BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

NEIGHBORS FOR LIVABILITY, SUSAN COOK, ROBERT BEARD, MAURA MALONE, MARK JOHN HOLADY, MONICA HOLADY and MARVIN DOTY,
Petitioners,

vs.

CITY OF BEAVERTON,
Respondent,

and

SORRENTO CONSTRUCTION/BRIAR DEVELOPMENT COMPANY, STEVE W. SANDERS, SHARON I. INSELMAN, TOM GILROY, JANE ATHANASAKOS, NANCY PLETZ, SHARON DUNHAM, KEVIN W. TELLER, PAUL FRANICH, ANNE FAHLBUSCH and MARIE BARZEN,
Intervenors-Respondent.

LUBA Nos. 2000-201, 2000-202 and 2000-203

FINAL OPINION
AND ORDER

Appeal from City of Beaverton.

Jeffrey L. Kleinman, Portland, filed the petition for review and argued on behalf of petitioners.

Mark E. Pilliod, City Attorney, Beaverton, Jack L. Orchard, Portland and Steve W. Sanders, Beaverton, filed a joint response brief. With them on the brief was Ball Janik LLP. Mark E. Pilliod argued on behalf of respondent and Jack L. Orchard argued on behalf of intervenor-respondent Sorrento Construction/Briar Development Company.

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

AFFIRMED 05/14/2001

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

Petitioners appeal a zoning map amendment.

MOTIONS TO INTERVENE

Sorrento Construction/Briar Development Company moves to intervene on the side of respondent in this appeal. In a separate motion, Steve W. Sanders, Sharon I. Inselman, Tom Gilroy, Jane Athanasakos, Nancy Pletz, Sharon Dunham, Kevin W. Teller, Paul Franich, Anne Fahlbusch, and Marie Barzen, move to intervene on the side of respondent. There is no opposition to the motions, and they are allowed.

FACTS

The challenged decision applies the city's Community Service (CS) zoning district to approximately 10 acres of land that were previously zoned for residential use. The challenged decision is one of a number of decisions that have been adopted by the city to allow construction of a grocery store and pharmacy on the subject 10 acres.[1] Our prior decision affirming the city's change of the plan map designation for the subject property from Residential to Commercial was remanded by the Court of Appeals. *Neighbors for Livability v. City of Beaverton*, 37 Or LUBA 408 (1999), *rev'd and rem'd* 168 Or App 501, 4 P3d 765 (2000). The defect in the city's plan map amendment decision that resulted in the remand was eliminated by the city in a separate decision that was not appealed to LUBA. In the present appeal, petitioners argue the city erred in applying the CS zoning designation, for a number of reasons.

[1]The petition for review in this consolidated appeal challenges the ordinance that adopts the zoning map amendment and the findings that the city adopted in support of that ordinance. Petitioners also appealed a related conditional use permit decision, but do not assign error to that decision. The city also has granted design review approval for the disputed grocery store and pharmacy, but that design review decision was not appealed to LUBA.

FIRST ASSIGNMENT OF ERROR

Beaverton Development Code (BDC) 40.90.15(2)(C)(1) establishes the following approval criteria for a quasi-judicial zoning map amendment.

"The applicant shall demonstrate that the request meets the following criteria:

"a. The proposal conforms with the City's Comprehensive Plan.

"b. The proposal complies with all applicable statutory and ordinance requirements and regulations."

Petitioners argue the challenged rezoning does not conform to the intent of the CS district, as stated at Beaverton Comprehensive Plan (BCP) 3.5.4. Therefore, petitioners argue, the proposed rezoning must be denied under BDC 40.90.15(2)(C)(1)(a). BCP 3.5 includes a general discussion of the city's commercial zoning designations and states that the individual discussions in the BCP of each of the commercial zoning designations, "outline the intent of the various commercial classifications."[2] BCP 3.5.4 is the individual discussion of the CS designation, which sets out the intent of the CS zoning designation. Petitioners argue that applying the CS zoning to the subject property does not conform to the intent of the CS zoning designation, as set out at BCP 3.5.4.[3]

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[2]The city has six commercial zoning designations: Office Commercial, Neighborhood Service, Convenience Commercial, Community Service, General Commercial, Central Business District.

[3]BCP 3.5.4 provides as follows:

> "The Community Service Designation is intended to recognize existing commercial activity found principally along Beaverton Hillsdale Highway, Canyon Road, Tualatin Valley Highway, Cedar Hills Boulevard, and Highway 217. As a result of our auto-dependent suburban development pattern, Beaverton has significant strip development along these travelways. This has created both functional and aesthetic problems. Functional problems arise because strip development interrupts the traffic flow as cars turn in and out of each business, impairing the overall efficiency and safety of the transportation system. Aesthetic issues arise related to signs, building relationships, merchandise display, etc.; competing for attention.
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> "Highway development does provide a means for business activity and service to the public. However, this type of development pattern should be limited to existing areas and not allowed to occur along other arterials."

A. Petitioners' Interpretation of BCP 3.5.4

The city's interpretation of BCP 3.5.4 is lengthy and elaborate. Petitioners' challenge of the city's interpretive findings is equally lengthy and elaborate. However, petitioners' view of how BCP 3.5.4 should be interpreted is also succinctly stated in the petition for review as follows:

> "As petitioners pointed out to the City Council, the effect of [BCP 3.5.4] is twofold: (1) it refers and applies exclusively to strip development, and defines its characteristics; and (2) it states that such development should not be allowed on arterial streets other than the four identified ones. Therefore, the purpose of the CS zone is to designate strip development, and not other types of development. If Haggen's proposal comprises strip development, the city erred in approving it on SW Murray Blvd. If it does not comprise strip development (and the city found it does not), it does not fall within the CS designation." Petition for Review 6 (record citations omitted).

To state petitioners' view of BCP 3.5.4 even more succinctly, for purposes of this appeal, petitioners contend that the CS district may *only* be used to recognize strip commercial development. Therefore, because the city council found that the proposal does *not* constitute strip commercial development, the CS district is not an available zoning option for the proposed development on the subject property. Petitioners argue the city's contrary interpretation of BCP 3.5.4 is "contrary to the express language and purpose of the plan." Petition for Review 6. Therefore, petitioners argue, the city's interpretation is clearly wrong and must be reversed. ORS 197.829(1)(a) and (b).[4]

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[4]Under ORS 197.829(1), this Board is required to affirm the city council's interpretation of the BCP unless we find that its interpretation:

> "(a) Is inconsistent with the express language of the comprehensive plan * * *;
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> "(b) Is inconsistent with the purpose for the comprehensive plan * * *;
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> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan * * *; or
>
> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision * * * implements."

We have no difficulty agreeing with petitioners that the city council could reasonably interpret BCP 3.5.4 to permit the CS district to be used only to recognize strip commercial development. Although less clear, we believe BCP 3.5.4 might also be interpreted to be limited to recognizing strip commercial development along the named travelways. However, the correctness or supportability of petitioners' view of BCP 3.5.4 is not the question that must be answered in this appeal. Rather, we must consider whether the city council's contrary interpretation is "clearly wrong," and "beyond all colorable defense."[5] For the reasons explained below, the city council's contrary interpretation is neither clearly wrong nor beyond all colorable defense.

B. The City Council's Interpretation of BCP 3.5.4

The first sentence of BCP 3.5.4 is the only sentence in BCP 3.5.4 that expressly purports to be a statement of intent.

> "The Community Service Designation is intended to recognize existing commercial activity found principally along Beaverton Hillsdale Highway, Canyon Road, Tualatin Valley Highway, Cedar Hills Boulevard, and Highway 217."

The remaining sentences of the first paragraph characterize the existing commercial development along these travelways as "strip development" and explain that such development creates aesthetic and functional problems. *See* n 3. The two sentences in the last paragraph of BCP 3.5.4 state that such "[highway development] should be limited to existing areas and not allowed to occur along other arterials." The central and dispositive question under this assignment of error is whether the CS designation must be interpreted to have the single and limited purpose that petitioners believe it does.

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[5]As the Court of Appeals has noted on many occasions, the standard of review that LUBA must apply when reviewing a local governing body's interpretation of its own land use legislation is exceedingly deferential. We must affirm the city council's interpretation of its own legislation unless we conclude that the interpretation is "clearly wrong," or "beyond all colorable defense." *Huntzicker v. Washington County*, 141 Or App 257, 261, 917 P2d 1051, *rev den* 324 Or 322 (1996); *Zippel v. Josephine County*, 128 Or App 458, 461, 876 P2d 854, *rev den* 320 Or 272 (1994); *Goose Hollow Foothills League v. City of Portland*, 117 Or App 211, 843 P2d 992 (1992).

We have already agreed with petitioners that the first sentence of BCP 3.5.4 could be interpreted in context with the remaining sentences of BCP 3.5.4 to express an intent that the CS designation be limited to recognizing "existing commercial activity found principally along" the named travelways, and that that is its "only" purpose. However, the city council interpreted BCP 3.5.4 not to limit use of the CS designation to that single purpose.

> "The [CS] District provides an intermediate zone for commercial uses in the City of Beaverton. [T]he CS zone was used primarily along certain travelways that suffered from a pattern of strip development. Thus, [BCP 3.5.4] devotes considerable attention to the problem of strip development. The City Council finds that one intent of [BCP 3.5.4] was to prevent the spread of strip development beyond the travelways listed in the purpose section. However, nothing in [BCP 3.5.4] precludes (or was or is intended to preclude) use of the [CS] District along other arterials as long as development in CS-zoned areas along those other arterials does not constitute strip development.* * *" Record 25.

> "[BCP 3.5.4] states that a certain 'type of development pattern' – i.e., 'highway development' (which the Council finds to be synonymous with 'strip development') – should not be allowed to occur along arterials other than the travelways listed in the purpose section. The Council finds that CS zoning may be used along arterials other than the travelways listed in [BCP 3.5.4] as long as the resulting development does not constitute 'highway' or 'strip' development. * * *" Record 26.

These interpretive findings express four key points. First, the CS designation was used by the city to recognize existing strip commercial development along certain named travelways. Second, while that strip commercial development was recognized and zoned CS, that kind of commercial development has adverse aesthetic and functional characteristics. Third, in view of these adverse characteristics, the CS designation is not to be made available to create additional strip commercial development in other locations. Fourth, although one of the purposes of the CS designation is to recognize certain existing strip commercial development, the CS designation is also the city's generally applicable intermediate commercial zoning district, which may be applied in other appropriate circumstances so long as it does not result in additional strip commercial development.

We do not understand petitioners to dispute the first three points, only the fourth point. In our view, the critical sentence in BCP 3.5.4 is the first one, and that sentence is ambiguous. The first sentence of BCP 3.5.4 does not expressly state whether recognizing existing strip commercial development is the *sole* purpose of the CS designation or whether this is only one purpose, leaving the city free to apply the CS designation to other lands that the BCP designates for commercial use, so long as CS designation of such lands does not violate other applicable BCP or BDC provisions.

Petitioners correctly argue that comprehensive plans and land use regulations typically identify the uses or activities that are allowed and do not attempt to expressly identify the universe of actions or activities that are not allowed. To the extent that principle applies to the interpretive question presented under this assignment of error, *i.e.*, the intended purpose of the CS designation, it lends some support to petitioners' argument. However, it is somewhat unusual to have a two-paragraph, generally worded comprehensive plan purpose statement establish the precise parameters for applying a particular zoning district. It would be still more unusual to create a zoning district that can *only* be applied to lands that are already developed with strip commercial development.[6] Absent clearer language in BCP 3.5.4 to require the limited application of the CS designation that petitioners argue is required, we cannot say the city exceeded its discretion under ORS 197.829(1) and *Clark* in rejecting that interpretation of BCP 3.5.4. Admittedly the language in BCP 3.5.4 that

[6]As the city points out in other findings, petitioners' interpretation would leave the city with only three generally applicable commercial zoning designations, with a gap in scale and intensity between the two most limited commercial zones and the most extensive commercial zone. The city also points out that it has applied the CS designation to undeveloped properties located on travelways other than those mentioned in BCP 3.5.4 in the past. We agree with petitioners that neither point would justify adopting an incorrect interpretation of BCP 3.5.4 here. However, we do not agree that past practice in interpreting and applying BCP 3.5.4 is irrelevant. *See Holland v. City of Cannon Beach*, 154 Or App 450, 962 P2d 701 (1998) (questioning whether local government may apply different interpretation of its legislation on different occasions and receive deference on review under ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992)). In addition, the city's point that petitioners' narrow interpretation of BCP 3.5.4 would leave an unintended commercial development intensity gap in the city's zoning scheme lends at least limited contextual support for the city council's interpretation.

requires containment of strip commercial development to its existing locations does not expressly authorize additional CS zoning if it is done in a way that will not spread strip commercial development. Such authority must be inferred from the language of BCP 3.5.4. Nevertheless, we agree with intervenors and respondent that the city council's interpretation of BCP 3.5.4 is not inconsistent with the language of that section or clearly wrong. Therefore, the city council's interpretation of BCP 3.5.4 must be affirmed.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

The subject property was a quarry between 1946 and 1984. Between 1984 and 1990, the subject property was used as a construction debris landfill. Some of that fill includes "wood debris, asphalt, concrete, and assorted other debris." Record 212. There is evidence in the record that a number of potentially hazardous substances are associated with the placement of this fill on the site. Of these potentially hazardous substances, the presence of methane drew the most attention during the local proceedings.[7]

A. Relevant Legal Standards

Petitioners argue that the city's allegedly inadequate response to their concern about hazardous substances on the site violates three BCP Objectives to (1) protect the livability of residential areas, (2) protect residential uses from intrusion of incompatible uses, and (3) direct commercial activity to areas that can be developed in harmony with the rest of the city.[8] As an initial point, the potentially hazardous substances on the subject property are

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[7]Other potential hazardous materials that were discussed below include carbon dioxide, carbon monoxide, hydrogen, petroleum hydrocarbons, volatile organic compounds, polynuclear aromatic hydrocarbons, arsenic and other metals.

[8]The BCP Objectives cited by petitioners in their brief are as follows:

> "The primary focus of residential development should be towards maintaining or creating maximum livability and promoting quality living areas." BCP Residential Objective 3.4.2.1; Record 17.

associated with prior uses of the subject property, and are not directly caused by the proposed development. Nevertheless, the city treated the issue of existing potentially hazardous substances on the site as a relevant consideration under these criteria and, therefore, we do not consider the relevancy of the issue further.[9]

B. The City's Findings

The city's findings responding to concerns that were raised below regarding hazardous substances on the property appear at Record 20-22 (Geotechnical Impacts) and Record 22-23 (Groundwater Impacts). Those findings acknowledge the presence of methane and soil contaminants on the property but conclude that the concentrations and locations of methane and soil contaminants on the property do not pose a threat, either onsite or offsite.[10] The findings go on to state that the applicant proposes to monitor methane concentrations "before, during, and after construction." Record 21. These findings are supported by geotechnical studies of the site.[11]

> "Various residential uses should be protected from the intrusion of incompatible uses in order to preserve and stabilize values and the character of the area." BCP Residential Objective 3.4.2.11; Record 24.
>
> "Commercial activity should be directed into areas where it can develop harmoniously with the rest of the community." BCP Commercial Objective 3.5.7.3; Record 30.

[9]We understand from the city's findings and documents in the record that with regards to methane, which was the focus below, the gas at present generally escapes into the atmosphere in very low concentrations that are too low to be explosive. Record 21. One of the concerns that was addressed below is that construction of commercial buildings on the site will disturb or block the path of methane gas escaping from the soil and present the possibility that methane might accumulate in potentially explosive concentrations. *Id.*

[10]With regard to the potential methane threat, the city council found:

> "The Council finds that, while there is a small amount of methane on the site, any problem with methane is manageable and the conditions imposed by the Board of Design Review [BDR] and the Council preclude any threat to public health and safety either on the site or off of the site. The methane on the site is a pre-existing condition, which would need to be addressed in any proposed development of the site. * * *" Record 20.

A similar finding that the contaminants on the property do not pose a threat to ground water appears in the second paragraph at Record 23.

[11]The studies include a 1995 phase I and II environmental site analysis which concludes, based on prior studies and onsite sampling, that organic material, asphalt and other pollutants were included in the fill but that

Petitioners' arguments under this assignment of error are primarily directed at two conditions of approval that were attached to the city design review approval decision.[12] One of those conditions requires that the applicant submit a detailed geotechnical report prior to issuance of a site development permit. That geotechnical report is to address methane detection and management during construction. The other condition provides that if site conditions warrant, the city engineer may retain an independent engineer who in turn may recommend additional design and mitigation measures. The condition provides that the city may incorporate those measures in the site development permit.[13] The gist of petitioners' argument is that the city council has improperly deferred discretionary decision making to the site development permit proceedings, where the city does not provide for public hearings. *Rhyne v. Multnomah County*, 23 Or LUBA 442, 446-47 (1992); *Holland v. Lane County*, 16 Or LUBA 583, 596-97 (1988).

An initial problem with petitioners' arguments under this assignment of error is that they are directed at conditions that were originally attached to a BDR decision, a decision that is not before us in this appeal. That problem aside, we agree with respondent and intervenors that the conditions from that decision, which are noted and incorporated by

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none of these materials were present in quantities that would result in adverse environmental impacts or require remediation. Record 217-18. With regard to methane, the 1995 study recommends passive and active venting structures be installed to avoid the potential for methane accumulating in any structures that are constructed on the site. Record 218. The record also includes an October 9, 2000 letter from the applicant's geotechnical consultant, which confirms the findings of the 1995 study. Record 365-68. The 2000 letter concludes that scattered organic material in the fill will not generate methane in sufficient volumes to present onsite or offsite hazards. The letter goes on to explain that sampling and monitoring of the site for methane will occur during and after construction and that any methane accumulations that might be detected can be safely managed with existing active and passive venting technology. Record 365-67.

[12]As previously noted, that design review decision was not appealed to LUBA. Apparently, neither condition of approval is included in the record of this appeal.

[13]In a footnote, petitioners suggest that the city council intended to modify the second condition to specifically require that the applicant pay for the independent engineer, but that the final decision in this matter does not do so. Petition for Review 22 n 4. Petitioners characterize this modification of the condition as "essential." *Id.* However, the cited pages of the record do not show that the issue of who would pay for the independent engineer was essential to the city council's decision and even if it was, petitioners fail to explain why failure to attach the modified condition would necessarily warrant reversal or remand of the challenged decision.

reference into the challenged decision, are properly viewed as being designed to provide further assurances in support of the city's threshold finding that identified onsite environmental concerns do not rise to a level that would violate the cited plan policies. In view of that threshold finding, petitioners do not explain why any modifications in construction of buildings on the site that may be required in the site development permit process under the cited conditions must include public hearings. As we explained in *Rhyne*, 23 Or LUBA at 447:

> "* * * When conducting a multi-stage approval process for discretionary permits, [a local government] is required to assure that discretionary determinations concerning compliance with approval criteria occur during a stage where the statutory notice and public hearing requirements * * * are observed. *Meyer v. City of Portland*, 67 Or App 274, 280 n [5], 678 P2d 741, *rev den* 297 Or 82 (1984); *Southwood Homeowners Assoc. v. City of Philomath*, 21 Or LUBA 260 (1991); *Bartles v. City of Portland*, 20 Or LUBA 303, 310 (1990); *Margulis v. City of Portland*, 4 Or LUBA 89, 98 (1981). Assuming a local government finds compliance, or feasibility of compliance, with all approval criteria during a first stage (where statutory notice and public hearing requirements are observed), it is entirely appropriate to impose conditions of approval to assure those criteria are met and defer responsibility for assuring compliance with those conditions to planning and engineering staff as part of a second stage. *See Meyer v. City of Portland*, *supra*; *Bartles v. City of Portland*, *supra*. In such circumstances, neither notice to adjoining property owners nor additional [public] hearings are statutorily required during the second stage. These principles are relatively simple and straightforward in the abstract, but, as this case demonstrates, may prove more complex in the context of specific permit approval requests."

See also Just v. Linn County, 32 Or LUBA 325, 330 (1997) (local government may properly find feasibility of obtaining required subsurface water without negatively impacting adjoining wells, based on hydrologist's report that negative impact on adjoining wells was unlikely and planning director's administrative review and approval of an additional study designed to confirm the hydrologist's report).

As we noted in *Rhyne*, there may be individual cases where it is uncertain whether the local government has *improperly* deferred discretionary decision making or *properly* found compliance with relevant approval criteria and imposed appropriate conditions to ensure that

those criteria are met following conclusion of the public hearing process. However, in this case, we agree with respondent and intervenors that the city properly found the cited BCP objectives are satisfied and imposed conditions to ensure that compliance. We also agree with respondent and intervenors that those findings are supported by substantial evidence.

Petitioners are certainly correct that the record suggests that methane *could* present problems on the property if the development were constructed without continued monitoring and incorporating any required measures to ensure that the gas does not accumulate in combustible concentrations. However, the city's findings conclude that, notwithstanding that possibility, the cited BCP objectives are not violated because problems with such accumulations either will not occur or will be discovered through proposed monitoring and solved by methane management measures that are both available and can be incorporated into the proposed development.[14]

The subassignments of error alleging violation of BCP objectives are denied.

Finally, under the second assignment of error, petitioners also argue that the cited environmental concerns violate Statewide Planning Goal 6 (Air, Water and Land Resources Quality).[15] We agree with respondent and intervenors that petitioners do not attempt to show that the environmental concerns they identify under this subassignment of error are attributable to "future development," as opposed to existing site conditions. We also agree with respondent and intervenors that the challenged decision and the evidence cited in that

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[14]Petitioners argue that active and passive methane venting measures may themselves result in impacts to adjoining properties that will violate the cited BCP objectives. As previously noted, the studies in the record point out that any methane problems on the site are an existing condition, and small amounts of methane are currently escaping into the atmosphere at scattered locations on the subject property. Petitioners do not explain how incorporating venting measures to ensure that such escaping methane does not collect in explosive concentrations would alter *existing* conditions in a way that violates the cited BCP objectives.

[15]As relevant, Goal 6 provides:

> "All waste and process discharges from future development, when combined with such discharges from existing developments shall not threaten to violate, or violate applicable state or federal environmental quality statutes, rules and standards. * * *"

decision are adequate to demonstrate that the proposed development, as conditioned, will not violate any identified state or federal environmental standards.

This subassignment of error is denied.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

BCP Natural Resources Policy 7.4.2(a) provides:

> "Riparian zones, stream corridors, or wetlands shall be protected for their wildlife habitat and other values. Development plans for these areas shall treat these components as assets and enhance or mitigate the wildlife habitat and other values."

Petitioners argue the city failed to find that wetlands located on the subject property shall be protected as required by the above-quoted policy.

Respondent and intervenors first argue petitioners waived the arguments presented under this assignment of error by failing to raise them below. Moreover, the planning staff report to the planning commission takes the position that because wetlands on the subject property are not subject to permitting requirements by the Oregon Division of State Lands or the Army Corps of Engineers, the cited BCP policy does not apply, and the planning commission's findings agree with that position. Record 748, 789. The city council adopted the planning commission's findings. Record 16. Respondent and intervenors point out that petitioners do not challenge those findings and for that additional reason the third assignment of error should be denied.

Petitioners do not respond to either of respondent's and intervenors' arguments under this assignment of error. Accordingly the third assignment of error is denied.

The city's decision is affirmed.