve as a  
14 basis for denial of the proposed wrecking yard.

15 This subassignment of error is sustained.

16 The second and fourth assignments of error are  
17 sustained.

18 **SIXTH ASSIGNMENT OF ERROR**

19 "Respondent is estopped from denying petitioner's  
20 sign-off of his DMV permit."

21 **SEVENTH ASSIGNMENT OF ERROR**

22 "Respondent made a decision which was outside the  
23 range of discretion allowed it under its  
24 comprehensive plan and implementing ordinances;  
25 presented this position without probable cause to  
26 believe their position was well founded; and  
27 primarily presented that position for the purpose  
28 of delay, harassment and intimidation of  
29 petitioner."

30 As stated supra, petitioner moved for an evidentiary

1 hearing, and we denied that motion on the basis that the  
2 challenged decision must be remanded in any event because,  
3 among other things, the city failed to hold a hearing. One  
4 of the bases for petitioner's motion for evidentiary hearing  
5 was that he wished to establish that city representatives  
6 had essentially told him, before he purchased the subject  
7 property, that if a wrecking yard were applied for it would  
8 be allowed.

9       Because we remand the challenged decision to the city  
10 for it to conduct an evidentiary hearing for the purpose of  
11 identifying and applying relevant standards to petitioner's  
12 application for a wrecking certificate, we do not reach  
13 petitioner's arguments concerning (1) whether the city is  
14 estopped from denying wrecking certificate approval, or (2)  
15 whether the city's denial of such certificate after our  
16 remand in Bradbury I, supra, without holding an evidentiary  
17 hearing, was outside of the range of the city's discretion.

18       The sixth and seventh assignments of error are denied.

19       The city's decision is remanded.