BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

OREGON ENTERTAINMENT CORPORATION,
Petitioner,

vs.

CITY OF BEAVERTON,
Respondent,

and

PARK PLAZA WEST, LLC,
Intervenor-Respondent.

LUBA No. 99-198

FINAL OPINION
AND ORDER

Appeal from City of Beaverton.

Bradley J. Woodworth, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Cobb, Woodworth & Holloway.

Mark E. Pilliod, Beaverton, and Jeffrey G. Condit, Portland, filed the response brief and argued on behalf of respondent and intervenor-respondent. With them on the brief were James F. Dulcich, Portland, and Miller Nash LLP.

HOLSTUN, Board Member; BASSHAM, Board Chair; BRIGGS, Board Member, participated in the decision.

AFFIRMED 08/04/2000

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals a city decision that denies a conditional use permit to operate an adult video store between the hours of 10 p.m. and 7 a.m.

MOTION TO INTERVENE

Park Plaza West, L.L.C. (intervenor) moves to intervene on the side of respondent. There is no opposition to the motion and it is allowed.[1]

FACTS

Petitioner operates an existing Fantasy Adult Video store (Fantasy Video), which is located on the south side of Beaverton-Hillsdale Highway near its intersection with Highway 217 in the City of Beaverton. Intervenor is the owner of the Park Plaza West office complex (PPW), which adjoins Fantasy Video to the east and south. Fantasy Video has an easement that allows automobile access to Fantasy Video from Beaverton-Hillsdale Highway across PPW property.

Fantasy Video and PPW are located in the Community Service District. Beaverton Development Code (BDC) 20.10.05.[2] Commercial uses in the Community Service District may operate between the hours of 7:00 a.m. and 10:00 p.m. by right. Commercial uses that wish to operate between the hours of 10:00 p.m. and 7:00 a.m. must obtain a conditional use permit. BDC 20.10.05.2.B.3. The city planning commission approved Fantasy Video's request for a conditional use permit to authorize it to remain open between the hours of 10:00

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[1]Intervenor and respondent filed a joint response brief. We refer to intervenor and respondent in this opinion as respondents.

[2]According to BDC 20.10.05(1), the purpose of the Community Service District is as follows:

> "The Community Service * * * District is intended to provide for businesses compatible with and of similar scale to existing commercial activity found principally along Beaverton-Hillsdale Highway, Canyon Road, T.V. Highway, Cedar Hills Boulevard, Sunset Highway and Highway 217."

p.m. and 7:00 a.m. Intervenor appealed the planning commission's decision to the city council, and after review the city council denied petitioner's request. This appeal followed.

INTRODUCTION

Petitioner alleges six assignments of error. Petitioner's first assignment of error alleges that the city's decision must be reversed because it violates Article 1, section 8, of the Oregon Constitution. Petitioner's remaining assignments of error allege subconstitional bases for reversal or remand of the city's decision. We address petitioner's subconstitional assignments of error first. *City of Portland v. Tidyman*, 306 Or 174, 180, 759 P2d 242 (1988) (*Tidyman*); Carson, *"Last Things Last": A Methodological Approach to Legal Argument in State Court*, 19 Willamette L Rev 641 (1983).

Petitioner's second assignment of error alleges the city council is biased against petitioner. Petitioner's fifth assignment of error alleges the city erred by refusing to allow it to cross-examine adverse witnesses. Since both the second and fifth assignments of error could potentially require that we reverse or remand the decision without considering petitioner's remaining assignments of error, we address those assignments of error first. We then consider petitioner's arguments that the city council improperly denied the application based on petitioner's opposition to executing and recording a waiver of remonstrance (sixth assignment of error) and petitioner's challenge to the city's findings that petitioner failed to demonstrate compliance with two conditional use permit approval criteria (fourth and third assignments of error). Finally, we consider petitioner's constitutional challenge.

SECOND ASSIGNMENT OF ERROR

Petitioner argues it was denied the "impartial tribunal" that parties in quasi-judicial land use proceedings are entitled to under *Fasano v. Washington Co. Comm.*, 264 Or 574, 588, 507 P2d 23 (1973).[3] Petitioner argues:

[3]The Oregon Supreme Court has explained the procedural rights extended under *Fasano* are derived from the comprehensive land use planning statutory scheme in this state, not the due process clause of the Fourteenth

> "The Record is replete with signs of the City Council's opposition to Petitioner's very existence. The [city council's] bias against Petitioner is shown in three ways: by the direct comments of City Council members, in their adoption of circular and illogical arguments against Petitioner, and in their unprincipled evaluation of the evidence. * * *" Petition for Review 10.

As respondents correctly note, the bias that is proscribed by *Fasano* is "actual bias," rather than an "appearance of bias." *1000 Friends of Oregon v. Wasco Co. Court*, 304 Or at 84. To demonstrate actual bias, "petitioner has the burden of showing the decision maker was biased, or prejudged the application, and did not reach a decision by applying relevant standards based on the evidence and argument presented [during the quasi-judicial proceedings]." *Spiering v. Yamhill County*, 25 Or LUBA 695, 702 (1993). For the reasons explained below, we conclude that petitioner fails to demonstrate actual bias on the part of the city council in this matter.

A. City Council Member's Comments

At page 11 of the petition for review, petitioner quotes the emphasized portion of the statements quoted below as evidence that the city council was biased against petitioner. We add the unemphasized portion of the quoted material to provide context.

> "[Mayor Drake] While on a personal basis, I think *the Council and I * * * don't want these businesses in the community*, the fact is our personal [feeling] versus our obligation as elected officials to uphold the law is very different, and so we can't base any decisions tonight based on content." City Council December 6, 1999 Transcript 111.[4]

> "[Councilor Stanton] [T]he citizens have chosen not to allow their local jurisdictions or the State to regulate [adult entertainment]. And that is the constraint we are under. * * * *I wish we had the authority to regulate [adult entertainment] in terms of time and location, but we are * * * precluded by state law from doing that at this point*." City Council December 6, 1999 Transcript 112.

Amendment to the United States Constitution. *1000 Friends of Oregon v. Wasco Co. Court*, 304 Or 76, 81, 742 P2d 39 (1987).

[4]Both petitioner and respondents attach to their briefs transcripts of the December 6, 1999 city council hearing. Petitioner also attaches portions of a transcript of the planning commission's November 3, 1999 hearing.

> "[Mayor Drake] Well, before I ask the vote, the mayor votes only in the event of a tie, it's apparent tonight there is no tie. I do have some opinions and I want to give them, and this is on a personal basis as a citizen of Beaverton, not as the City's Mayor.
>
> "I understand that the [petitioner] is entitled to his right to exist, and he moved into that facility knowing that he was allowed outright from 7:00 a.m. to 10:00 p.m. What he does there is protected expression, and I understand it. On a personal basis I don't agree with it. And I do respect though * * * your right, sir, to exist as a business.
>
> "My personal view is that *you pedal smut and there's no value added to our community.* The sad point is that there is business in the community for what you do, and I see that, and I understand it, but it doesn't mean on a personal basis I have to agree with it." City Council December 6, 1999 Transcript 135.

The councilor's and mayor's statements make it clear that as a personal matter they do not like petitioner's business. It would perhaps be preferable for local quasi-judicial decision makers to refrain from stating how they personally feel about parties in those proceedings, because such statements can lead the target of such statements to believe that their arguments are not receiving unbiased consideration. However, the Oregon appellate courts have specifically noted the unique combined legislative and judicial roles that elected local officials are required to play and take that combined role into account in considering whether such officials exhibit actual bias. *1000 Friends of Oregon v. Wasco Co. Court*, 304 Or at 82-83; *Eastgate Theatre v. Bd. of County Comm'rs*, 37 Or App 745, 750-52, 588 P2d 640 (1978).

In isolation, the emphasized portions of the statements quoted above *might* reasonably lead petitioner to believe the city councilors and mayor were biased against it. However, when the emphasized portion of the statements are viewed in context, they show the city councilors recognized that they must put their personal feelings about petitioner aside and make their decision in this matter based on the evidence and arguments that were presented during the quasi-judicial proceedings below. There may be cases where a quasi-judicial decision maker's verbal recognition of his or her duty to put aside personal opinions

about a party will be insufficient to avoid an inference of bias from that decision maker's expressions of personal animosity toward a party. However, petitioner has not shown that such is the case here.[5]

B. Circular and Illogical Reasoning

Petitioner cites several instances of reasoning included in the challenged decision that petitioner contends demonstrate the city council was biased. According to petitioner the city exhibited circular reasoning when it found that the proposed 24-hour use is incompatible because (1) no other existing business in the area is open for 24 hours and (2) allowing Fantasy Video to operate for 24 hours would encourage other businesses to request permission to remain open for 24 hours.[6] The city council also found that petitioner's conditional use permit would run with the land and for that reason the city could not be assured that Fantasy Video's operational practices would necessarily be followed by a successor adult video operator.[7] Finally, the city council noted that a fast food restaurant in a different Community Service District location had been granted a conditional use permit to operate 24 hours, but distinguished that decision from its decision in this case because, unlike

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[5]Petitioner goes on to make the following observations concerning Councilor Soth, which petitioner contends demonstrate bias:

> "At the City Council hearing, when Petitioner renewed its motion for cross-examination, the City Attorney said that although there was no right to cross-examination under applicable law, the Petitioner could suggest areas for the Councilors to inquire into. Councilor Soth squelched the idea by responding that he was 'sort of an independent type of person' who did not 'appreciate anyone trying to put words in my mouth or ideas in my head that are not already there.' Councilor Soth also showed his failure to appreciate the constitutional implications of the application by announcing, 'we are here to discuss a land use issue and not a constitutional issue.' * * *" Petition for Review 11-12 (citations omitted).

Councilor Soth's statements reflect that he objected to participating in a somewhat awkward process to allow a substitute for cross-examination of witnesses and, apparently, a feeling that the application did not present a constitutional issue. The statements do not demonstrate that Councilor Soth was biased against petitioner.

[6]Petitioner contends that both of these reasons would likely mean no conditional use permit for 24-hour operation could ever be granted.

[7]Petitioner contends this finding is a pretext for the council's biased decision against it, because petitioner was willing to have the conditional use permit limited so that it could not be used by a successor lessee.

Fantasy Video, the fast food restaurant was open and well-lighted and therefore did not present the crime and safety issues the council found would be presented by Fantasy Video's 24-hour operation. Petitioner argues it is "illogical and unprincipled" for the city to fault petitioner for not copying the fast food restaurant's operating characteristics.[8] Petition for Review 10.

Although the validity of the above reasoning as a basis for denying the disputed application may be subject to debate, the reasoning is not so lacking in merit as to demonstrate that the decision makers that adopted the reasoning are biased against petitioner.

C. Weighing of Evidence

Petitioner cites six ways that the city council weighed and relied upon the evidence that was submitted to them that petitioner believes demonstrate the city council was biased against it. First, the city council relied on a letter from a neighbor of a Fantasy Video store in Portland rather than letters and oral testimony by Fantasy Video landlords in favor of the application.[9] Second, petitioner contends the city council ignored evidence that Fantasy Video's procedures, which include patrolling outside the building at night when it is open, actually reduce the chances for vandalism and criminal behavior as compared to when the building is closed and patrolling outside the building stops.[10] Third, petitioner argues the city council relied improperly on neighborhood opposition.[11] Fourth, petitioner argues that the city council's dispute with petitioner's reference to opponents as a vocal minority

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[8]Petitioner notes it would not be possible for Fantasy Video to replicate the fast food restaurant's openness and lighting because it "cannot allow people passing by to see inside the store without imposing itself on unwilling viewers and minors." *Id*.

[9]Petitioner contends that the city council's position that favorable testimony by petitioner's landlords might be attributable to their business relationship with petitioner is absurd. Respondents contend that there is nothing absurd about that position.

[10]Respondents contend the city council did not ignore this evidence but rather found other evidence of problems at existing 24-hour adult video stores in other locations to be more persuasive.

[11]Respondents dispute the argument.

demonstrates that the city council was biased against it.[12] Fifth, petitioner argues the city council should have evaluated the evidence offered by PPW critically, because PPW opposes the continued existence of Fantasy Video at the subject property. Sixth, petitioner argues the city council's bias is shown by its reliance on a neighbor's testimony concerning litter and vandalism at the Fantasy Video store on NE Sandy Boulevard in Portland, while the city council ignored evidence that the same store had not had a "discernable impact on property values." Petition for Review 21.

Petitioner has not shown that the city council improperly ignored or failed to consider evidence that petitioner submitted. Neither has petitioner established that the city council improperly based its decision on expressions of opposition that have nothing to do with the relevant approval criteria. This is not to say that petitioner's criticism of the evidence the city council relied upon is entirely without merit. We might have relied on different evidence than the city council chose to rely on, were we the decision maker. However, the city council's choice between conflicting evidence may not be overturned on appeal, unless we cannot say a reasonable person would have relied on the evidence the city council relied upon. *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 586-88, 842 P2d 441 (1992); *Douglas v. Multnomah County*, 18 Or LUBA 607, 617-18 (1990). More to the point for purposes of resolving this assignment of error, petitioner's cited criticisms of the manner in which the city council considered the evidence in this matter fall significantly short of demonstrating that the city council was biased against petitioner.

The second assignment of error is denied.

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[12]Petitioner argues that the number of opponents who testified below are in fact a minority of the number of persons living in the neighborhood and the City of Beaverton and far fewer than the number of Fantasy Video customers in the area.

FIFTH ASSIGNMENT OF ERROR

Petitioner argues the city erred by refusing its request to allow cross-examination of opposition witnesses. Petitioner contends it was prejudiced by the city's refusal to allow cross-examination and the city council's failure to ask questions of the opposition witnesses who petitioner argues presented testimony that was unsupported or contradicted by documentary evidence.

In its petition for review, petitioner does not identify the source of its alleged right to cross-examine witnesses. In its arguments below to the city council, petitioner argued that its right to cross-examination is based on the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and its rights of due process that can "be fairly implied from the text of the Oregon Constitution." Record 336 n 6.

We have held on many occasions that absent a code or other legislative requirement that participants in quasi-judicial land use proceeding be allowed to cross-examine witnesses, there is no such right. *Consolidated Rock Products v. Clackamas County*, 17 Or LUBA 609, 614-17 (1989), *Mason v. Linn County*, 13 Or LUBA 1 (1984), *aff'd in part, rev'd in part on other grounds, sub nom Mason v. Mountain River Estates*, 73 Or App 334, 698 P2d 529, *rev den* 299 Or 314 (1985). In those cases it was not clear whether the petitioner asserted that cross-examination was a necessary adjunct of the right of rebuttal that is guaranteed by *Fasano* or whether the petitioner asserted that a right of cross-examination exists separately from the right of rebuttal under *Fasano*. *Id.* In either event, no Oregon appellate court has held that there is an absolute due process right to cross-examination in city and county quasi-judicial land use proceedings, and we decline to find such a right in this appeal.

As we explained in *Younger v. City of Portland*, 15 Or LUBA 210, 233 (1987), LUBA has employed a three step inquiry in responding to claims that a local government's failure to allow cross-examination of witnesses in quasi-judicial land use proceedings

violated a party's right to due process under the Fourteenth Amendment. That inquiry involves asking the following questions:

> "1. Did the petitioners assert a right of cross-examination?
>
> "2. Did the local governing body deny petitioners the right to cross-examine?
>
> "3. Were petitioners prejudiced by the denial of any right to cross-examination? * * *"

Petitioner asserted a right of cross-examination and the city denied the right. The only remaining question is whether petitioner was thereby prejudiced. The city offered petitioner the opportunity to propose cross-examination questions for the city council to pose to witnesses. Petitioner did not request that the city council ask questions of opposition witnesses and, while that procedure would admittedly be somewhat cumbersome, petitioner does not make any attempt to explain why that procedure would not have been sufficient to avoid prejudice to its substantial rights.[13] Therefore, we agree with respondents that petitioner fails to demonstrate that it was prejudiced by the city's refusal to allow it to cross-examine witnesses directly.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

BDC 40.05.15.2.C specifies three "Approval Criteria" for conditional use permits.[14] The city's findings concerning two of those three approval criteria are discussed below under

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[13]As previously noted, one city councilor made statements that indicate he was not willing to relay questions to witnesses, but petitioner does not identify statements by other city councilors that indicate they would not have asked questions of witnesses had they been asked to do so.

[14]The BDC includes essentially identical provisions for conditional use permits at BDC 40.05.15.1 and 40.05.15.2. The primary difference appears to be that BDC 40.05.15.1 provides for an initial administrative decision with a right of local appeal, whereas BDC 40.05.15.2 requires a public hearing before the initial decision. The challenged decision does not cite consistently to either BDC 40.05.15.1 or BDC 40.05.15.2. BDC 40.05.15.2 appears to be the applicable provision, and we cite to BDC 40.05.15.2 in this opinion.

the third and fourth assignments of error. BDC 40.05.15.2.D specifies three "Special Conditions." The third special condition, BDC 40.05.15.2.D.3, is as follows:

> "The owner of the property upon which a Conditional Use Permit is approved but which, in the determination of the Planning Commission is without standard off-site improvements, shall consent to, and waive the right to remonstrate against, the formation of any local improvement district for the purpose of providing the needed off-site improvements and to accept their share of the costs arising from such local improvement project. Said consent and waiver shall be in such form as to bind the owner and successors in interest and shall be executed and recorded in a manner satisfactory to the City Attorney and in substantial accord with Resolution No. 1655, or any successor thereof, prior to the issuance of building permits."

The planning commission imposed a condition that required petitioner to execute and record a waiver of remonstrance in accordance with BDC 40.05.15.2.D.3. After opponents appealed the planning commission's decision to the city council, petitioner objected to the condition of approval.[15] In the city council's final decision in this matter, one of the stated bases for denial is petitioner's objection to the planning commission's condition under BDC 40.05.15.2.D.3. The city council explained:

> "While the City could validly attach a condition to the approval of the CUP, as the Planning Commission did in this case, where an applicant objects to such [a] condition, the City is justified in denying the CUP.
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> "Since the Applicant was not willing or not able to furnish agreement from the owner for this condition of approval, despite the City's valid justification, Council finds and concludes the application fails to comply with BDC 40.05.15.2.D.3 * * *." Record 15.

We need not and do not reach the question of whether the disputed condition is subject to the "rough proportionality" requirement of *Dolan* or whether consideration of the

[15]Petitioner argued to both the planning commission and the city council that the requested increased hours of operation would not generate impacts that would justify requiring petitioner to pay for off-site improvements. Petitioner argued that requiring that it sign a waiver of remonstrance under BDC 40.05.15.2.D.3 deprived it of an individualized determination that establishes a nexus between the expected impacts of its extended hours of operation and the cost to petitioner of constructing such improvements. Petitioner argued that such an individualized determination is required under *Dolan v. City of Tigard*, 512 US 374, 114 S Ct 2309, 129 L Ed 2d 304 (1994).

"rough proportionality" requirement is required or possible at this stage of the local proceedings, even if *Dolan* does apply. However, we do agree with petitioner that by its terms, BDC 40.05.15.2.D.3 is a "Special Condition" and the city is authorized under its code to require that petitioner comply with it as a condition of approval. It is not an "Approval Criterion" under BDC 40.05.15.2.C. Therefore, petitioner's verbal opposition to a condition of approval under BDC 40.05.15.2.D.3 does not provide a basis for denying the requested conditional use permit.[16]

BDC 40.05.15.2.D.3 requires that a waiver of remonstrance be "executed and recorded" "prior to the issuance of building permits." Respondents take the position in their brief that no building permits will be required in this case because Fantasy Video already exists and operates on the site. To the extent this point is offered as a reason why petitioner's agreement to the waiver required by BDC 40.05.15.2.D.3 should be treated as an approval criterion, rather than imposed as a condition of approval, that reasoning is not stated in the challenged decision. Moreover, we see no reason why the city could not, consistent with BDC 40.05.15.2.D.3, require that a waiver of remonstrance be executed and recorded before Fantasy Video commenced 24-hour operations. BDC 40.05.15.2.D.3 states an absolute deadline for executing and recording waivers of remonstrance (before building permits are issued); it does not expressly preclude a different, earlier deadline, particularly if respondents are correct that no additional building permit would be required to extend Fantasy Video's operating hours. The city may not rely on petitioner's verbal opposition to executing and recording a waiver of remonstrance to deny the requested conditional use permit.

The sixth assignment of error is sustained.

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[16]As petitioner correctly notes, ORS 197.796(1) specifically authorizes an applicant for a land use permit to "accept a condition of approval imposed under * * * ORS 227.175 and file a challenge to the condition under this section." However, ORS 197.796(3) requires that before the permit applicant can appeal the condition to LUBA or challenge the condition in circuit court, the permit applicant must comply with ORS 197.763(1), which requires that the applicant raise an issue concerning the condition prior to the close of the final local evidentiary hearing.

FOURTH ASSIGNMENT OF ERROR

As previously noted, BDC 40.05.15.2.C specifies three "Approval Criteria" for conditional use permits. One of those approval criteria is BDC 40.05.15.2.C.2 (criterion 2). Criterion 2 requires that the city find that "[t]he proposed development will comply with the Comprehensive Plan." The challenged decision finds that the applicant failed to establish compliance with Beaverton Comprehensive Plan Goal 7 (Plan Goal 7).[17] Petitioner assigns error to that finding.

Petitioner argues that the letter that the city sent to the applicant following the pre-application conference identified some comprehensive plan provisions, but did not identify Plan Goal 7. The notice of hearing that the city provided in accordance with ORS 197.763(3)(b) quotes criterion 2, but does not identify Plan Goal 7 as an approval criterion.[18] According to petitioner, neither the city nor any party took the position that Plan Goal 7 applies until the evidentiary phase of the local proceedings ended and the city council was deliberating toward its final decision. Moreover, petitioner argues those oral deliberations by the city council show that only one city councilor believed Plan Goal 7 applied and was violated. The other city councilors and the mayor did not state that they believed the application violates Plan Goal 7. Nevertheless, the final written decision that was adopted by the city council includes a finding that the applicant failed to demonstrate compliance with Plan Goal 7.

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[17]Plan Goal 7 is as follows:

> "Retain and enhance the character and quality of established areas and revitalize, rehabilitate or redevelop those established areas where such improvements are needed."

[18]ORS 197.763(3)(b) requires that the notice provided by the city before the initial evidentiary hearing must:

> "List the applicable criteria from the ordinance and the plan that apply to the application at issue[.]"

We agree with respondents that the failure of the written decision to accurately reflect statements that may have been made by individual city councilors during their oral deliberations is irrelevant. It is the final written decision that constitutes the land use decision on review in this matter. *Cook v. City of Eugene*, 15 Or LUBA 344, 355 (1987).

However, the city's failure to list Plan Goal 7 as a relevant approval criterion constitutes a violation of ORS 197.763(3)(b). *See* n 18. Respondents argue that the failure did not result in prejudice to petitioner's substantial rights because Plan Goal 7 is similar to BDC 40.05.15.2.C.3 (criterion 3), one of the conditional use permit approval criteria, and the city's findings concerning Plan Goal 7 are in some respects similar to the findings addressing criterion 3.[19] The city contends that because petitioner exhaustively challenges the city's findings addressing criterion 3 there was no prejudice to petitioner's substantial rights by failing to identify Plan Goal 7 as an approval criterion prior to the city council's adoption of its final written decision basing its denial of the conditional use permit, in part, on petitioner's failure to demonstrate compliance with Plan Goal 7.

The prejudice that resulted from the city's failure to identify Plan Goal 7 as an approval criterion is obvious. Neither petitioner nor any other party addressed that criterion during the local proceedings. Although criterion 3 is in some respects similar to Plan Goal 7, it is not the same criterion. The city's failure to list Plan Goal 7 as an approval criterion in its notice of hearing, and the city's failure following that omission to advise the parties that it considered Plan Goal 7 to be an approval criterion during a stage in the local proceedings where the parties could have presented arguments and evidence concerning that criterion, were procedural errors that prejudiced petitioner's substantial rights. Therefore, the city may

[19]We address the city's findings concerning criterion 3 under the third assignment of error below. Criterion 3 requires that the city consider whether the proposal will be compatible with the surrounding area and its impact on livability.

not rely on its finding that petitioner failed to demonstrate compliance with Plan Goal 7 to deny the disputed conditional use permit.

The fourth assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

A second approval criterion for a conditional use permit is BDC 40.05.15.2.C.3 (criterion 3). Under criterion 3 the city must find:

> "That the location, size, design, and functional characteristics of the proposed use are such that it can be made reasonably compatible with and have a minimum impact on the livability and appropriate development of other properties in the surrounding neighborhood."

Under the third assignment of error, petitioner challenges the city's final basis for denying the requested conditional use permit.

The city's findings regarding criterion 3 include the following:

> "Applicant argued that the terms, 'compatibility' and 'livability' in BDC 40.05.15.[2].C.3 are unconstitutionally vague and would violate ORS 227.173(1)[20] unless they are applied in a clear and objective manner. Applicant asserted that these terms should be defined by the presence or absence of the types of objective, measurable impacts that a particular land use proposal might or might not entail: factors such as traffic, congestion, noise, lighting, sewage disposal, pollution, and the like. The Council finds that while these terms would ordinarily include such factors, *each term also includes other, less precise and more subjective factors, such as effects on neighboring uses, vacancies, potential for criminal activity and the character of the area surrounding the use*. Furthermore, because the current use does not operate during the hours of 10 p.m. to 7 a.m. the Council must necessarily predict whether or not the proposed use will generate these effects. As will be explained, Council's decision is based on an evaluation of the existing use, similar uses and other area establishments." Record 3 (emphasis added).

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[20]ORS 227.173(1) provides:

> "Approval or denial of a discretionary permit application shall be based on standards and criteria, which shall be set forth in the development ordinance and which shall relate approval or denial of a discretionary permit application to the development ordinance and to the comprehensive plan for the area in which the development would occur and to the development ordinance and comprehensive plan for the city as a whole."

The city's findings go on to explain that some of the parking for Fantasy Video is not visible from Beaverton-Hillsdale Highway and therefore is not easily observed by police. The findings also explain that the "opportunities for undetected vandalism and other criminal behavior" in this area increase at night "due to limited lighting." Record 8. The decision relies on evidence from and testimony concerning a police sting operation that resulted in a number of arrests for prostitution near D.K. Wild's, an adult video store located in a different location in the city that allows a 24-hour operation.[21] The findings also cite and rely on written testimony from the Executive Director of Teen Challenge, a nonprofit business located next to the Sandy Boulevard Fantasy Video, concerning vandalism, prostitution and illegal drug activity at that store.[22] Record 9, 554-55. The findings note testimony by several of petitioner's landlords concerning a lack of criminal activity around Fantasy Video stores, but the city finds that testimony to be less credible than the Teen Challenge Executive Director's testimony concerning criminal activity around the Sandy Boulevard store. The findings ultimately conclude as follows:

> "When the * * * evidence is considered in total, it constitutes substantial evidence that problems are likely to occur if Applicant is allowed to operate on a 24-hour basis. That such problems are likely to have a negative impact on the existing businesses and property owners is illustrated by the fact that Park Plaza West has already lost tenants because of concerns about the activities cited * * * as occurring around Applicant's [Sandy Boulevard] business.
>
> "Based on the foregoing the Council concludes the applicant has failed to establish that the location, size, design, and functional characteristics of the proposed use are such that it can be made reasonably compatible with and have a minimum impact on the livability and appropriate development of other properties in the surrounding neighborhood." Record 10-11.

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[21]The chief of police testified that five sting operations resulted in a total of 16 arrests, with 75 percent of those arrests occurring after 10 p.m. Respondents' Brief App. 145. Apparently there was also one sting operation at the existing Fantasy Video store at issue here, but that sting operation resulted in no arrests. *Id*.

[22] Teen Challenge is a nonprofit organization that works with at-risk youth. The Sandy Boulevard Fantasy Video has been at that location for 10 years, and Teen Challenge has been at its Sandy Boulevard location for five years.

Petitioner presents a number of challenges to the adequacy of the city's findings and the evidentiary support for those findings. Whether those challenges are considered individually or together, they fail to demonstrate reversible error in the city's decision that petitioner failed to demonstrate compliance with criterion 3. We specifically address petitioner's more significant challenges below.

A. Criterion 3 is not Impermissibly Vague

Criterion 3 is quoted in full above. We agree with respondents that petitioner's argument that criterion 3 is unconstitutionally vague is without merit. *Larsson v. City of Lake Oswego*, 26 Or LUBA 515, 522, *aff'd* 127 Or App 647, 874 P2d 99 (1994); *Marineau v. City of Bandon*, 15 Or LUBA 375, 378 (1987); *see Anderson v. Peden*, 284 Or 313, 324-26, 587 P2d 59 (1978) (rejecting argument that vague land use legislation required prior rule making before being applied in individual cases). Petitioner's argument that criterion 3 is inconsistent with ORS 227.173(1) is also without merit. ORS 227.173(1) does not proscribe land use approval standards such as the standard imposed by criterion 3, simply because they are subjective. *See Lee v. City of Portland*, 57 Or App 798, 802-03, 646 P2d 662 (1982) ("ORS 227.173(1) does not require perfect standards, but only standards that are clear enough for an applicant to know what he must show during the application process"); *Rogue Valley Assoc. of Realtors v. City of Ashland*, 35 Or LUBA 139, 155 n 22 (1998) (absent statutory or administrative rule requirements to the contrary, "land use standards can be, and frequently are, unclear, subjective and highly discretionary"); *Spiering*, 25 Or LUBA at 715 ("use of 'compatibility' as an approval standard is widespread in state land use statutes, statewide planning goals and local land use regulations").

B. The City's Interpretive Findings

Particularly where local land use standards are highly subjective, local governments may be required to adopt interpretive findings in making quasi-judicial land use decisions that apply those land use standards. Petitioner faults the city's interpretation of the

"compatibility" requirement of criterion 3 and faults the city for not adopting other interpretive findings in applying criterion 3.

As noted above, the city interpreted "compatibility" and "livability" as including "subjective factors, such as effects on neighborhood uses, vacancies, potential for criminal activity and the character of the area surrounding the use." Record 3. Petitioner argues that without additional explanation, which the city fails to provide, factors such as "effects on neighborhood uses" and "character of the surrounding area" are too vague to be meaningful. Regardless of any problems that may be present with regard to the factors petitioner identifies, the city interpreted the "compatibility" and "livability" requirements of criterion 3 as requiring that the city consider the "potential for criminal activity" near Fantasy Video if it begins operating 24 hours a day and the possibility that increased "vacancies" in the adjoining office complex would result. The city's interpretation of the "compatibility" and "livability" requirements of criterion 3 as requiring consideration of those factors is not impermissibly vague and is easily within the city's interpretative discretion under ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). *See Huntzicker v. Washington Count*y, 141 Or App 257, 261, 917 P2d 1051 (1996) (the "clearly wrong standard" requires that LUBA find "that no person could reasonably interpret the provision in the manner that the local body did").

Petitioner also argues that because criterion 3 requires that the city evaluate "the location, size, design, and *functional characteristics* of the proposed use" and determine whether the use "can be made reasonably compatible with and have a minimum impact on the livability and appropriate development of other properties in *the surrounding neighborhood*" the city erred by failing to adopt findings that identify the relevant "functional characteristics" and the relevant "surrounding neighborhood."

The city did not adopt findings that identify the "functional characteristics" of petitioner's business that the city considered relevant, as such. However, it is clear from the

city's findings that the functional characteristic that the city found to be determinative in this case is the potential for increased criminal activity if petitioner's adult video store extends its current hours to become a 24-hour operation and the potential of that criminal activity to cause additional vacancies in nearby offices. We find the city's failure to label that concern as a relevant "functional characteristic" harmless error, if it is error.

The city's failure to specify the relevant "surrounding neighborhood" presents a closer question. However, petitioner does not dispute that the "surrounding neighborhood," at a minimum, includes the area immediately adjacent to Fantasy Video, including the adjoining PPW offices. We agree that the surrounding neighborhood would at least include the adjoining PPW offices. Because the city found the impacts on that area would violate criterion 3, the city's failure to adopt findings that specifically define the "surrounding neighborhood" is not reversible error.

C. Petitioner's Substantial Evidence Challenge

1. Evidence of Potential Criminal Activity

Petitioner argues "[f]ear of crime was a hot-button issue with almost everyone who testified against [the] application." Petition for Review 30. Petitioner further contends that "[w]hen examined closely, however, the evidence presented to the City Council simply does not support any of the fears expressed." *Id*. Petitioner then proceeds to challenge the validity of using the prostitution sting evidence as a predictor of potential criminal activity around Fantasy Video if it is allowed to operate 24 hours a day.[23]

> "These reports are evidence of only one thing: that when a young woman loiters on a sidewalk late at night near the Satellite Motel or DK Wilds, she may be taken for a prostitute. They are not evidence that the establishments she stands near are the *cause* of 'increased criminal activity.' Without evidence of what happened on similar sting operations at other locations to use as a basis for comparison, they are not evidence that these specific

[23]The police sting operation involved stationing police decoys on SW Henry Street near the Satellite Motel and D.K. Wild's. D.K. Wild's and the Satellite Motel are located on opposite sides of SW Henry Street.

> locations are *associated with* 'increased' prostitution activity. They are certainly not evidence that either motels other that the Satellite Motel or 'adult' establishments other than DK Wilds, located in other areas, cause 'increased criminal activity.'
>
> "* * * * *
>
> "* * * The picture of 11 men emerging from DK Wilds within two hours, soliciting prostitution as they exited, might indeed suggest a 'proclivity.' In reality, however, most of the 11 men arrested were passing motorists, not video store customers, and the arrests did not all happen in one night. One man arrested emerging from DK Wilds to solicit a prostitute, as a result of stings over a period of several months, does not even 'suggest' a 'proclivity.'" Petition for Review 31-33 (emphases in original; footnote omitted).

Regarding evidence of criminal activity in the area of petitioner's Sandy Boulevard store, petitioner argues the city should not have relied on the testimony of the Executive Director of Teen Challenge. Petitioner contends the testimony offered by the Executive Director of Teen Challenge is relied on for propositions that are not clearly stated in the Executive Director's letter.[24] Petitioner also argues the letter should be discounted because Teen Challenge located on Sandy Boulevard five years after Fantasy Video began operations there and, therefore, the Executive Director has no way to know whether the problems predated the opening of the Sandy Boulevard Fantasy Video.

An initial problem with petitioner's argument under this assignment of error is that petitioner appears to argue that identified criminal activity near D.K. Wild's is only potentially relevant in this case if it is established that the persons involved in that criminal activity were D.K. Wild's customers. We do not agree. The question the city was apparently attempting to answer in considering the evidence from the sting operations is whether criminal activity occurred in proximity to adult video stores that operate 24 hours a day. That some of the participants in that criminal activity proximate to D.K. Wild's may not have

[24]Petitioner argues the letter "does not say that the Fantasy Video store 'has created' criminal activity." Petition for Review 34. Respondents contend, and we agree, that the letter can be reasonably read to take the position that the cited criminal activity can be attributed to the presence of the Sandy Boulevard Fantasy Video store.

been customers of D.K. Wild's does not mean the proximate criminal activity of those non-customers is irrelevant in this case.

A more fundamental problem with petitioner's substantial evidence challenge under this assignment of error is that petitioner invites this Board to engage in the kind of weighing of evidence (*i.e.*, resolving conflicts, discrepancies and omissions in evidence and assessing the believability of written and oral testimony) that is reserved to the city council. As the Court of Appeals has noted, the line between LUBA (improperly) performing such weighing of the evidence and (properly) determining whether the evidence the city relied upon qualifies as substantial evidence "is either razor thin or invisible." *1000 Friends of Oregon v. Marion County*, 116 Or App at 588. However, petitioner's arguments clearly ask that we cross the line and reweigh the evidence. We limit our review in this appeal to determining whether the evidence the city relied upon is "substantial," *i.e.*, whether it is evidence that a reasonable person could accept as adequate to support the city's decision.

We readily agree with petitioner that the evidence in the record falls well short of establishing with certainty that allowing Fantasy Video to operate for 24 hours a day at its Beaverton-Hillsdale Highway store will necessarily lead to criminal activity. However, that is not the burden the city must shoulder in this matter. Neither does it matter whether the planning commission or another decision maker faced with this evidentiary record might reasonably resolve the evidentiary questions in petitioner's favor, so long as the evidence also could reasonably support the city's resolution of the evidentiary questions against petitioner. *Younger v. City of Portland*, 305 Or 346, 360, 752 P2d 262 (1988). We cannot agree with petitioner that the city council could not reasonably conclude, based on the evidence that was submitted below, that such criminal activity is likely and would have more than a minimum impact on the livability of the surrounding area and would be incompatible with the surrounding area.

2. Impacts on PPW Vacancies

The city also concluded that allowing Fantasy Video to become a 24-hour business would further impact PPW office tenants and potentially increase the vacancy rate. Respondents identify testimony by the managing agent of PPW in which he takes the position that existing tenants have advised him that they fear for their own safety and the safety of their employees who work late if Fantasy Video is allowed to operate 24 hours a day. The managing agent testified that based on his 30 years experience as a broker and property manager, it will be more difficult for PPW to attract and retain tenants if Fantasy Video is allowed to operate 24 hours a day. Respondents also cite the following testimony by one of PPW's existing tenants:

> "* * * My fear and concern over the increased hours is a change in the clientele, a change in the activity of the present business could occur based on not facts that I personally have, but what I've heard and police records.
>
> "* * * We are a CPA firm that does taxes. We work late * * * during the tax season, so we are there, and although our office isn't open for business, we are working late, and I have a concern for our safety during that time. * * *" Respondents' Brief App. 122.

We understand the city to have found that a potential consequence of increased criminal activity around Fantasy Video if it is allowed to operate 24 hours a day is an increase in conflicts with adjoining offices with a resulting increase in vacancies. We agree with respondents that a reasonable person could rely on the evidence in the record to reach that conclusion.

For the reasons explained above, we conclude the city council's findings that the applicant failed to carry its burden to demonstrate compliance with criterion 3 are adequate and are supported by substantial evidence.

The third assignment of error is denied

FIRST ASSIGNMENT OF ERROR

The city's decision denying the requested conditional use permit must be affirmed if it is supported by at least one adequate basis for denial, unless petitioner is correct that the city's reliance on that basis for denial is unconstitutional. We have just concluded in our discussion under the third assignment of error that criterion 3 provides such an adequate basis for denial. We therefore turn to petitioner's argument that the city's application of criterion 3 in this matter violates Article 1, section 8, of the Oregon Constitution.

Article I, section 8, provides:

> "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

The framework for analyzing Article I, section 8 challenges to state and local legislation was first set out in *State v. Robertson*, 293 Or 402, 649 P2d 569 (1982) and was summarized in *State v. Plowman*, 314 Or 157, 838 P2d 558 (1992), *cert den* 508 US 974, 113 S Ct 2967, 125 L Ed 2d 666 (1993). That framework was further summarized in *City of Eugene v. Miller*, 318 Or 480, 488, 871 P2d 454 (1994) as follows:

> "The first *Robertson* category consists of laws that 'focus on the *content* of speech or writing' or are '"written in terms directed to the substance of any 'opinion' or any 'subject' of communication."' *State v. Plowman*, *supra*, 314 Or at 164 (quoting *State v. Robertson*, *supra*, 293 Or at 412) (emphasis in original). Laws within that category violate Article I, section 8, 'unless the scope of the restraint is wholly confined within some historical exception that was well established when the first American guarantees of freedom of expression were adopted and that the guarantees then or in 1859 demonstrably were not intended to reach.' *State v. Robertson*, *supra*, 293 Or at 412. The second *Robertson* category consists of laws that 'focus[ ] on forbidden effects, but expressly prohibit[ ] expression used to achieve those effects.' *State v. Plowman*, *supra*, 314 Or at 164. Laws in that category 'are analyzed for overbreadth.' *Ibid*. Finally, the third *Robertson* category consists of laws that 'focus[ ] on forbidden effects, but without referring to expression at all.' *Ibid*. Laws within the third category are analyzed to determine whether they violate Article I, section 8, as applied. *State v. Robertson*, *supra*, 293 Or at 417."

Criterion 3 is not directed at the substance of protected speech (*Robertson* category 1) and does not prohibit expression to achieve its regulatory goal (*Robertson* category 2).[25] A land use regulation, such as criterion 3, which "makes no reference whatsoever, either by text or context, to expression" is analyzed under the third *Robertson* category. *Media Art Co. v. City of Gates,* 158 Or App 336, 341, 974 P2d 249 (1999). In determining whether criterion 3 violates Article I, section 8, as applied in this case, we must determine whether the city's application of criterion 3 "impermissibly burdens [petitioner's] right of free speech guaranteed by Article I, section 8." *Miller*, 318 Or at 490.

Petitioner relies in large part on the Oregon Supreme Court's decision in *Tidyman*. The City of Portland ordinance that was at issue in *Tidyman* directly regulated "adult businesses."[26] The ordinance required that adult businesses "locate at least 500 feet distant from any residential zone or any public or private school and, in some zones, at least 1000 feet from any other adult business."[27] *Id*.

In *State v. Henry*, 302 Or 510, 732 P2d 9 (1987) and *State v. Ray*, 302 Or 595, 733 P2d 28 (1987), the Oregon Supreme Court found no historical exception that would allow laws prohibiting "obscenity" under the first *Robertson* category and "invalidated laws against disseminating obscene material and against telephonic harassment that were written in terms describing the forbidden content of speech or printed material." *Tidyman*, 306 Or at 179.

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[25]As noted earlier in this opinion, before the city may grant a conditional use permit for petitioner to operate 24 hours a day, criterion 3 requires that the city find:

> "That the location, size, design, and functional characteristics of the proposed use are such that it can be made reasonably compatible with and have a minimum impact on the livability and appropriate development of other properties in the surrounding neighborhood."

[26]The city's ordinance defined "adult bookstores" and other "adult businesses" as "enterprises that are characterized by an emphasis on nudity or sexual activity." 306 Or at 177.

[27]Portland's ordinance was patterned after a Detroit, Michigan ordinance that was challenged on First Amendment grounds and upheld in *Young v. American Mini Theaters*, 427 US 50, 96 S Ct 2440, 49 L Ed 2d 310 (1976).

The fatal feature of the city ordinance in *Tidyman* was that it defined the regulated use (adult businesses) based on the content of the protected "speech" that was the stock and trade of those adult businesses, *i.e.* films, books, and services of a sexual nature. The court held that the city's ordinance was "flatly directed against one disfavored type of pictorial or verbal communication." *Tidyman*, 306 Or at 184. As respondents correctly note, *Tidyman*, a *Robertson* category 1 case, is therefore at best indirect authority that the city's application of the facially neutral land use regulation that is at issue in this appeal violates Article I, section 8. Nevertheless we consider petitioner's arguments based on language in *Tidyman* that supports its first assignment of error in this appeal.

The City of Portland argued in *Tidyman* that its ordinance could be affirmed under *Robertson*, because the ordinance was "concerned with the 'effect' of speech, not the speech itself." 306 Or at 184. The court rejected the city's argument:

> "If the ordinance were so written, it might well be valid on its face and subject only to scrutiny for valid administration; but it is not so written." *Id*.

> "The Portland Ordinance * * * [by its] terms restricts the marketing of the described communicative material, not only the effects of this marketing." *Id*. at 188.

In rejecting the city's argument that its ordinance could be sustained as an "effect" rather than a content-based "speech" regulation, the court rejected the city's argument that it could rely on "vague and conclusory" legislative findings contained within the ordinance about the effects of adult businesses. The court pointed out those findings did "not purport to be findings of adjudicative facts" and described the findings as "only a recital of premises for legislation." *Id.* at 185. The court went on to state that "[o]ur cases under Article I, section 8, preclude using apprehension of unproven effects as a cover for suppression of undesired expression, because they require regulation to address the effects rather than the expression as such." *Id.* at 188. Petitioner's Article I, section 8 arguments rely almost entirely on this statement and related statements concerning the requirements for regulations directed at

effects rather than speech and arguments noted earlier in this opinion that challenge the quality and quantity of evidence that the city relied upon in finding that criterion 3 is not satisfied.[28]

We first note an argument that is notably absent from petitioner's "as applied" challenge under Article I, section 8. Petitioner makes no arguments that its ability to successfully operate its business at its Beaverton-Hillsdale Highway location depends on it being granted more liberal operating hours than its commercial neighbors. Petitioner never argues that the city's application of criterion 3 "impermissibly burdens" its right to operate an adult video establishment. *Miller*, 318 Or at 490. Petitioner is seeking preferential treatment, via a conditional use permit under the city's land use regulations, rather than seeking to avoid an additional regulation that is not also imposed on petitioner's commercial neighbors, as was the case in *Tidyman*.

We also note that, throughout the petition for review, petitioner suggests that it believes the city's denial of the conditional use permit on the basis of criterion 3 and other BDC requirements is a pretext and that the real reason for the city's denial is its disapproval of the adult nature of petitioner's business. If we agreed with petitioner that the real reason the city denied the requested conditional use permit was the city council's disapproval of the nature of petitioner's business, it would necessarily follow that the city's decision violates Article I, section 8. From our review of the record, including the statements made by individual city councilors and the mayor, we cannot say petitioner's belief is without *any*

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[28]Other language in *Tidyman*, that is cited by petitioner, includes the following:

> "* * * The obvious problem is that when a locational restriction is justified by only the secondary effects of showing or selling constitutionally protected materials, the restriction is unconstitutional if the feared effects do not exist." 306 Or at 187.

> "[W]hen the terms of * * * a restriction include the specified harm from particular forms of expression, application of the ordinance necessarily requires showing the reality of the threatening effect at the place and time * * *." *Id.* at 188.

support. However, we do not agree that the record, viewed as a whole, includes sufficient evidence to support a conclusion that the city council's objection to the adult nature of petitioner's business is the real reason the city council denied petitioner's application.

We turn to petitioner's argument that the evidence the city relied upon in this matter is not of the quantity or quality that petitioner believes is required under *Tidyman*. It is not at all clear that the language from *Tidyman* that petitioner cites was intended to state generally applicable principles concerning the quality of evidence or level of proof that is required to support application of facially neutral land use regulations. We believe petitioner misreads the cited language in *Tidyman* as imposing a heavier evidentiary burden on the city and a heightened level of scrutiny in our review of the city's findings and evidence. Petitioner ignores other language in *Tidyman* that we believe undercuts petitioner's apparent assumption that far more than substantial evidence is required to apply criterion 3 in this case, simply because petitioner's business activity, like many other businesses, happens to include speech that is entitled to protection under Article I, section 8.

As the Supreme Court explained in *Tidyman*:

> "* * *A grocery store gains no privilege against a zoning regulation by selling *The National Enquirer* and *Globe* at its check-out counter. The same applies to 'adult businesses' that sell other merchandise besides books, pictures or records. Even structures and activities unquestionably devoted to constitutionally privileged purposes such as religion or free expression are not immune from regulations imposed for reasons other than the substance of their particular message. Many regulations are not impermissible laws 'restricting the right to speak, write, or print freely on any subject whatever,' although they can be impermissibly applied in individual cases.
>
> "A regulation is not always unconstitutional because it restricts one's choice of a place or time for self-expression or religious practice, when that is not the object of the regulation. The concern may be with the medium, not the message, as when park regulations ban fireworks even for a Fourth of July celebration. To decline an exception from a land-use regulation for a theater, a printing plant or a church differs from attempting to restrict prayer meetings, film showings or desktop publishing in a residence, or in turn from enforcing safety codes or parking restrictions when a residence is so used. Similarly, it can make a difference whether a city imposes a permissible limitation on all location, time, manner, intensity, or invasive effect of some communicative

> activity (for instance, zones out all bookstores along with other commercial shops, or restricts all use of soundtrucks in residential areas to specified hours) or whether it concludes that limitations of number, frequency, density, or duration suffice to serve the city's regulatory objective. * * *" 306 Or at 182-83 (footnote omitted).

Unlike the ordinance at issue in *Tidyman*, criterion 3 is not expressly directed at protected speech. Unlike the city's attempt to enforce its ordinance in *Tidyman*, the city's application of criterion 3 here is supported by adjudicative findings that the effects that criterion 3 proscribes (incompatibility and more than minimal impacts on livability) will result if the requested conditional use permit is granted. Finally, unlike the city's legislative findings in *Tidyman*, the city's adjudicative findings in this case are supported by substantial evidence (evidence a reasonable person would find adequate to support a conclusion that criminal activity and resulting vacancies will result in the effects that criterion 3 proscribes). To the extent petitioner argues that *Tidyman* requires that the city must sustain a higher evidentiary burden in this case, we reject the argument.

The first assignment of error is denied.

The city's decision is affirmed.