

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

3
4 JIM BRADBURY,)
5)
6 Petitioner,) LUBA No. 91-008
7)
8 vs.) FINAL OPINION
9) AND ORDER
10 CITY OF INDEPENDENCE,)
11)
12 Respondent.)

13
14
15 Appeal from City of Independence.

16
17 Wallace W. Lien, Independence, represented petitioner.

18
19 Kathleen M. Poole, Independence, represented
20 respondent.

21
22 KELLINGTON, Referee; HOLSTUN, Chief Referee; SHERTON,
23 Referee, participated in the decision.

24
25 REMANDED 12/05/91

26
27 You are entitled to judicial review of this Order.
28 Judicial review is governed by the provisions of ORS
29 197.850.

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).¹

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.

¹Because 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.²

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."³

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

²To 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."

³The 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."⁴
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.⁵ However, the plan's "Land Use" goal is

⁴The 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.

⁵The 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

"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.⁶

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[.]"⁷ Record 8. This apparently refers to

⁶While 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."

⁷Ordinance 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

"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."⁸ 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.⁹ 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

⁸Petitioner 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.

⁹The 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 468.720.¹⁰

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

¹⁰ORS 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.