BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

RONALD R. and IRENE CALLAHAN; ALFRED W. and RUTH JONES; MARIE HALEN; GOLDIE JACOBSON; JOANNE KNUDSON; ROBERT L. STEWART, P.E.; WILLIAM J. and JILL FORREST; HAL BARRY and HEIDI HOXSIE; JOHN and INGEBORG KONIES; JOSEPH W. WILEY; DOREEN WILSON; BETTIANN KINNEY; ROBERT D. and ELAINE KELLER; MYRON W. and RUTH STOVALL, P.E.; DIANE L. SHIELDS; ROBERT R. CAMPBELL; EDWARD R. and DELORES J. MOGLIOTTI; ROBERT D. GREAVES; LYNNE SOTO-SELLIG; HELEN J. SEABECK; JANEL WARNER and CHARLES AND PATRICIA WATKINS, Petitioners, vs. CITY OF PORTLAND, Respondents.	LUBA No. 86-001 FINAL OPINION AND ORDER

Appeal from City of Portland.

Robert D. Greaves and Charles R. Watkins, Portland, filed the petition for review and argued on behalf of petitioners.

Kathryn Beaumont Imperati, Portland, filed a response brief and argued on behalf of Respondent City.

DUBAY, Referee; KRESSEL, Chief Referee; BAGG, Referee, participated in the decision.

REMANDED 05/29/86

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

Opinion by DuBay.

NATURE OF THE DECISION

The city approved a conditional use permit for a day care center. The city also approved two variances from parking and off-street loading regulations. This appeal challenges all the approvals.

The applicant, Circle of Life Educational Services, Inc., proposes to convert a duplex into a day care center in an R2 Multi-family Residential Zone. A conditional use permit is required.

After a public hearing, the city hearings officer granted the conditional use permit with several conditions discussed below. As part of his decision, the hearings officer also approved two variances to the city's code requirements. One would eliminate the need to construct an on-site drive-through loading area. Another would authorize only two off-street parking places instead of the seven spaces required by the code. The decision was appealed to the city council which affirmed the hearings officer. The council also granted the two variances.

ASSIGNMENT OF ERROR A

Petitioners allege the city did not follow city code procedures for granting variances. According to petitioners, the code requires that appeals from variance decisions by the planning director must be heard by the Variance Committee. The appeal of the hearings officer's decision regarding the two

variances was not heard by the Variance Committee but was instead heard by the city council along with the appeal of the conditional use permit. Petitioners say the failure of the city to follow its prescribed procedures is error.[1]

Respondent makes three arguments in defense: (1) the code does not require Variance Committee involvement when variances are granted in conjunction with a conditional use permit; (2) petitioners have not alleged prejudice from the alleged error; and (3) the error was not raised before the city council. Respondent's arguments are persuasive, and we deny this assignment of error.

Variances from parking and off-street loading regulations in the R2 Zones are "major variances." Portland Municipal Code (PMC) 33.98.015(b)(1). The variance procedures in PMC 33.98.025(b) provide for review of major variance applications by the Variance Committee in two situations. First, the Variance Committee reviews major variance applications whenever a nearby property owner requests the opportunity to testify at a public hearing. If no one requests a public hearing, the planning director may grant or deny the variance. An appeal from the planning director's decision is the second circumstance that triggers Variance Committee review.

However, not all variances are subject to this procedure. When variances are applied for in conjunction with a conditional use permit, the application is reviewed by a hearings officer who may approve or deny the variances at the

time the permit is acted upon. PMC 33.106.010. Although the code does not prescribe a specific granting authority when variances are first proposed by a hearings officer as part of a conditional use permit approval, it is clear that the code calls for review by the Variance Committee only when variances are applied for and processed independently of other permit applications. The city council's approval of the variances in conjunction with the conditional use permit approval did not bypass review by the Variance Committee as petitioners contend.

We also agree with respondent that petitioners have not shown how their substantial rights were prejudiced by the alleged procedural error. The law is quite clear that we may remand for procedural error only when substantial rights of petitioners have been prejudiced. ORS 197.835(8)(a)(B). Petitioners had the opportunity to present their case in opposition to the variances at the city council hearings, and they did so. Petitioners' failure to allege and show prejudice to a substantial right requires we reject this claim of error. See footnote 1, supra.

This assignment of error is denied.

ASSIGNMENT OF ERROR B

Petitioners allege the order violates two provisions of the city's parking regulations.

The first provision requires off-site parking areas to be not more than 100 feet from the conditional use.

"(h) Required parking spaces in...R2...zones shall be

> provided on the site except for conditional uses. The nearest portion of a parking area may be separated from the site of the conditional use it serves by a distance not to exceed 100 feet." PMC 33.82.010(h).

Petitioners claim the city's approval of parking for six employees at a site more than 100 feet from the facility violates PMC 33.82.010(h). Respondent argues that these six spaces are not "required parking" referred to in the code because of the variance from the code's parking space requirements. We disagree.

The code requires one off-street parking space per teacher for nursery schools having four or more teachers. PMC 33.30.430(1). The proposed school has 6.5 teachers. Seven off-street spaces are therefore required. According to PMC 33.82.010(h), the seven spaces may be either on the site or not more than 100 feet away.

The city granted a variance, reducing the number of required off-street spaces from seven to two. The two spaces are in the existing driveway. However, the decision also imposed a condition requiring the applicant to obtain a commitment for six off-street parking spaces at a nearby church. These spaces are more than 100 feet from the day care facility.

As we note in Assignment of Error E, a critical factor in the city's allowance of the variance is the requirement that six additional spaces be provided off-site. The city relies on the availability of these six spaces to conclude that the

variance will protect the neighborhood, a concern required to be addressed by PMC 36.106.010. Record at 12. In this sense, the six spaces are "required" to justify the variance.

In these circumstances, we perceive no distinction between parking spaces "required" by PMC 33.30.430(1) and the parking spaces the city required to justify the equal protection criteria in PMC 36.106.010. Accordingly, we sustain petitioners' first claim.

The second code provision petitioners point to requires "legal evidence...that property is and will remain available for use as off-street parking space." PMC 33.82.010(a). Petitioners allege the agreement between the applicant and the church for use of the six parking spaces does not meet this requirement because the church retains the right to cancel applicant's access to the six parking spaces.

We agree with petitioners. The church's unqualified right to bar access to the spaces takes their future availability out of the center's control. This claim is also sustained.

Petitioners make another claim the city violated the same code section. The code provides:

> "When any parking area for the parking of three or more cars is to be established, a building permit shall be obtained therefore and the standards set forth herein shall be complied with." PMC 33.82.010(a).

Petitioners say the order fails to require a building permit for the eight parking spaces to be provided by the day care center.

We reject this claim. The city's interpretation that the code does not require a building permit when, as here, nothing is to be built is reasonable.

Last, petitioners allege the city made no findings addressing testimony at the hearings that the applicant's parking plan will be difficult to enforce, inherently dangerous and likely to have adverse impacts on residential character.

Petitioners' objections to the order based on traffic safety and adverse impacts to the neighborhood are also asserted in Assignments of Error E and I. Our consideration of these issues under those assignments of error disposes of the allegations made here.

This assignment of error is sustained.

ASSIGNMENT OF ERROR C

The code requires a day care center to have 100 square feet of play area for each child enrolled. PMC 33.30.430(3). The proposed day care center will have 46 children. Petitioners allege no substantial evidence shows the play area requirement has been met.

By referring to applicant's description of the property and to the site plan, petitioners calculate a maximum play area of 2,824 square feet, or 61.4 square feet per child. Respondent calculates 5300 square feet of play area are available to meet the code requirement.[2]

Although the code has a specific criterion for the amount of play area, and testimony focused on the adequacy of the

amount of play area (Record at 40), the city made no findings concerning the play area criterion. In their briefs, petitioners and respondents ask this Board to accept their respective interpretations of the evidence as well as their separate calculations to determine whether or not the code standard has been met.

Initial determinations about whether the evidence shows compliance with applicable criteria must be made by local decisionmakers, not this Board. We do not have the benefit of the city council's views on this issue, and we may not presume how the council would resolve the question. Since there was testimony on this criterion, the council should have addressed it in the findings. Grovers Beaver Electric Plumbing and Supply v. City of Klamath Falls, 12 Or LUBA 61 (1984).[3] Without findings showing compliance with applicable criteria, the decision is not adequate for our review. Hoffman v. DuPont, 49 Or App 699, 621 P2d 63 (1980).

We sustain this assignment of error. A remand is necessary to give the city the opportunity to address the issue.

ASSIGNMENT OF ERROR D

Petitioners find fault with the site plan submitted with the application and also allege error for the city's failure to require an accurate site plan. Petitioners say the site plan does not show exact play area dimensions, does not clearly label the east property line and depicts a driveway larger than permitted by the code.

We construe petitioners' challenge to the site plan to be a

corollary challenge to petitioners' claim (discussed above) that the evidence fails to demonstrate conformance with the code. So construed, the challenge has merit. The site plan does not provide substantial evidence on at least one of the city's criteria, viz. the amount of play area. See discussion in previous assignment of error. We do not consider this assignment of error to be separate from other assignments of error challenging critical findings for lack of supporting evidence. No separate disposition is required.

Petitioners also allege that the site plan shows a violation of the code section regulating the size of access driveways. According to petitioners, the plan shows the driveway occupying 38 percent of the sideyard. This, they say, violates the following code provision:

> "Access drives to parking, maneuvering or loading areas shall not occupy more than 20 percent of the required yard which abuts a right of way." PMC 33.82.010(k).

Petitioners' challenge is supported by a memo from the Bureau of Planning commenting on the applicant's original proposal. This proposal called for construction of a paved drive-through and loading area covering a substantial part of the front yard abutting Florida Street. Record at 209. However, this configuration was modified by the variance from the on-site loading area requirements. As a result of the variance, construction of the loading area in the front yard will not occur. Accordingly, the memo relied upon by

petitioners does not apply to the permit approved by the city. We therefore reject petitioners' claim the city approved a violation of PMC 33.82.010(k).

Petitioners' last claim in this assignment of error is that "no revised or amended site plan was submitted after the hearings officer eliminated the on-site turn-around area and some of the off-street parking." Petition at 22.

Petitioners cite no authorities for the claim that a site plan must be revised if a project is modified by action of the permit issuing body. We know of no such authority.[4]

The city code does not require amended site plans in these circumstances. We deny this claim.

Apart from the allegations concerning the adequacy of the play area, this assignment of error is denied.

ASSIGNMENT OF ERROR E

Petitioners challenge the adequacy and the evidentiary support for the city's findings related to parking, traffic and the on-site loading area requirements.

A. Parking

Petitioners challenge the finding that the eight parking spaces provided for in the city's approval (2 on-site and 6 off-site) are in excess of the number of spaces required by the code. Petitioners say the minimum number of spaces required is the number of spaces described in the applicant's original proposal, i.e., 13 spaces.[5] According to petitioners, the proposal establishes a "total need of 13 spaces."

The challenged finding addresses the following criterion regarding variances to allow conditional uses:

> "The applicant may apply for a modification of the minimum or maximum requirement specified for the conditional use in the respective zone. The modification may be granted only if it is found that substantially equal protection to the surrounding properties is afforded by some other means or by the physical situation." (Emphasis added) PMC 36.106.010.

Here, the city approved a variance from the minimum number of parking space requirements. As we read the quoted code section, the variance may be granted only if the city finds that "other means or the physical situation" will provide protection to surrounding properties substantially equal to the protection provided by the parking space requirement of the code. The general requirements for off-street parking include the obligation to provide parking either on-site or not more than 100 feet away. PMC 33.82.010. We construe the "equal protection" clause in PMC 36.106.010 to mean that the other means or physical situation justifying a variance must give the same protection to the community as these general requirements.

The city found the parking spaces at the church give "equal protection" only because the number of spaces are equal to the number required without a variance. The city did not give consideration to the location of the church lot in its findings, even though the location of the alternative off-street parking is a logical element of the equal protection standard. The failure of the city to consider whether the

alternate location gives equal protection to the neighborhood is grounds to sustain this subassignment of error.

Petitioners next assert the city erred by finding the purpose and intent of the off-street parking regulations is only to assure availability of parking at convenient locations. Petitioners contend the purpose of the regulation is broader and intended to prevent congestion, traffic and safety problems. Petitioners' point is unclear. We understand petitioners to contend that the city puts too much emphasis on the number of parking spaces available for the day care center and too little emphasis on the effects of cars parked on the street. If that is petitioners' claim, our discussion above regarding the "substantially equal protection to surrounding properties" criterion in PMC 36.106.010 addresses this issue. We need not discuss it further.

Petitioners' last claim in this subassignment of error is that the city erred in finding the variance from parking requirements will apply only to the applicant's property. Petitioners contend that impacts resulting from parking by non-teacher employees and visitors will affect surrounding properties.

The criterion addressed by the challenged finding requires a finding that the variance:

> "...will relate only to the property that is owned by the applicant." PMC 33.989.010(a)(4).

We agree with respondent that this criterion prohibits

variances from zoning regulations at the request of those who do not control the property benefitted by the variance. The criterion does not address the effects of variances on surrounding properties. We reject petitioners' interpretation as well as their contention the order violates the provision.

This subassignment of error is sustained in the particulars above described.

B. Traffic Safety

Petitioners make three challenges concerning traffic safety. They are:

1. The weight of the evidence shows unacceptable traffic hazards will result from the use.

2. The city failed to address articulated concerns about traffic safety matters, and

3. The city did not state how conflicts in the evidence were resolved.

The city's order includes findings about traffic related to the proposed day care center. The city found the location of the proposed on-site semi-circular loading area would not allow sufficient area for cars waiting to drop off or pick up children. Sight distance along the street when entering or leaving the drop off area was also a concern.

Because of these anticipated problems, the city granted a variance from the on-site loading requirement. In addition, the city imposed a condition that all arrivals at the day care center be via Capitol Highway and Florida Street and that all the departures be via Florida Street and 32nd Avenue. The city

estimated approximately 80 trips per day on Florida Street by day care center users. The city also found sight lines adequate at the intersection that would be used by departing autos. In addition, the city compared traffic from the proposed use with traffic that could be generated at the same site if the property were redeveloped as a fourplex. The city found the proposed use would generate less traffic problems than if the property were more intensely developed.

Petitioners say extensive testimony was presented about traffic and safety problems. We reject petitioners' claim that the weight of evidence supporting their position requires reversal. We may not reweigh the evidence and are bound by any findings of fact supported by substantial evidence in the whole record. ORS 197.830(11). We also reject petitioners' claim the city is required to explain how conflicts in the testimony are resolved. Ash Creek Neighborhood Association v. City of Portland, 12 Or LUBA 230 (1984); Morrison v. City of Portland, 11 Or LUBA 246 (1984).

Turning to the question whether substantial evidence supports the findings regarding traffic safety, we are guided by the standard that substantial evidence is evidence a reasonable mind would accept to support a conclusion. Braidwood v. City of Portland, 24 Or App 477, 480, 546 P2d 777 (1976). The city relied on statements of officials in its Office of Transportation who initially recommended denial of the original application. The officials were concerned that

the turnaround area was too close to the intersection of Capitol Highway and Florida Street and that shrubbery blocks the view along Capitol Highway. Record at 151. After conferring with the applicant, the transportation officials changed their opinion and issued a revised letter recommending approval. The revised letter was issued September 12, 1984, before the hearings officer's decision. This later opinion notes the applicant's proposal to "direct all parents to enter and leave the day care by way of Florida to 32nd to Vermont," (emphasis added) and that no access to Capitol Highway would be allowed. The opinion also notes that loading space for five cars would be provided and that no employees would park on site. The statement concludes:

> "These actions would reduce the traffic impact on Capitol Highway at Southwest Florida which were the reasons for the denial." Record at 153.

We understand the city traffic official's report recommended approval of the application if no arrivals or departures utilized the Capitol Highway-Florida Street intersection. The report was also premised on use of an on-site turnaround, as described in the original application with no on-site parking for employees. In contrast, the final decision: (1) requires use of the Capitol Highway-Florida Street intersection, (2) allows on-site employee parking, and (3) omits the on-site loading zone approved by the transportation office.

The record does not show that the Office of Transportation

made any report or comment on the parking plan and traffic patterns finally approved by the city. Under these circumstances the record does not support the city's conclusion that the "city's traffic and transportation experts are comfortable with the safety aspects of this proposal...." Record at 017. The city's conclusions about traffic safety are not supported by substantial evidence.

C. On-site Turnaround

To grant a variance, the code requires a finding that the variance will not be contrary to the intent and purpose of the zoning code. PMC 33.98.010(a)(1). The city found the purpose of the on-site loading area requirement is to preserve vegetation and the feeling of openness in the residential area and not to increase unnecessarily the amount of asphalt, concrete, driveways and curbing. Petitioners attack this finding saying the purpose is to prevent risks to children and that the findings do not explain how the variances reflects or considers this purpose.

We agree with petitioners that the city's interpretation of the code is too narrow. A fair reading of the code would favor an interpretation of the off-street loading area requirement as a safety provision, not an aesthetic requirement. Petitioners' claim is sustained on this point.

The assignment of error is sustained in the particulars discussed above.

ASSIGNMENT OF ERROR F

ORS 227.175(4) requires that permits and zone changes must be in compliance with the city's acknowledged comprehensive plan. The city made findings about 11 applicable comprehensive plan goals. Petitioners challenge the findings regarding Goals 2, 3, 4 and 5 on grounds the findings are inadequate or not supported by substantial evidence.[6]

Housing - Goal 4

Petitioners allege use of the property as a day care center will remove two housing units from the available supply. They say this violates Goal 4 of the city's plan.

The city's finding that two existing dwelling units will be removed from the housing supply does not by itself mean the decision must be reversed or remanded. The city was entitled to weigh the loss of two dwellings against the benefits resulting from the proposal to determine whether the proposal complies with the plan as a whole. Downtown Community Association v. City of Portland, ___ Or LUBA ___, (1986)(LUBA No. 85-095, dated April 22, 1986). We note that in a large metropolitan area like Portland, the elimination of two dwellings from the housing supply is not by itself a significant reduction in housing. The finding about loss of two dwellings does not impair the decision that the proposal is in compliance with the city's comprehensive plan.

Economic Impact - Goal 5

The city specifically addressed Goal 5 - Economic

Development - as follows:

> "The proposal would provide day care services to working parents, thereby encouraging an expansion of the labor pool. Stability of employment would be enhanced through elimination of the need for parents to quit work in order to care for children during the day." Record at 014.

Petitioners allege the day care center is merely relocating an existing day care center operating in the same vicinity. Moving the child care service does not increase the number of children to be cared for or add to the number of people eligible for work, according to petitioners' argument. Petitioners also point to testimony showing no need for additional child care services in the vicinity.

However, in addition to the finding quoted above, the city found:

> "The applicant's proposal would allow relocation and expansion of an established day care center to larger quarters within the same vicinity of their present facility, thereby being able to serve its existing users with minimum inconvenience." Record at 010.

Assuming the change of location will not increase the number of people eligible to work, as petitioners charge, the above finding is adequate to show compliance with Goal 5. Changes that improve services for working parents or make services more convenient satisfy the goal's objective to improve the stability of jobs.

We deny this subassignment of error.

Residential Character - Goals 2 and 3

Petitioners allege the proposal will be detrimental to the

residential character of the neighborhood, a violation of Goals 2 and 3.

We understand petitioners to say the city's findings addressing Goal 2 and 3 are not supported by substantial evidence. Although the opponents' testimony about possible adverse impacts to the character of the neighborhood may be credible, we may not sustain their claim if the city's findings on this issue are also supported by substantial evidence. Homebuilders v. Metropolitan Service District, 54 Or App 60, 633 P2d 1320 (1981).

The city found the day care center would use an existing residential structure and that the two variances would aid retention of the desirable residential character without causing adverse impacts in the neighborhood. The city also made findings that neither noise nor traffic from the day care center would detract from the residential character of the neighborhood.

We agree with respondent that substantial evidence supports the city's findings.

Petitioners challenge the support for the findings by citing evidence about parking problems on the street, increases in traffic, and the introduction of a commercial activity into the neighborhood. Most of petitioners' arguments are discussed in other assignments of error and will not be re-examined here.

The city specifically addresses petitioners' concern about

introduction of commercial activities in the neighborhood. The city found:

> "The Zoning Code has for many years allowed this kind of activity as a Conditional Use in residential neighborhoods. Indeed, this kind of use is best placed in a residential neighborhood because of the peace and quiet those neighborhoods afford to the use. Conversely, experience with these uses over the years and throughout the city is persuasive that little or no problem ensues from them when they are in place." Record at 017.

This finding is supported by testimony of a neighbor of the applicant's day care center conducted at another location. He said the applicant's day care center made inconsequential noise, generated no traffic problems, did not reduce property values and was generally an excellent neighbor. This evidence is adequate to support the city's conclusion.

This assignment of error is denied.

ASSIGNMENT OF ERROR G

Petitioners allege the findings on comprehensive plan Goal 6 are not supported by substantial evidence. Goal 6 concerns the impact of vehicle traffic in residential areas. Policy 6.2 of the goal specifies that the city should create and maintain traffic patterns that protect the livability of established neighborhoods. Petitioners say the evidence does not support the city's finding that the day care facility will add only 80 vehicle trips per day to the neighborhood. In addition, petitioners challenge the city's finding that additional vehicle trips will occur at an average rate of seven per hour.

The city calculates the additional traffic in the following

manner:

> "In addition, this circulation plan halves the amount of traffic which would be using Florida and 32nd under the circular drive proposal: Estimates are, with a maximum of 46 children, 46 x 4 = 184 trips (2 trips per child for delivery, and 2 for pick up) + 16 (employee arrival and departure) = 200 trips per day. It is reasonable to estimate that carpooling, transit, and walking will reduce that number of trips to between 150 to 160 per day. Dividing that number by 2 (because of the restriction of arrivals to Capitol Highway) means that the additional number of trips on Florida and 32nd will likely be no more than approximately 80 per day. The day-care center is open from about 7:00 a.m. until about 6:00 p.m. five days a week. That means that the average added number of cars per hour is seven. Peak hour usage will not exceed the capacity of the street, nor pose a significant traffic hazard. This is not an undue burden for either Florida Street or 32nd Avenue. Both are streets of reasonable width. The City's Traffic Engineers evaluate Florida as having reasonable sight lines into 32nd, and it, despite neighborhood objection, as having the same into Vermont." Record at 016.

Petitioners say the evidence shows more than 16 employee trips per day. In addition, petitioners say there was no evidence supporting the city's assumption that public transportation, walking and carpooling would reduce traffic as stated in the above-quoted findings.

Although the city's method of calculating the amount of vehicle traffic is confusing, the evidence supports the conclusion that traffic will increase by 80 additional vehicle trips per day.[7]

We reject petitioners' contention that the seven on-site spaces and six off-site spaces requested in the original application means that 26 vehicles each day will go through the

neighborhood. The day care center has eight employees. Record at 236. The estimate of 16 vehicle trips per day for these employees is reasonable. Indeed, the evidence that only three teachers plus the director will drive to work indicates fewer than 16 trips each day by these employees.

We also reject the challenge to the finding that the amount of expected vehicle traffic should be reduced to account for public transportation, walking and carpooling. Petitioners claim no evidence supports a 25 percent reduction for these factors.[8] The applicants' representative testified that of the 46 children attending the facility, 36 come and go by car. Transcript of hearing of November 6, 1985 at 28. The city was justified in using this evidence of actual automobile use at the existing location to predict use at the proposed location.

Petitioners also challenge the comparison made by the city with traffic that could be generated if the property were developed more intensively than at present. The point to be made by this conjectural finding is neither stated nor apparent from the order. We do not consider the finding to be necessary or critical to the city's final decision even if unfounded as petitioners claim. We deny this assignment of error.

ASSIGNMENT OF ERROR H

Goal 8 of the city's comprehensive plan provides:

> "Maintain and improve the quality of Portland's air, water and land resources and protect neighborhoods and business centers from detrimental noise pollution."

Policy 8.5 of the plan states:

"Reduce and prevent excess noise levels from one use which may impact another use through ongoing noise monitoring and enforcement procedures."

The county made the following findings on these criteria:

"The request will not significantly impact the air or water resources, and no designated open space is affected. The staff contends the proposed use will not increase noise levels in the area and that the request therefore is not in conflict with this goal and associated policies. Neighbors contend that there will be a noise problem." Record at 015.

"Noise. The most pointed objection concerning noise was to the use of the rear play area by a maximum of 16 infants for two half hour periods during the middle of the day. Despite objections, it is concluded that this usage, given the sizable rear play area, a distance of over 35 feet from the nearest objector, and its extensive natural screening along much of its boundary with contiguous property, cannot reasonably be expected to be troublesome. To be sure, a condition requiring currently existing screening to be made continuous was imposed by the hearings officer." Record at 016.

Petitioners' challenge to these findings is, like several previously discussed challenges, based upon petitioners' claim that opposing evidence is contrary to the city's final conclusion and that the city did not explain how conflicts in the evidence were resolved. We again note that we may not reweigh the evidence and are bound by findings of fact supported by substantial evidence in the record. ORS 197.835; Valley & Siletz Railroad v. Laudahl, 56 Or App 487, 642 P2d 337 (1982), pet rev dism, 293 Or 340 (1984).

We find there is substantial evidence in the record supporting the city's findings about noise and deny this assignment of error.

We recognize the difficulty in land use proceedings such as this to prove the amount of noise expected from a proposed activity. However, the city was entitled to rely on the testimony by a former neighbor of the applicants' day care facility at another location that noise was not objectionable at lesser distances than exist at the proposed location.[9] This evidence, together with evidence that the outdoor play areas will be used by only 16 infants for two half periods each day during good weather and the emphasis on close supervision during playtimes, is substantial evidence supporting the city's findings.

We therefore deny this assignment of error.

ASSIGNMENT OF ERROR I

Petitioners allege the findings regarding the variances eliminating five off-street parking spaces and the off-street loading area are not supported by substantial evidence. The challenged findings address the following variance criteria:

"(a) * * * *

> "(1) It will not be contrary to the public interest or to the intent and purpose of this title and particularly to the zone involved.
>
> * * *
>
> "(3) It will not cause substantial adverse effect upon property values or environmental conditions in the immediate vicinity or in the zone in which the property of the applicant is located.
>
> "(4) It will relate only to the property that is owned by the applicant.

"(b) * * * *

"(2) * * * *

"A. The variance is required in order to modify the impact of exceptional or extraordinary circumstances or conditions that apply to the subject property or its development that do not apply generally to other properties in the vicinity;" PMC 33.98.010.

Petitioners first challenge the evidentiary support for findings that the variances are not contrary to the public interest and will not cause substantial adverse effects in the vicinity. Petitioners ask that we find petitioners' evidence outweighs the evidence relied upon by the city. We decline to do so.

Petitioners' claim, asserted in Assignment of Error E, that findings about traffic are unsupported are pertinent to the variance criterion in PMC 33.98.010(a)(1) and (3). In our discussion under Assignment of Error E, we noted the Office of Transportation changed its recommendation from denial to approval in part on the premise that loading zone space for five cars would be provided and that no employees would park on the site. Because the decision did not adopt these recommended steps, we said substantial evidence does not support the finding that "the city's traffic and transportation experts are comfortable with the safety aspects of this proposal." This finding is critical, we believe, to the city's conclusion required by PMC 33.98.010(a)(1) and (3) that the variances are

in the public interest and will not result in adverse impacts in the immediate vicinity.[10] Accordingly, petitioners' challenges to the findings that the variances will have minimal adverse impacts and that the city's traffic experts are satisfied as to safety are sustained.

Petitioners also claim no substantial evidence supports the findings that the variances relate only to the applicant's property. As we noted above in the discussion of Assignment of Error E, we reject petitioners' interpretation that PMC 33.98.010(a)(4) requires findings that the variance will affect only property owned by the applicant.

Petitioners' last claim is that the city's findings on PMC 33.98.010(b)(2)(A) are not supported by substantial evidence. Petitioners say the city's only justification for the variance is the city's desire to preserve the residential character of the property and that this rationale does not show compliance with the ordinance standard. Therefore, according to petitioners, evidence supporting the city's stated reason does not support a finding that PMC 33.98.010(b)(2)(A) is satisfied.

Respondent argues that without the variances, construction of parking and turnaround areas on-site would destroy the residential appearance of the duplex. The front yard, which blends well with the surrounding residential neighborhood, would be paved over. The city says these circumstances are exceptional and extraordinary, within the meaning of PMC 33.98.010(b)(2)(A) and justify the variances to protect the

residential character of the neighborhood.

The city's reasoning, however, does not satisfactorily explain how the variances are warranted under the criterion in PMC 33.98.010(b)(2)(A). The city's rationale characterizes the conditions and circumstances as "exceptional and extraordinary," thus satisfying the ordinance standard, merely because meeting ordinance requirements on this site would harm the character of the neighborhood. This application of the code fails to take account of the requirement that the extraordinary or exceptional circumstances or conditions warranting a variance must be circumstances or conditions that "do not apply generally to other properties in the vicinity." PMC 33.98.010(b)(2)(A). We interpret this language to mean that existing conditions or circumstances justifying a variance must be unique to the property in question when compared with other nearby property. The city made no findings that the property in question is physically different from other properties in the vicinity or is subject to any restrictions that do not also apply in the neighborhood.[11]

Without findings addressing the requirements of PMC 33.98.010(b)(2)(A) in these terms, the city's order can not be sustained. It follows that the findings of compliance with the variance criteria are not supported by substantial evidence sufficient to withstand petitioners' challenge. The assignment of error is sustained.

Remanded.

FOOTNOTES

1

Although petitioners allege the variances were initially approved by the hearings officer, the hearings officer's decision leaves some doubt whether the variances were granted or only recommended. His report does not expressly state the variances are granted. He does state that notice of the proceedings included no information about the variances. The report also states:

> "If this case is appealed to the city council, those two variances ought to be advertised in the notice of the hearing, thus curing the defect. If it is not appealed, a further round of notices for the variances alone will go out to the neighborhood and, if required, a further hearing will be conducted by the hearings officer as to the variances alone." (emphasis in original) Record at 145.

Petitioners have not alleged the city council is without authority to grant the variances in these circumstances. Compare, Downtown Community Association v. City of Portland, 3 Or LUBA 244 (1981) where a variance was held unlawful when granted by the city council in the absence of prior approval by either the Variance Committee or a hearings officer. We express no opinion on this issue.

2

We also observe that calculations in respondent's brief to this Board claiming 5,300 square feet of play area are at variance with the testimony of applicant's representative that the play area equaled 8,382 square feet. Transcript of November 6, 1984, p. 29.

3

We note in particular the opponents' testimony challenging the play area east of the building. The site plan shows a substantial play area outside the property line but west of a hedge. Petitioners contended at the hearings that the area between the property line and the hedge is within the city-owned right of way of Capitol Avenue. Record at 092. They alleged the area outside the property may not be used to satisfy the minimum play area requirements. The council made no findings responding to petitioners' allegations. We do not know, therefore, whether the city considered this area to

qualify towards meeting the minimum play area standard.

4

In Ash Creek Neighborhood Association v. City of Portland, supra, the applicant proposed a modification of driveway curb cuts during the permit proceedings. The city took no action to approve or disapprove the proposed modification. In those circumstances, the unmodified site plan showing curb cuts in excess of requirements was cause for a remand because the site plan portrayed a violation of the code. In contrast, the city council here took action to dispense with the access driveway shown on the site plan.

5

The original application proposed seven on-site spaces and six off-site spaces at the Hillsdale Community Church.

6

Goal 2 of the city's comprehensive plan states:

"Maintain Portland's role as the major regional employment, population and cultural center through public policies that encourage expanded opportunity for housing and jobs, while retaining the character of established residential neighborhoods and business centers."

Goal 3 states:

"Preserve and reinforce the stability and diversity of the City's neighborhooods while allowing for increased density in order to attract and retain long-term residents and businesses and ensure the City's residential quality and economic vitality."

Goal 4 states:

"Provide for a diversity in the type, density and location of housing within the City consistent with the adopted City housing policy in order to provide an adequate supply of safe, sanitary housing at price and rent levels appropriate to the varied financial capabilities of City residents."

Goal 5 states:

"Improve the level, distribution and stability of jobs and income for resident industry, business and people

in accordance with the economic development policy adopted by the City Council on March 26, 1980."

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7 The hearings officer's method of calculating the number of vehicle trips by multiplying the number of children by four was confusing to the city council members. See Transcript of hearing on November 6, 1985 at 12-15. Nevertheless, the method was incorporated into the final order.

As we understand the order, cars arriving and departing the day care center must travel clockwise via Capitol Highway-Florida Street-32nd Avenue and Vermont Street. Using this pattern, vehicles should pass through the intersections of these streets only once for delivery and once for picking up children. See Map at Record 148.

We also note the city Office of Transportation estimated 200 vehicle trips per day. However, that estimate was based on a different circulation pattern than the one finally approved by the city. The traffic official's assumption was that cars would arrive and depart the day care center by using Florida Street and would not use the intersection at Capitol Highway and Florida Street. This pattern would require two passes through the Florida-32nd Avenue intersection for each trip bringing a child to the day care center and two passes through the intersection for each trip to pick up a child. See Record at 153. By this analysis, multiplying the number of children by four would be appropriate if the traffic pattern recommended by the Office of Transportation were adopted, but a multiplier of two would be appropriate for the traffic pattern finally approved.

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8 The city found that walking, carpooling and transportation would reduce the number of car trips from 200 per day down to 150-160. This calculates to be a 21-25 percent reduction for these factors.

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9 Although the neighbor's testimony indicated the neighborhood where the day care center formerly operated might not have been of the same character as at the proposed location, the city council was entitled to take this factor into account when assessing the testimony.

[10] We note the record does not show that the city's Office of Transportation made any comment on variances or the traffic circulation requirement adopted in the final order. Comments by the Office of Transportation were made prior to the hearings officer's decision.

[11] An example of the condition or circumstance meeting the criterion of PMC 33.98.010(b)(2)(A) was considered in Atwood v. City of Portland, 2 Or LUBA 397 (1981). There, variances allowing a stepback construction next to a steep hillside were approved in part because an injunction order prohibited construction more than 30 feet high on one corner of the property. The injunction was found to be a restriction that did not apply to other properties in the vicinity.