BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JOHN FREWING,
Petitioner,

vs.

CITY OF PORTLAND,
Respondent,

and

PHK DEVELOPMENT INC.,
Intervenor-Respondent.

LUBA No. 2016-006

FINAL OPINION
AND ORDER

Appeal from City of Portland.

John Frewing, Portland, filed the petition for review and argued on his own behalf.

Lauren King, Deputy City Attorney, Portland, filed a response brief and argued on behalf of respondent.

Christe White, Portland, filed a response brief and argued on behalf of intervenor-respondent. With her on the brief was Radler White Parks & Alexander LLP.

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

AFFIRMED 07/21/2016

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioner appeals a hearing officer's decision approving a land division.

FACTS

The subject site includes five lots zoned High Density Residential (RH) and Commercial Office 2 (CO2). The site is bordered on the south by Sullivan's Gulch, a light rail line, and Interstate 84, on the north by NE Multnomah Street, and on the east by NE 21st Avenue. The steep southern portion of the site is within an Environmental Conservation (c) overlay zone, and the entire site is designated as a Potential Landslide Hazard Area. An undeveloped 16-foot wide pedestrian easement crosses the site from NE 21st Avenue to the western property line, where it takes two 90 degree turns to the south and connects with an undeveloped continuation of the easement across the adjacent property, which is otherwise developed as a motel.

Intervenor-respondent PHK Development, Inc. (intervenor) filed a land division application in order to consolidate the five lots into two lots and two resource tracts. Proposed Lot 1 is 37,500 square feet in size, and has frontage on both NE Multnomah Street and NE 21st Avenue. The record includes conceptual drawings and plans for a multi-family dwelling that intervenor intends to construct on Lot 1. Proposed Lot 2 has 50 feet of frontage on NE Multnomah Street, and includes an existing single-family dwelling that would remain. Tracts A and B to the south of proposed Lots 1 and 2 are within the

Environmental Conservation overlay zone. Intervenor proposed that the existing pedestrian easement north of the overlay zone be vacated, and a new easement be placed within the overlay zone that could accommodate a future Sullivan's Gulch Trail with both pedestrian and bicycle facilities.

The city processed the land division application under its Type IIx procedures, which are intended for land divisions that create up to three new lots where any portion of the lots are within a landslide hazard area. Type IIx procedures call for an initial staff decision that can be appealed to a hearings officer. Land divisions that create four or more new lots within a landslide hazard area are subject to the city's Type III procedures, which require an initial hearing and offer potential appeal beyond the hearings officer.

Staff approved the application, with conditions. Petitioner appealed the decision to the hearings officer, who conducted a hearing and, on December 30, 2015, issued the city's final decision approving the application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioner argues that the city committed procedural error by processing the land division application under the city's Type IIx process rather than the Type III process. Portland City Code (PCC) 33.660.110(A) provides that land divisions that "include" any of several listed elements shall be processed under Type III procedures. One of the listed elements is "[f]our or more lots, where any portion of the lots * * * are proposed within a Potential Landslide Hazard

Area[.]" PCC 33.660.110(A)(2). Petitioner argues the Type III process is required, because the land division consolidates five lots into two lots and two tracts, and therefore the proposal "includes" four or more lots, even if it only creates two lots.

The city responds, and we agree, that the city correctly processed the application under its Type IIx procedures. First, as the city notes, PCC 33.910.030 defines "lot" to exclude "tract[.]" The proposed land division created only two "lots" as that term is defined in PCC 33.910.030. What distinguishes the Type IIx process from the Type III process is the number of lots created, not the number of tracts created.

Second, contrary to petitioner's argument, the language in PCC 33.660.110(A)(2) that land divisions that "include" elements such as four or more lots are subject to Type III procedures is addressing the number of lots "proposed," not the number of preexisting lots. That is clear when viewed in context with PCC 33.660.110(B), which requires hazard area land divisions that include "[t]wo to three lots" to follow Type IIx procedures. If petitioner were correct that the proposal "includes" both the number of pre-existing lots *and* the lots created, there would never be only "two" lots involved in a land division; at a minimum there would be three (the original lot and two lots created from that original lot).

Finally, as the city argues, petitioner identifies no prejudice to his substantial rights. ORS 197.828(2)(d) authorizes LUBA to remand a limited

land use decision such as the present one on the basis of procedural error only if the error prejudiced the substantial rights of the petitioner. Petitioner fully participated in the proceedings below, and identifies no prejudice to his substantial rights.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

As noted, Lot 2 is zoned RH, is developed with a single family dwelling, and retains the 50 feet of frontage on NE Multnomah Street that one of its constituent former lots provided. No new development is proposed for Lot 2. PCC Table 612-1 provides that for RH lots to be developed with multi-family dwelling structures the minimum front lot line is 70 feet. The minimum front line for lots to be developed with a detached dwelling is 10 feet. The RH zone allows both multi-family dwellings and single family dwellings.

Petitioner argued to the hearings officer that because Lot 2 is zoned for multi-family dwellings, and because no new development is proposed on Lot 2, the minimum front lot line should be the 70 feet appropriate for multi-family development. According to petitioner, Table 612-1 only applies to *proposed* development. Because no new development of Lot 2 is proposed, petitioner argues, the dimensions of Lot 2 must be able to support development in accordance with the highest planned density of the RH zone, even if no redevelopment is proposed at this time.

The hearings officer rejected that argument, concluding that Table 612-1 does apply, and that Lot 2 *is* proposed for development, as the site for the existing single-family dwelling. Because Lot 2's 50-foot front lot line exceeds the 10-foot lot line required for single-family development, the hearings officer concluded that Lot 2 satisfies the minimum dimensional standards. The hearings officer also noted if that if Lot 2 is ever redeveloped with multi-family housing, a subdivision amendment would be required to conform the lot dimensions to the applicable standards. Record 9-11.

Other than simply repeating the arguments made below that Table 612-1 does not apply because no development of Lot 2 is proposed, petitioner does not acknowledge or challenge the hearings officer's findings at Record 9-11. Intervenor argues, and we agree, that absent a more developed challenge to the hearings officer's finding that single-family development is proposed for Lot 2, and therefore the 10-foot front lot line standard applies, petitioner has not demonstrated a basis for reversal or remand.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

PCC 33.700.025 requires that, prior to filing an application for a land division, the applicant must request a meeting with the applicable neighborhood association contact, must provide a summary of the proposal, and is encouraged to provide conceptual site plans or other information that supports the proposal. If the neighborhood association requests a meeting, the

1 applicant must attend. PCC 33.700.025(A) states that where the proposal is for
2 a land division, the focus of the meeting should be on the proposed
3 configuration of lots, tracts and streets. After the meeting, but prior to filing
4 the application, the applicant must send a letter to the neighborhood association
5 explaining what "changes, if any, the applicant is making to the proposal."
6 PCC 33.700.025(C)(2).

7 In the present case, intervenor's request for a meeting stated that the
8 "land use application to create this property configuration is a Type IIx land
9 division[,]" and included a drawing of the proposed configuration. The request
10 described the proposal as one to "reconfigure a property line between two
11 sites[,]" and the drawing was labeled "Concept for the Property Configuration,"
12 and "Proposed Property Line Adjustment." Record 326-28. The neighborhood
13 association set two meetings, which intervenor's representatives attended. The
14 neighborhood association board voted unanimously to support the proposal,
15 and suggested no changes. Intervenor sent a post-meeting letter memorializing
16 that no changes were requested, and thereafter filed its land division
17 application. City staff requested that intervenor show the existing and
18 proposed trail easement on the submitted plans, and intervenor accordingly
19 revised the site plan to depict the existing and proposed trail easements.
20 Representatives from the neighborhood association appeared at the land
21 division proceeding, acknowledging the relocated trail and again expressing its
22 support.

1 Petitioner argued below that the proposal submitted to the city differs in
2 some particulars from the proposal reviewed by the neighborhood association,
3 and that the city committed procedural error by not requiring intervenor to
4 resubmit the changed proposal to the neighborhood association. For example,
5 petitioner argues that the proposal submitted to the association was labeled a
6 property line adjustment, rather than a land division, and that the drawing
7 submitted to the association did not depict the relocated trail easement. The
8 hearings officer rejected those arguments, concluding that intervenor complied
9 with all neighborhood contact requirements. Record 7-9. Again, petitioner does
10 not acknowledge or challenge those findings, but largely repeats to LUBA the
11 arguments he made to the hearings officer. That problem aside, petitioner
12 identifies no code provision requiring that changes made to the proposal during
13 the public review process means that the proposal must be reviewed again by
14 the neighborhood association, or that such changes mean that the application
15 must be denied. Petitioner's suggestion that intervenor misled the
16 neighborhood association by labeling the proposed lot configuration a property
17 line adjustment rather than a land division is without merit. The letter to the
18 neighborhood association advised that intervenor was seeking a "Type IIx land
19 division." Petitioner does not explain why the label applied to the proposed lot
20 configuration—property line adjustment versus land division—is material.
21 Petitioner identifies minor differences between the conceptual drawing
22 presented to the neighborhood association, and the final plan, with the most

1 notable difference being the depicted trail easements that staff requested, and
2 that the neighborhood association expressed support for. Petitioner argues that
3 any change at all between the conceptual and final drawings means that there is
4 a new "proposal," which according to petitioner means that the city erred in
5 approving the land division without sending the new proposal back to the
6 neighborhood association for review. However, respondents argue, and we
7 agree, that petitioner has not demonstrated that intervenor violated any
8 neighborhood meeting requirements, or that the city committed error in
9 processing the land division application. Nothing cited to us in PCC
10 33.700.025 or elsewhere suggests that a land division that includes changes
11 made during the public proceedings cannot be approved unless the proposal is
12 returned to the neighborhood association for further review.

13 The third assignment of error is denied.

14 **FOURTH ASSIGNMENT OF ERROR**

15 As noted, the subject site is designated a Potential Landslide Hazard
16 Area. PCC 33.632 requires a landslide hazard study, in order to ensure that lots
17 and proposed buildings are located on parts of the site suitable for
18 development. Intervenor's geotechnical engineer submitted a landslide hazard
19 study, at Record 129-209, based on soil studies of Lot 1, where the anticipated
20 multi-family dwelling will be located. Petitioner objected that the study failed
21 to study landslide hazards on Lot 2, which is developed with an existing
22 dwelling. While the initial staff decision was on appeal to the hearings officer,

1 city staff sent intervenor an e-mail asking for a response to petitioner's
2 objection. In response, the engineer submitted a supplemental memorandum
3 stating that "[a] landslide hazard assessment was completed for the project and
4 encompasses parcels 1 and 2 of the proposed development[,]" referencing
5 several "cross sections" that were used to evaluate the "global stability of the
6 site and neighboring properties." Record 535-36. Staff reviewed the
7 supplement and concurred with its conclusions. The hearings officer concluded
8 that the geotechnical engineer evaluated both lots, and that the study complied
9 with all criteria.

10 On appeal to LUBA, petitioner disputes that the landslide study
11 evaluates any part of the site other than Lot 1. According to petitioner, the
12 engineer's supplemental memorandum simply states that the study includes
13 both Lots 1 and 2, but without substantiating that assertion, or citing any basis
14 to infer from study of Lot 1 that Lot 2 is safe to develop. Intervenor responds
15 that the study and supplemental memorandum evaluated cross-sections of the
16 entire site, including Lots 1 and 2, to determine the stability of the entire site.
17 Intervenor argues that the hearings officer's finding that the engineer
18 performed a study of the entire site is supported by substantial evidence. We
19 agree with intervenor.

20 Petitioner also argues that city staff exhibited bias in favor of the
21 applicant, because staff sent an e-mail to intervenor's attorney requesting a
22 response to petitioner's argument that the initial landslide hazard study

evaluated only Lot 1. Intervenor responds that the city staff e-mail to the applicant was not an ex parte communication or an indication of staff bias. Intervenor argues that it is appropriate for planning staff to request additional information from the applicant, in response to questions that arise during public review. In any case, intervenor argues, the relevant question is whether the final decision maker is biased, not planning staff. *Hoskinson v. City of Corvallis*, 60 Or LUBA 93, 100 (2009). Petitioner does not argue that the hearings officer was biased. We agree with intervenor's responses.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

Intervenor proposed, and the city approved, vacating the undeveloped pedestrian easement across the property, and requiring intervenor to dedicate a new easement across Tracts A and B that could also accommodate the future Sullivan's Gulch Trail. The existing easement was dedicated in 1994, and was intended to provide a pedestrian-only connection across several properties between NE 21st Avenue on the east with NE 15th Avenue on the west. However, no part of the easement has ever been developed. The existing easement has several deficiencies: it is limited to pedestrians, has a travel width of only four to six feet, is limited in hours of operation, and on the subject property includes two 90-degree turns at its west end. By contrast, the replacement easement is wider, spreading across the entire resource area of Tracts A and B, in order to provide a number of potential alignments and

connections to adjoining property that can accommodate both pedestrians and bicyclists. The future Sullivan's Gulch Trail, if ever planned and built, would pass under the NE 21st Avenue bridge, but intervenor submitted a conceptual plan showing how an ADA-compliant ramp could provide a connection to NE 21st Avenue. Record 319.

Petitioner advances eight sub-assignments of error directed at the decision to vacate and replace the existing easement. The sub-assignments are difficult to distinguish from each other, because they overlap and are set forth in a single paragraph that extends 12 pages. We agree with intervenor that none of the sub-assignments of error have merit.

A. First Sub-Assignment: PCC 33.654.110(B)(1)(c)

PCC 33.654.110(B)(1)(c) provides that pedestrian connections are required where appropriate and practicable, taking into consideration a number of factors, including "[t]he location of existing streets and pedestrian connections[.]" We understand petitioner first to argue that vacating the existing easement on the property severs the connection with the abutting undeveloped easement on the motel property to the west. The hearings officer found that the existing easement "extended a possible pedestrian path to the west over property now developed as a motel making a direct and straight westerly connection unlikely to occur in the foreseeable future." Record 14. The hearings officer also found that "the existing easement provides relatively poor connectivity between the NE 21st and the property immediately west of

the Subject Property." *Id.* Petitioner does not acknowledge or challenge these findings and other related findings, which appear adequate to explain why vacating and relocating the easement is consistent with PCC 33.654.110(B)(1)(c), even considering the severed connection with the unlikely-to-develop easement to the west.

B. Second Sub-Assignment: PCC 33.654.110(B)(1)(e)

Petitioner's next argument is based on PCC 33.654.110(B)(1)(e), which states that "[p]edestrian connections should take the most direct route practicable. Users should be able to see the ending of the connection from the entrance point, if possible." Petitioner also cites to the purpose statement at PCC 33.654.110, which states that one purpose of the PCC 33.654.110 connectivity requirements is to ensure provision of "efficient access" and "enhance direct movement by pedestrians, bicycles, and motor vehicles between destinations." Petitioner argues that the existing easement is more efficient and direct than the replacement easement, notwithstanding the 24-foot jog in the former, because the latter will be located further down the slope into Sullivan's Gulch, requiring a ramp to access from NE 21st Avenue.

Petitioner's arguments again ignore the hearings officer's findings explaining why the replacement easement, all things considered, is superior to the existing easement. Petitioner's preference for the existing easement fails to demonstrate that the hearings officer erred in approving the replacement easement.

C. Third and Fifth Sub-Assignments: PCC 33.641.020

PCC 33.641.020 is a land division standard requiring a finding that the transportation system is capable of safely supporting the proposed development in addition to existing uses in the area. Petitioner argues that because the city did not choose exactly where a pedestrian trail will be constructed within the replacement easement or determine exactly where and how it will connect to NE 21st Avenue and points west, the city is in no position to evaluate the safety impacts of vacating the existing easement in favor of the replacement easement.

Intervenor provided a preliminary conceptual design for the replacement easement showing how it could connect to NE 21st Avenue and points west. The replacement easement is broad and flexible enough to accommodate a number of different built alignments and connections. Based on the conceptual plan and other submissions, the hearings officer found compliance with PCC 33.641 and other standards, concluding that the replacement easement will improve connectivity compared to the existing easement. Petitioner does not challenge that finding or the supporting evidence or reasoning. Petitioner has not demonstrated that a finding of compliance with PCC 33.641.020, or any other standard, required the city to choose a specific built location or connections for a pedestrian/bicycle path within the replacement easement.

Under the fifth sub-assignment, petitioner also challenges a finding that "no mitigation is necessary" for the transportation system to safely support the

proposed development, arguing that steep slopes on which the replacement easement would be located would impact the safety of the trail, and that the city erred in concluding that no mitigation was necessary. Record 715. However, the finding at Record 715 does not address the trail or resource area on Tracts A and B, and the city did not find, as petitioner appears to argue, that no mitigation is necessary to address safe development of a trail within the replacement easement. Absent a more developed argument, petitioner has not demonstrated a basis for reversal or remand.

D. Fourth Sub-Assignment: PCC 33.654.150(D)(2)

PCC 33.654.150(D)(2) applies to public use of a right-of-way, and requires that pedestrian connections "must include a public access easement that allows public access on all parts of the connection[.]" Petitioner argues that vacating the existing easement violates PCC 33.654.150(D)(2) because it leaves the remaining western portion of the existing easement, which crosses the adjacent motel property, a dead-end at the property line.

Intervenor responds that because the existing easement takes a 24-foot jog to the south at the western property line and extends into Tract B, the severed connection to the easement on the motel property to the west is already located in proximity to the western end of the replacement easement within Tracts A and B, and the two easements can now be directly connected without the jog. From the diagrams in the record, that appears to be correct. *See* Record 41 (diagram showing the southernmost jog of the existing easement

extending into Tract B). To the extent the undeveloped easement across the motel property has any continued viability as a pedestrian trail, the replacement easement appears to preserve the possibility of a connection between the two easements. Petitioner has not demonstrated that PCC 33.654.150(D)(2) requires more.

E. Sixth Sub-Assignment: Environmental Review

Pedestrian and bicycle paths are permitted uses within the conservation overlay zone that applies to portions of Tracts A and B, and any trail construction or ramp up to NE 21st Avenue within the conservation overlay would require environmental review pursuant to PCC 33.430. Noting this, petitioner argues that the city erred in approving the replacement easement without requiring environmental review for construction of a trail or ramp up to NE 21st Avenue.

The hearings officer rejected this argument below, concluding that environmental review is not required for the land division or the acceptance of the replacement easement, but may be required when and if construction of a bicycle/pedestrian trail within the resource area of Tracts A and B is proposed. Record 17. Petitioner does not acknowledge or challenge those findings. Absent a more developed argument, petitioner had not demonstrated a basis for reversal or remand.

1 **F. Seventh Sub-Assignment: PCC 33.654 Rights of Way**

2 PCC 33.654 is a chapter with seven sections that concerns approval of
3 rights-of-way, including pedestrian connections. Petitioner argues that the
4 existing easement satisfies all relevant PCC 33.654 standards and
5 considerations, and that the replacement easement does not. However,
6 petitioner does not cite or identify what section of PCC 33.654 he believes
7 supplies the standards and considerations applicable to the replacement
8 easement, what those applicable standards or considerations are, or explain
9 why he believes the replacement easement does not meet the applicable
10 standards and considerations.[1] That the existing easement may satisfy all PCC
11 33.654 standards is immaterial. Absent a more developed argument, petitioner
12 has not established a basis for reversal or remand.

13 **G. Eighth Sub-Assignment: Condition of Approval**

14 The hearings officer imposed a condition of approval requiring that
15 intervenor must record a new trail easement to the satisfaction of the city, prior
16 to issuance of building permits on Lots 1 and 2. Petitioner argues that the
17 condition is inappropriate, because it is not "feasible." Petition for Review 33.

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[1] We could speculate that petitioner intends to refer to Section 110 of PCC 33.654, subsection (B) of which includes certain standards and considerations for approval of rights-of-way, including pedestrian connections. Some of petitioner's arguments appear to match some of the standards and considerations listed in that subsection. However, we decline to develop petitioner's arguments for him, particularly in light of petitioner's failure to acknowledge or challenge the findings adopted to address PCC 33.654.110(B).

However, petitioner identifies no reason to believe that it is not feasible for intervenor to record a new trail easement to the satisfaction of the city. Petitioner repeats his arguments that a new trail will require environmental review but does not explain why that makes the condition, or approval of a new trail within the replacement easement, infeasible. Petitioner also argues that the public will not have the ability to participate in the "design/location" of any new trail. *Id.* However, as we understand matters, the design and location of a new trail within the replacement easement, if proposed, would be decided in the environmental review process, and petitioner does not argue that the environmental review process fails to provide for public participation. Petitioner has not demonstrated that the city erred in imposing a condition requiring that intervenor record the replacement easement.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

The sixth assignment of error includes two-subassignments of error. The first sub-assignment concerns the setback for buildings and structures on Lot 1. The second sub-assignment concerns the allowed disturbance area in Tracts A and B.

A. First Sub-Assignment: PCC 33.120.220 Minimum Setback

PCC 33.120.220 sets out minimum setbacks required for development within multi-dwelling zones. Petitioner argues that the multi-family dwelling contemplated for Lot 1 will violate the minimum setback.

1 Intervenor responds that no party raised any issue under PCC 33.120.220
2 during the proceedings below, and therefore the issue raised in this sub-
3 assignment is waived, under ORS 197.763(1) and 197.835(3).[2] On the merits,
4 intervenor argues that no development is proposed as part of this land division,
5 and that compliance with minimum setback standards on Lot 1 will be
6 determined when intervenor applies for building permits.
7 Petitioner does not allege that any party raised compliance with PCC
8 33.120.220 or minimum setbacks during the proceedings below. Accordingly,
9 the issue is waived.
10 **B. Second Sub-Assignment: PCC 33.430.140 Disturbance Area**
11 PCC 33.340.140 limits the maximum square footage of the resource area
12 of an environmental conservation zone that can be disturbed, using a formula
13 that subtracts the square footage of the site outside the resource area from a
14 number that is equal to 50 percent of the base zone building coverage or one

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[2] ORS 197.763(1) provides:

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

ORS 197.835(3) provides in limited part that the issues that may be raised to LUBA are limited to those raised by any participant before the local hearings body as provided in ORS 197.763.

acre, whichever is less. As we understand the argument on appeal, petitioner argues that construction of a trail within the resource area on Tracts A and B is essentially prohibited, because as petitioner crunches the numbers under the formula at PCC 33.340.140 the maximum disturbance area within the resource area is a negative number, meaning no disturbance at all is allowed.[3]

Intervenor responds that no development or disturbance is proposed within the resource area, and that the maximum disturbance limitations therefore do not apply to this land division. As noted above, the hearings officer found that the replacement easement is not development, and that if and when construction of the trail is proposed, the proposal will likely require environmental review. Record 17. Similarly, the incorporated staff findings conclude that no disturbance within the resource area would be allowed without environmental review. Record 516. Petitioner does not acknowledge or challenge those findings, which appear to take the position that the environmental review process is the appropriate forum to address compliance with the standards that will apply when development is proposed that will

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[3] Petitioner does not allege, and it does not appear to be the case, that petitioner presented his calculations to the hearings officer or argued that no disturbance whatsoever, and hence no trail, is allowed within the resource area of Tracts A and B. Had that argument and those calculations been presented below, presumably intervenor and the hearings officer would have addressed the issue, perhaps by disputing petitioner's understanding of how to calculate under the formula at PCC 33.430.140. However, no party argues that the issue raised under this sub-assignment of error is waived, so for purposes of this opinion we assume it was preserved.

1 cause disturbance within the resource area of Tracts A and B. Petitioner offers

2 no basis to conclude otherwise.

3 The sixth assignment of error is denied.

4 The city's decision is affirmed.