



1 Opinion by Hanna.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the city's denial of his application  
4 to site a single family dwelling on an oceanside bluff  
5 protected by an Environmental Overlay Zone (EQ zone).

6 **FACTS**

7 This is the second time this matter has been before us.  
8 Johns v. Lincoln City, \_\_\_ Or LUBA \_\_\_ (LUBA Nos. 96-082 and  
9 96-083, November 18, 1996) (Johns I), rev'd 146 Or App 594,  
10 933 P2d 978 (1997) (Johns II).<sup>1</sup> The focus of this appeal is a  
11 procedural matter involving the scope of two local notices of  
12 appeal. In remanding our first decision, the Court of Appeals  
13 described the procedural history of the case:

14 "Although the proposed location of the dwelling is  
15 in a residential zone, the area is also part of an  
16 environmental quality overlay zone. As such, the  
17 city's zoning ordinance makes the dwelling proposal  
18 reviewable under aesthetic resource and natural  
19 hazards standards, instead of being permitted  
20 outright pursuant to the residential zoning. The  
21 city planning director approved petitioner's  
22 application. Two separate groups of opponents, the  
23 Morfitts and the Darnells, appealed the director's  
24 decision to the planning commission pursuant to  
25 section 9.040 of the city's zoning ordinance. \* \* \*

26 "Although the two notices of appeal differed in the  
27 amount and content of their specificity, \* \* \* the  
28 city attorney considered that both sufficed to raise  
29 issues that could be considered on appeal. \* \* \* The  
30 city attorney concluded his written advice by  
31 preparing two detailed questions of his own that he

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<sup>1</sup>The parties stipulate that all issues raised in Johns I that were not decided by LUBA or the Court of Appeals, are preserved for review at the Court of Appeals.

1 considered to be before the commission, based on his  
2 interpretation of the respective notices.

3 "The commission proceeded to apply the two  
4 provisions and to consider the two questions that  
5 the city attorney had prepared. On the basis of one  
6 or both of the provisions and questions, the  
7 commission reversed the director's decision and  
8 denied petitioner's application. Petitioner  
9 appealed to the city council, which affirmed the  
10 planning commission. \* \* \*

11 "Petitioner then appealed to LUBA, contending, inter  
12 alia, that the notices of appeal failed to raise the  
13 issues on which the denial of his application was  
14 based and failed to meet the specificity  
15 requirements of section 9.040."<sup>2</sup> Johns II, 146 Or  
16 App at 596-97.

17 In our opinion, we held in relevant part that ZO 9.040(1)  
18 does not prohibit an appellant from raising issues beyond  
19 those indicated in the local notice of appeal. The Court of  
20 Appeals disagreed, interpreting ZO 9.040(1) as limiting the  
21 issues an appellant can raise on appeal to those "reasonably  
22 discernible from the notice itself." 146 Or App at 603  
23 (emphasis in original). The court noted that ZO 9.040 does  
24 not require that the notice of appeal contain voluminous

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<sup>2</sup>Zoning Ordinance (ZO) 9.040(1) states, in relevant part:

"A decision of the Planning Department on the issuance of an administrative permit or discretionary action concerning a land use matter may be appealed to the Planning Commission by an affected party by filing an appeal with the Planning and Community Development Director within ten (10) days of the mailing of the decision. The Notice of Appeal that is filed with the City shall indicate the interpretation that is being appealed and the basis for the appeal. The notice shall indicate in what respects the decision being appealed is a discretionary decision involving a land use matter. The matter at issue will be a determination of the appropriateness of the interpretation of the requirements of the Ordinance. \* \* \*"  
(Emphasis added.)

1 detail or that "interstices in their meaning cannot be filled  
2 by common sense readings and reasonable extrapolations from  
3 what they say." Id. at 602. However, the court concluded  
4 that in this case the city attorney essentially rewrote in  
5 toto the two notices. The court commented:

6 "The fact that the city attorney rewrote the notices  
7 does not mean, in itself, that a sufficiently clear  
8 meaning could not be found in them in the absence of  
9 his clarifying exercise. It does mean, however,  
10 that the questions decided in the local appeals did  
11 not come from the notices and that the city did not  
12 ascertain whether any cognizable questions, or what  
13 questions, could be ascribed to the notices in the  
14 absence of the city attorney's elaborations." Id.  
15 at 603 (emphasis in original).

16 The court concluded that

17 "[a] remand to the city is necessary to determine  
18 whether either or both of the notices of appeal meet  
19 the specificity requirements of the ordinance as we  
20 interpret it and to decide only those questions that  
21 it may conclude have been adequately raised." Id.

22 In a footnote, the court commented that the city's  
23 determination on remand

24 "must be based on the documents that have already  
25 been filed. We note that there is a much greater  
26 possibility that the Darnells have specified a  
27 reviewable issue than that the Morfitts have.  
28 However, any decision of that question by LUBA or us  
29 must, of course, await a later day." Id. at 603, n2  
30 (emphasis in original).

31 On remand, the planning commission reviewed the Morfitt  
32 and Darnell notices of intent to appeal, and concluded that  
33 the bases the city had cited in its original decision to deny  
34 petitioner's application were not reasonably discernible on  
35 the face of either notice. The planning commission then

1 interpreted ZO 9.040(1) to allow the city, where the bases for  
2 appeal were not clear on the face of the notice, to review the  
3 issues raised in the record to determine whether, in light of  
4 the record, it is reasonably apparent what criteria and issues  
5 the notice is intending to raise. As an alternative, the  
6 planning commission interpreted ZO 9.040(1) to allow the city  
7 to raise any issue it wanted to at the appeal hearing, as long  
8 as petitioner had notice of those issues.<sup>3</sup> The planning  
9 commission then entered an order finding that, under its  
10 interpretative methodology, the Morfitt notice and the Darnell  
11 notice raised the issues under ZO 3.110(4)(c) and ZO  
12 3.110(4)(e), respectively, on which the city based its  
13 original decision. The planning commission adopted its  
14 findings, conclusion and order in the Darnell appeal without  
15 any changes, and adopted the findings, conclusion and order in  
16 the Morfitt appeal with one minor change, with the result  
17 that, under either appeal, the planning director's decision  
18 was reversed and petitioner's application denied.

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<sup>3</sup>The planning commission's alternative resolution was based on a footnote in the Court of Appeals' opinion that stated:

"We emphasize that there is no question in this case about the scope of the issues that the reviewing bodies may consider if a hearing is initiated other than by a party's notice. We imply no answer to that question. We also imply no view as to whether the reviewing body may raise questions of its own, beyond those specified in the notice. The only question we consider in this part of our discussion is what a party may raise at the hearing under the circumstances and the ordinance provision in question." 146 Or App at 602, n1 (emphasis in original).

1           Petitioner appealed the planning commission order to the  
2 city council. The city council reviewed the record before the  
3 planning commission, which itself had before it only the  
4 record of the original proceedings. The city council  
5 concluded, first, that both the Morfitt and Darnell notices,  
6 read on their faces, reasonably raised the respective bases  
7 for appeal under ZO 3.110(4)(c) and ZO 3.110(4)(e). As an  
8 alternative, the city adopted the planning commission's  
9 interpretation of ZO 9.040(1) and adopted, with modifications,  
10 the planning commission's interpretative methodology allowing  
11 the city to consider the notices in light of issues raised in  
12 the record.<sup>4</sup> Accordingly, the city made findings and  
13 conclusions, and adopted the planning commission's order, with  
14 modifications, thus denying petitioner's appeal.

15           This appeal followed.

16           **FIRST ASSIGNMENT OF ERROR**

17           Petitioner argues that the city impermissibly  
18 reinterpreted ZO 9.040 after the Court of Appeals had already  
19 made an interpretation, and applied its reinterpretation in  
20 making the challenged decision. Petitioner contends that the  
21 challenged decision thus improperly construes the applicable  
22 law, and is subject to reversal or remand under ORS  
23 197.835(9)(a)(D).

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<sup>4</sup>The city also agreed with the planning commission's alternative holding that ZO 9.040(1) permitted the city to raise issues on its own during appeal hearings, as long as petitioner had notice of what issues the city would raise.

1           Petitioner's first assignment of error is nominally  
2 directed at the city council's alternative application of its  
3 interpretative methodology, allowing it to consult the record  
4 when a notice of appeal does not clearly state a basis for  
5 appeal.     However, the bulk of petitioner's argument is  
6 directed at the city council's primary conclusion that both  
7 the Morfitt and Darnell notices reasonably raise, on their  
8 faces, the issues under which the city decided those appeals.  
9 Petitioner argues strenuously that the bases for appeal on  
10 which the city denied his application are not "reasonably  
11 discernible" on the face of either notice.     Accordingly, we  
12 address petitioner's contention that neither notice adequately  
13 raises the issues under ZO 3.110(4)(c) and (e) under which the  
14 city denied petitioner's appeal.

15           The challenged decision describes, first, the Darnell  
16 notice and appeal:

17           "8. On June 23, 1995, Louis and Colleen Darnell  
18           filed a notice of appeal to the Planning  
19           Commission of the Planning Director's decision.  
20           The substance of the Darnell notice of appeal  
21           was as follows (bold face material is from the  
22           Planning Department's printed Notice of Appeal  
23           form):

24           **"The interpretation that is being appealed and**  
25           **the basis for the appeal.**

26           "1. Environmental assessment does not  
27           [protect] adjoining property and does not  
28           relate to the unbuildable nature of the  
29           land.

1            ''Indicate in what respects the decision being  
2            appealed is a discretionary decision involving  
3            a land use matter.

4                    ''1. The Planning Director has interpreted  
5                    the finding of EA & this is only an  
6                    interpretation.''' Record 51.

7            The city concluded with respect to the Darnell notice:

8            **"Council Findings and Conclusions.** Based on its own  
9            review of the notices of appeal, the Council  
10           believes it was reasonably clear that the Darnell  
11           notice of appeal intended to assert that the  
12           environmental assessment did not provide sufficient  
13           mitigation measures to protect adjoining properties  
14           from the proposed project--'Environmental assessment  
15           does not protected [sic] adjoining property \* \* \*.'  
16           This was particularly true given that the proceeding  
17           in which the notice of appeal was filed was an  
18           environmental assessment review proceeding and that  
19           an environmental assessment is supposed to explain  
20           the methods that will be employed to minimize the  
21           natural hazard-related losses associated with a  
22           project and to explain the environmental  
23           consequences the project and the protective measures  
24           will have on surrounding properties. \* \* \* " Record  
25           78-79 (emphasis added).

26           Thus, the city found the Darnells' notice reasonably  
27           clear on its face and described the scope of the notice as  
28           invoking concerns about compliance with the environmental  
29           assessment standards at ZO 3.110(4)(e)(2), the standards under  
30           which the city ultimately denied petitioner's application in  
31           the Darnell appeal.<sup>5</sup>

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<sup>5</sup>ZO 3.110(4)(e) provides:

"(1) Development of all types, except rip-rap beach front protective structures and natural means of beach protection, in hazard areas identified on the Comprehensive Plan Map shall not occur until a review is completed by a qualified engineer or qualified engineering geologist. The review shall be prepared at

1           Petitioner disagrees, arguing that the Darnell notice  
2 mentions only a concern that the environmental assessment did  
3 not protect adjoining property and the unbuildable nature of  
4 petitioner's lot, and that it is not "reasonably discernible"  
5 from the Darnell notice that it invokes concerns about  
6 compliance with the environmental assessment standards at ZO  
7 3.110(4)(e)(2). Petitioner contends that the Darnell notice  
8 does not mention the specific issues under which the city  
9 ultimately decided that petitioner's application did not  
10 comply with ZO 3.110(4)(e)(2): "issues of erosion,  
11 disturbance of the bluff, trenching, filling, compacting and  
12 drilling holes, and vibration from heavy equipment." Petition  
13 for Review at 9.

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the developer's expense. All costs incurred by the City to review the development shall be the responsibility of the applicant. The review shall include but is not limited to erosion control, vegetation removal, slope stabilization, and other items necessary to satisfy the requirements of the Comprehensive Plan.

"(2) The review completed shall be submitted to the City as a written report and shall consider as a minimum, the following:

"(a) An explanation of the degree the hazard affects the property use in question.

"(b) An explanation of the method(s) to be employed to minimize the losses associated with the hazard.

"(c) An explanation of the environmental consequences the development and the protective measure will have on the surrounding properties.

"(3) If structures to protect shore lands, beaches and dunes, or flood areas are proposed, Comprehensive Plan Shoreland Policy 4, 22, and 23 shall also apply."

1           The Court of Appeals remanded the decision to the city to  
2 determine whether "either or both of the notices of appeal  
3 meet the specificity requirements of the ordinance as we  
4 interpret it and to decide only those questions that it may  
5 conclude have been adequately raised." 146 Or App at 603. In  
6 order to meet the specificity requirement that the court found  
7 in ZO 9.040(1), "[t]he issues must be reasonably discernible  
8 from the notice itself." Id. (emphasis in original). The  
9 court emphasized that there is a "much greater possibility  
10 that the Darnells have specified a reviewable issue than that  
11 the Morfitts have." Id. at 603, n2 (emphasis in original).  
12 We review the city's conclusion that the Darnell notice is  
13 reasonably construed to raise issues of compliance with the  
14 environmental assessment standards at ZO 3.110(4)(e)(2) in  
15 light of the scope and terms of remand indicated by the Court  
16 of Appeals.

17           We agree with the city that where the Darnells' notice of  
18 appeal states "[e]nvironmental assessment does not [protect]  
19 adjoining property and does not relate to the unbuildable  
20 nature of the land" it clearly raises the issue of the  
21 adequacy of the environmental assessment with respect to  
22 mitigation of the impact of the proposal on adjoining  
23 properties, as required by ZO 3.110(4)(e)(2). We disagree  
24 with petitioner that ZO 9.040(1) or the court's opinion  
25 requires the Darnells to go beyond invoking the issue of  
26 compliance with ZO 3.110(4)(e)(2) and describe the precise

1 ways in which the environmental assessment is inadequate to  
2 protect adjoining properties. The Darnells' notice  
3 sufficiently apprised petitioner that the Darnells were  
4 concerned that the environmental assessment was inadequate and  
5 that the development and its protective measures did not  
6 adequately protect adjoining properties, as required by ZO  
7 3.110(4)(e)(2).

8 We conclude that the city has fulfilled the mandate  
9 required by the Court of Appeals, and accordingly affirm the  
10 city's decision denying petitioner's appeal insofar as it  
11 involves the Darnell appeal and issues raised therein.

12 We need not reach petitioner's arguments directed at the  
13 adequacy of the Morfitt notice and the city's denial of  
14 petitioner's appeal based on the Morfitt appeal and the  
15 criteria at ZO 3.110(4)(c). The Darnell and Morfitt appeals  
16 were separate appeals, resulting in separate planning  
17 commission decisions that separately, and independently,  
18 resulted in denial of petitioner's application. Petitioner  
19 appealed the Darnell and Morfitt orders separately to the city  
20 council, where they were consolidated for the council's  
21 review, and there affirmed on separate and independent  
22 grounds. Petitioner is required to establish compliance with  
23 each criteria under ZO 3.110. On review of a local  
24 government's denial of a development permit, the local  
25 government is required to establish only one basis for denying  
26 petitioner's application. R/C Pilots Assoc. v. Marion County,

1 \_\_\_ Or LUBA \_\_\_ (LUBA No. 96-250, 96-256, October 2, 1997),  
2 citing Baughman v. Marion County, 17 Or LUBA 632, 636 (1989).  
3 The city has established in the Darnell appeal that petitioner  
4 failed to comply with ZO 3.110(4)(e)(2)(c). Accordingly,  
5 there is no reason to review the city's conclusions regarding  
6 the Morfitt appeal and compliance with ZO 3.110(4)(c).

7 Further, we need not reach petitioner's nominal argument,  
8 directed at the city council's alternative holding under its  
9 interpretative methodology, allowing it to consider the notice  
10 of appeal in light of the issues raised in the record.  
11 Because we affirm, above, the city's primary reason for  
12 denying petitioner's application, any error the city committed  
13 in its alternative holding does not provide a basis to reverse  
14 or remand the challenged decision.

15 The first assignment of error is denied.

16 **SECOND ASSIGNMENT OF ERROR**

17 Petitioner argues that the city committed a procedural  
18 error and made a decision not supported by substantial  
19 evidence, when it made the challenged decision without having  
20 a copy of the transcript of the planning commission hearing as  
21 required by ZO 9.040(4).<sup>6</sup>

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<sup>6</sup>ZO 9.040(4) states:

"(4) Review on the Record.

"(a) If an appeal is confined to the record of the proceeding, the record shall include:

1           The parties agree that the challenged decision is a  
2 limited land use decision. We are required to reverse or  
3 remand a limited land use decision where, inter alia, the  
4 decision is not supported by substantial evidence in the  
5 record, or where the local government commits a procedural  
6 error that prejudices the substantial rights of the  
7 petitioner. ORS 197.828(2)(a) and (d).

8           With respect to the city's alleged procedural error,  
9 petitioner argues that the failure to obtain a transcript of  
10 the planning commission hearing prejudiced his substantial  
11 rights because, without that transcript, he could not make

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"(i) All exhibits, materials, pleadings, memoranda, stipulations and motions submitted by [a] party and received or considered in reaching the decision under review.

"(ii) The final order and findings of fact adopted in support of the decision being appealed.

"(iii) The request for an appeal filed by the appellant.

"(iv) The minutes of the public hearing.

"(v) The transcript of the hearing below.

"(b) After receipt of transcript and all fees required therefor, a hearing shall be set and public notice shall be provided indicating the date, time and place of the review and the issues that are the subject of the review pursuant to Section 9.020(2)(b) of the Zoning Ordinance.

"(c) The reviewing body shall make its decision based upon the record after first granting the right of argument, but not the introduction of additional evidence, to parties to the hearing.

"(d) In considering the appeal, the reviewing body need only consider those matters specifically raised by the appellant.

"(e) The appellant shall bear the burden of proof."

1 arguments to the city council that he wanted to make.<sup>7</sup> The  
2 transcript petitioner refers to is apparently the transcript  
3 of the oral argument conducted before the planning commission  
4 on remand. We do not understand petitioner to contend that  
5 the record before the city council is missing the transcript  
6 of the original evidentiary hearing before the planning  
7 commission in 1995.<sup>8</sup>

8 Although petitioner describes the arguments he wanted to  
9 make to the city council, he does not explain why the absence  
10 of the transcript precluded his making those arguments to the  
11 city council, and thus prejudiced his substantial rights. The  
12 gist of those arguments appear to be that the Darnells and  
13 Morfitts could have, but did not, specify various concerns  
14 regarding the proposed development in their notices of appeal.

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<sup>7</sup>Petitioner describes the arguments he would have made to the council, had it had the transcript of the planning commission hearing before it:

"Petitioner wanted to point out that he had argued that the common scheme of the neighborhood would indicate that if the Morfitts were concerned about the wood retaining wall or cantilevered decks they would have included it in their notice of appeal. Also, if the Darnells were worried about vibrations, or penetration of the bluff with a retaining wall, or the use of concrete pilings for a foundation, they would have indicated this in their notice of appeal. Petitioner points out that not only were many of the issues listed in the Planning Director's Notice of Approval, the photographs of the surrounding community used in the hearing below indicate that retaining walls and construction activities similar to petitioner's application were carried on in the neighborhood, and were part of the common scheme. He sees no reason why the Darnells or Morfitts, if they were objecting to his project, could not have specified these items if they were opposed to them." Petition for Review 12 (citations to record omitted).

<sup>8</sup>The city responds to the second assignment of error by arguing that the city impliedly interpreted ZO 9.040(2) as not requiring the transcript of a planning commission hearing when that hearing is not an evidentiary hearing. Our disposition of the second assignment of error makes it unnecessary to reach the city's argument.

1 What is missing is any explanation why the absent transcript  
2 of oral argument before the planning commission precluded  
3 petitioner from making those arguments.

4 Although it is not at all clear, it is possible that  
5 petitioner is arguing that the transcript would show that  
6 during oral argument before the planning commission on remand  
7 he offered photographs of the neighborhood into the record,  
8 apparently to bolster his argument that retaining walls and  
9 other features objected to in his development were common in  
10 the neighborhood, and hence features that the Darnells and  
11 Morfitts knew about and could have specifically objected to in  
12 their notices. The planning commission rejected those  
13 photographs, apparently because its review was, pursuant to  
14 the Court of Appeals' mandate, on the record of the original  
15 proceeding. Thus, petitioner may be contending that the  
16 absence of the transcript prevented his making arguments based  
17 on the rejected photographs.

18 To the extent we understand petitioner's argument, we  
19 disagree that it demonstrates any prejudice to petitioner's  
20 substantial rights and thus a basis to reverse or remand the  
21 challenged decision. Petitioner appealed the issue of the  
22 planning commission's rejection of his photographs to the city  
23 council, the city council affirmed the planning commission on  
24 that point, and petitioner has not appealed that issue to us.  
25 Petitioner has not identified any reason why the absence of  
26 the transcript or the photographs for that matter precluded

1 him from making any argument to the city council. We  
2 therefore reject petitioner's argument based on allegations of  
3 procedural error.

4 Petitioner's substantial evidence challenge under ORS  
5 197.828(2)(a) is even more obscure. Petitioner states that,  
6 without the transcript, "it is impossible for the City Council  
7 to have made a decision based on substantial evidence in the  
8 whole record." Petition for Review 12. Petitioner goes on to  
9 argue that, given the "evidence" cited in the arguments  
10 petitioner wanted to make,<sup>9</sup> and the planning commission's  
11 finding that neither notice of appeal is clear on its face,  
12 "the City Council reviewing the record from below could not  
13 have substantial evidence to support the finding that the  
14 notices of appeal raised" the issues the council found that  
15 they did. Petition for Review 13.

16 We disagree with petitioner's first contention. The  
17 planning commission hearing on remand was on the record of the  
18 original proceeding and thus a transcript of that hearing  
19 could not include any evidence, only argument. It follows  
20 that the absence of that transcript could have no possible  
21 bearing on whether the record contains substantial evidence  
22 supporting the city council's decision.

23 To the extent we understand petitioner's second  
24 contention, we disagree that the record lacks substantial

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<sup>9</sup>Petitioner does not explain what "evidence" is contained in the arguments he recites on page 12 of the Petition for Review.

1 evidence supporting the city's determination that the Darnell  
2 notice of appeal raises on its face the issues the council  
3 found that it did. It is not even clear to us that the city's  
4 determination presents a substantial evidence question. As  
5 the Court of Appeals has framed the scope of remand in this  
6 case, what issues are raised on the face of the Darnell notice  
7 of appeal is more aptly characterized as an interpretative  
8 exercise or conclusion of law rather than a finding of fact.

9 To the extent the city's determination is a finding of  
10 fact that must be supported by substantial evidence in the  
11 record, petitioner cites no evidence in the record that  
12 undermines the city's conclusion. The planning commission's  
13 conclusion that both notices are not clear on their faces is  
14 not "evidence" of any sort, but merely a conclusion that the  
15 city council could, and did, disagree with. Even if  
16 petitioner had cited countervailing evidence in the record,  
17 the "existence of evidence in the record supporting a  
18 different decision shall not be grounds for reversal or  
19 remand if there is evidence in the record to support the final  
20 decision." ORS 197.828(2)(a). We conclude that petitioner  
21 has not established with respect to the Darnell notice of  
22 appeal that the record lacks substantial evidence supporting  
23 the challenged decision.<sup>10</sup>

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<sup>10</sup>As noted in our discussion of the first assignment of error, the city need only establish one adequate basis, supported by substantial evidence in the record, in order to deny petitioner's application. Our conclusion that there is substantial evidence in the record supporting the city's decision regarding the Darnell notice of appeal makes it unnecessary to

1           The second assignment of error is denied.

2           The city's decision is affirmed.

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address petitioner's arguments with respect to the city's conclusions about the Morfitt notice of appeal.