BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ANDREW SOUTH and MARY SOUTH,
Petitioners,

vs.

CITY OF PORTLAND,
Respondent.

LUBA No. 2004-062

FINAL OPINION
AND ORDER

Appeal from City of Portland.

Ty K. Wyman, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Dunn Carney Allen Higgins and Tongue LLP.

Frank Hudson, Deputy City Attorney, Portland, filed the response brief and argued on behalf of respondent.

BASSHAM, Board Member; DAVIES, Board Member, participated in the decision.

REVERSED 02/16/2005

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

Opinion by Bassham.

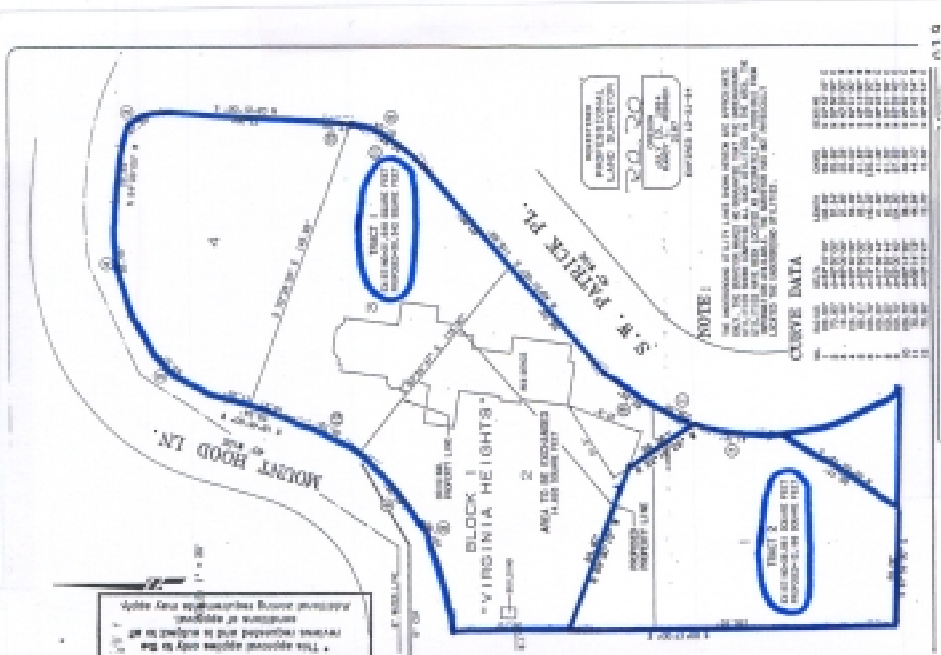
NATURE OF THE DECISION

Petitioners appeal city approval of a property line adjustment.

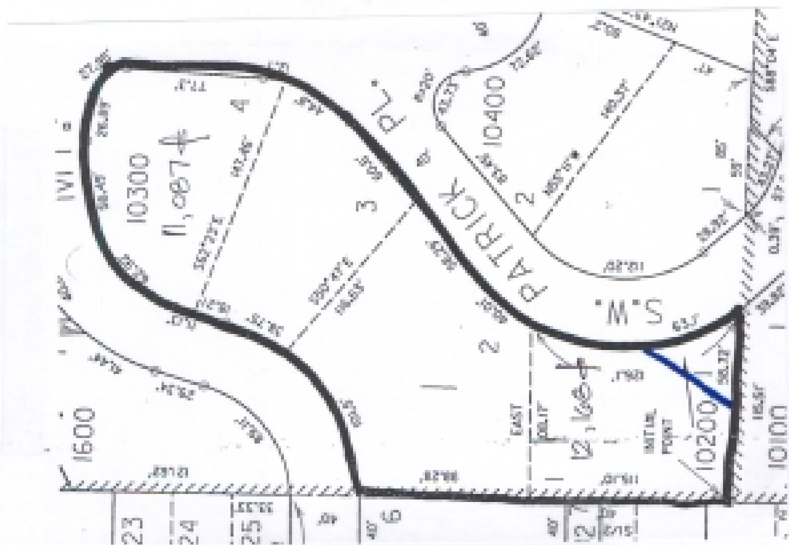
FACTS

This is the second decision involving the subject property that petitioners have appealed to this Board. In *South v. City of Portland*, 46 Or LUBA 558 (2004), *aff'd* 193 Or App 512, 93 P3d 845 (2004), we affirmed a city decision that granted a variance (known as an "adjustment" under the city's code) to a zoning maximum lot size, as one step in a proposal to reconfigure four lots into two tracts. We repeat the relevant facts from *South*, as well as two maps showing the existing and proposed configuration:

> "The subject property is made up of four existing lots and includes approximately 48,510 square feet, or a little more than an acre. The owner of the subject property wishes to reconfigure those lots into two tracts. Tract 1 would be approximately three times larger than Tract 2. We include two maps from the record on the following page to show the approximate configuration of the existing 4 lots and the planned reconfiguration into tracts 1 and 2.
>
> "As the maps on the next page show, there is an existing dwelling on lots 2 and 3. The northernmost lot (lot 4) and the southernmost lot (lot 1) are undeveloped. A small triangular portion of lot 1 was sold at some point in the past, but the dimensions of lots 2, 3 and 4 apparently have not changed since they were originally subdivided.
>
> "Tract 1 would include 36,342 square feet and would be made up of lot 4, lot 3, most of lot 2 and a small triangular portion of lot 1. The existing dwelling would remain on Tract 1. Tract 2 would include 12,168 square feet and would be made up of most of lot 1 and a part of lot 2. Apparently a new dwelling is to be built on Tract 2.



Configuration After
Lot Line Adjustment



Existing Configuration

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1 "The property owner first sought to reconfigure the four lots through a minor
2 partition. That application was denied for reasons that are not relevant here.
3 * * * The property owner now plans to achieve the reconfiguration through a
4 future lot line adjustment * * *. As we understand it, the property owner plans
5 to relocate the existing lot line separating lots 2 and 3 to create a new lot line
6 that divides the property into Tract 1 and Tract 2 as shown on the prior page.

7 "The subject property is located in the Residential R-10 zone. The R-10 zone
8 imposes both minimum and maximum lot size requirements. The minimum
9 lot size in the R-10 zone is 6,000 square feet, and Tract 1 and Tract 2, as
10 proposed, would meet this minimum lot size requirement. The maximum lot
11 size in the R-10 zone is 17,000 square feet. Tract 2 would not exceed this
12 maximum lot size requirement, but Tract 1 would. The city's [variance]
13 procedure is used to allow approval of proposals that deviate from zoning
14 ordinance requirements. The [variance] that is the subject of this appeal was
15 granted to allow a future lot line relocation to create Tract 1, which will
16 include 36,342 square feet." 46 Or LUBA at 559-61 (footnote omitted).

17 The variance decision became final on October 8, 2003. As our above summary
18 indicates, the city and the applicant seemed to view the variance decision as the first step of a
19 multi-step process necessary to achieve the applicant's desired lot configuration.[1] In *South*,

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[1] Petitioner attaches the October 8, 2003 variance decision to the petition for review, and the city does not object to our consideration of that decision. We quote portions of the variance decision, as it provides the best explanation we can find for the theory under which the city processed the applicant's proposals to achieve the desired configuration.

"**Proposal**: The applicant proposes [a variance] to increase the maximum allowed lot size in the R10 zone to 36,342 square feet for 'Tract 1' of this site. The [variance] is needed so the applicant con complete a lot segregation that will reestablish two of the historic lot lines on the site, and a simultaneous property line adjustment (PLA) that will move the existing historic lot line between Lots 2 and 3 on the site (see Exhibits C-1 and C-3) to the new location shown. The historic lot line separating Lots 1 and 2 on the site cannot be reestablished, because a portion of the original lot has been removed (the triangular area in the southeast corner—see Exhibit C-3). The Zoning Code allows reestablishment of historic platted lot lines as long as the original lot configuration is intact.

"**This proposal is NOT a Property Line Adjustment**, and WILL NOT result in an additional buildable lot on the site. The lot segregation and property line adjustment may follow the approval of this [variance]." October 8, 2003 Adjustment Decision, Appendix A-2 to the Petition for Review.

"The site currently consists of four historically platted lots of record (see Zoning Code section 33.110.212) that have been consolidated in the Multnomah County Assessment and Taxation records for tax purposes. (Exhibit C-3) (The applicant receives one tax bill instead of four). However, the plat that created those lots has not been vacated, so the lines still exist for the

we affirmed the adjustment decision, in doing so rejecting arguments from petitioners that were directed at the future property line adjustment and the ultimate configuration created by that contemplated adjustment, rather than at the variance to the maximum lot size itself.

However, contrary to our understanding in *South*, it turns out that the city had already approved the property line adjustment, even prior to issuing the final variance decision. On September 2, 2003, while the variance decision was before the adjustment committee, the applicants submitted a property line adjustment application to the city. The application proposed the following:

> "Complete a lot segregation that will reestablish two of the historic lot lines on the site and a simultaneous property line adjustment that will move the existing historic lot line between lots 2 and 3 to the new location shown." Record 1.

City staff processed the application administratively without notice or hearing, and approved it on September 5, 2003, by signing the application. Petitioner's attorney discovered the September 5, 2003 decision when conducting a search of the city's records on April 2, 2004, and petitioners appealed that decision to LUBA on April 7, 2004.

JURISDICTION

The city argues that the challenged September 5, 2003 property line adjustment decision is not a "land use decision" as defined by ORS 97.015(10), because it is made under "land use standards which do not require interpretation or the exercise of policy or legal

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> purposes of the City's zoning regulations (See [ORS] 92.017). The City allows reestablishment of those lines in certain circumstances and also relocation of those lines within the same subdivision plat, in certain circumstances ([PCC]33.667 Property Line Adjustments). Lot 4 does exist in its original platted configuration, and therefore can be re-established and expanded." *Id.* at A-5.
>
> "This proposal is not for a Property Line Adjustment. However, the eventual Property Line Adjustment would result in two lots. The applicant does not seek to reestablish the historic Lot 2 as a separate property. The property identified as 'Tract 2' would include the historic Lots 1 and 2. Because Lot 2 will be smaller than the minimum size allowed in the R10 zone, the applicant will not be allowed to re-establish it as a separate property in the future. The minimum lot size is applied to the properties on either side of the Property Line Adjustment. Tract 2 meets the relevant size requirements of [PCC] 33.110.212." *Id.* at A-5 and 6.

1 judgment."[2] ORS 197.015(10)(b)(A). According to the city, the only standards applicable to
2 a property line adjustment are those at PCC 33.667.300, none of which require interpretation
3 or the exercise of policy or legal judgment.[3]

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[2] ORS 197.015(10) provides, in relevant part:

"'Land use decision':

"(a) Includes:

"(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

"(i) The goals;

"(ii) A comprehensive plan provision;

"(iii) A land use regulation; or

"(iv) A new land use regulation;

"* * * * *

"(b) Does not include a decision of a local government:

"(A) Which is made under land use standards which do not require interpretation or the exercise of policy or legal judgment[.]"

[3] PCC 33.667.300 provides:

"A request for a Property Line Adjustment will be approved if all of the following are met:

"**A. Properties**. For purposes of this subsection, the site of a Property Line Adjustment is the two properties affected by the relocation of the common property line.

"1. The Property Line Adjustment will not cause either property or development on either property to move out of conformance with any of the regulations of this Title, including those in Chapters 33.605 through 33.615 except as follows:

"a. If a property or development is already out of conformance with a regulation in this Title, the Property Line Adjustment will not cause the property or development to move further out of conformance with the regulation;

"b. If both properties are already out of conformance with maximum lot area standards, they are exempt from the maximum lot area standard; and

1 Petitioners respond that the application proposed, and the city apparently approved,
2 more than a property line adjustment. According to petitioners, the city appears to have
3 approved a "lot segregation," whatever that is, as well as a property line adjustment. In
4 addition, petitioners dispute that the lot line adjustment approved by the challenged decision
5 is in fact a "property line adjustment," as that term is defined in the city's code and in
6 ORS 92.010(11).[4] Finally, petitioners argue that even if the only applicable criteria are those
7 at PCC 33.667.300, many of the terms in that code provision are ambiguous, and require
8 interpretation and the exercise of policy and legal judgment as applied to the facts in this
9 case.

10 As is sometimes the case, our resolution of the jurisdictional question requires
11 discussion of, and effectively resolves, the underlying merits. For the following reasons, we

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"c. If one property is already out of conformance with maximum lot area standards, it is exempt from the maximum lot area standard.

"2. The Property Line Adjustment will not configure either property as a flag lot, unless the property was already a flag lot;

"3. The Property Line Adjustment will not result in the creation of street frontage for a land-locked property;

"4. If any portion of either property is within an environmental overlay zone, the provisions of Chapter 33.430 must be met; and

"5. The Property Line Adjustment will not result in a property that is in more than one base zone, unless that property was already in more than one base zone.

"**B. Services**. The availability of services to the properties may not change.

"**C. Conditions of previous land use reviews**. All conditions of previous land use reviews must be met."

[4] Both PCC 33.667.100 and ORS 92.010(11) define "property line adjustment" to mean "the relocation of a common property line between two abutting properties." Further, ORS 92.010(7) defines the term "partition land" to exclude "[a]n adjustment of a property line by the relocation of a common boundary where an additional unit of land is not created and where the existing unit of land reduced in size by the adjustment complies with any applicable zoning ordinance." Read together, these provisions make it clear that a property line adjustment is a rather limited vehicle for changing the configuration of a tract. *Warf v. Coos County*, 43 Or LUBA 460, 466 (2003).

1 agree with petitioners that the challenged decision does not fall within the ministerial
2 exception to the definition of "land use decision" at ORS 197.015(10)(b)(A).

3 It seems reasonably clear that city planning staff believed that the four historic tax lots
4 on the subject tract, although continuing to legally exist as separate lots in a technical sense,
5 had been somehow aggregated in a manner that required an explicit process of "lot
6 segregation" in order to recognize and move some of those lot lines into the configuration
7 desired by the applicant. However, the basis for that belief is unclear to us. The city's
8 adjustment decision, portions of which are quoted above, correctly notes that under
9 ORS 92.017 a lawfully created lot or parcel remains a "discrete lot or parcel," unless the lot
10 or parcel lines are vacated or the lot or parcel is further divided.[5] As far as we can tell or the
11 parties advise, the PCC contains no provisions governing "lot segregation," and the subject
12 lots have never been vacated or further divided.[6] The PCC does include a chapter providing
13 for "lot consolidation," but that chapter makes it clear that consolidation of several lots for
14 tax purposes does not affect the underlying platted lots.[7] As far as we know, the city has
15 never approved a lot consolidation for any of the subject four lots, and certainly the
16 September 5, 2003 decision did not address the criteria for lot consolidation at

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[5] ORS 92.017 provides:

> "A lot or parcel lawfully created shall remain a discrete lot or parcel, unless the lot or parcel lines are vacated or the lot or parcel is further divided, as provided by law."

[6] Apparently, the southeast corner of lot 1 was removed from that lot sometime in the past. It is not clear whether that change occurred as a partition of lot 1 into two lots, or as a property line adjustment with an adjoining lot. No party argues that the historic change to lot 1 makes any difference in this appeal, and we do not see that it does.

[7] PCC 33.675.010 states the purpose of "lot consolidation":

> "This chapter states the procedures and regulations for removing lot lines within a site to create one lot. The regulations ensure that lot consolidation does not circumvent other requirements of this Title, and that lots and sites continue to meet conditions of land use approvals. The lot consolidation process described in this chapter is different from (and does not replace) the process used by the county to consolidate lots under one tax account. A tax consolidation does not affect the underlying platted lots. A lot consolidation results in a new plat for the consolidation site."

PCC 33.675.300. Therefore, it seems indisputable that the four historic lots continue to exist as discrete legal lots, notwithstanding that they are a single consolidated tax lot.

In adopting the September 5, 2003 decision, the city appeared to operate under the assumption that it could "segregate" or recognize only *one* of the historic lot lines, the line between lots 2 and 3, and then move that line south to the approximate location of the lot line between lots 1 and 2, without considering the existence of or impact on other existing lots or lot lines. The apparent intent is to create two tracts: Tract 1 consisting of lot 4 in its original configuration and lot 3 expanded to include most of lot 2 and the northeast corner of lot 1, and Tract 2 consisting of most of lot 1 and part of lot 2. *See* "Configuration After Lot Line Adjustment," above. In other words, the city proceeded as if lots 3 and 4 had been previously consolidated into a single lot, Tract 1, and lots 1 and 2 had been previously consolidated into a single lot, Tract 2, and therefore all the city had to do to create the desired configuration was to move the common boundary between Tracts 1 and 2. As explained above, however, the city has never consolidated lots 3 and 4 or lots 1 and 2 into two lots, and those four lots continue to exist as discrete units of land.

The assumptions or theories under which the city proceeding to approve the requested lot segregation and property line adjustment are without foundation, as far as we can tell. No code provision or other authority brought to our attention allows the city to recognize the existence of only one internal lot line within a four-lot tract and move that lot line around within the tract while ignoring the lot lines of other lawfully discrete lots within the tract, as the city appears to have done here. As petitioners point out, the city moved the lot line between lots 2 and 3 so that it actually *crosses* the existing line between lots 1 and 2. Petitioners argue that the city's decision effectively created a new triangular-shaped lot in the northeast corner of lot 1, formed from the existing lot line between lots 1 and 2, and the relocated lot line between lots 2 and 3, so that the subject property now includes five lots

1 rather than four.[8] Whatever the merits of that argument, it seems clear to us that there is a
2 very serious question, at least, as to whether the city's decision qualifies as a "property line
3 adjustment" under the applicable code and statutory definitions. Arguably, the decision
4 effectively approves a "partition" or "replat," either of which is indisputably a land use or
5 limited land use decision.[9] In order to approve the application, city staff necessarily if
6 implicitly determined that the requested action qualified as a "property line adjustment"
7 under the city code and state statutes. Under the facts as presented to the city, that
8 determination necessarily required the application of standards that require interpretation and
9 the exercise of legal judgment.

10 Following oral argument in this case we requested that the city provide us with any
11 code provisions supporting the assumptions or theories under which the city made its
12 decision, in particular any code provisions governing "lot segregation." We also allowed the
13 city and petitioners an opportunity to brief the significance of any such code provisions. The
14 city provided us with a copy of PCC 33.675, governing lot consolidation. The city argues
15 that PCC 33.675 "is relevant to the current appeal insofar as it demonstrates the property
16 owner must still apply for lot consolidation to achieve its ultimate goal of reconfiguring the
17 subject property into two tracts of land." Respondent's Legal Memorandum 2. According to

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[8] Further, it appears to have diminished the remnant of lot 2 to a size that probably does not comply with the 6,000 square foot minimum parcel size in the R10 zone.

[9] ORS 92.010(12) defines "replat" to mean "the act of platting the lots, parcels and easements in a recorded subdivision or partition plat to achieve a reconfiguration of the existing subdivision or partition plat or to increase or decrease the number of lots in the subdivision." As we explained in *Goddard v. Jackson County*, 34 Or LUBA 402, 414-15 (1998), a property line adjustment is essentially a *de minimis* replat. A replat is processed in the same manner and under the same standards as a partition or subdivision. ORS 92.185. A local government may use procedures other than replatting procedures to adjust property lines. ORS 92.190(3). Thus, a local government may adopt procedures such as PCC 33.667 that allow administrative approval of applications proposing a "property line adjustment," and is not required to process such applications as a replat. However, whether a local government can employ such administrative procedures, which in the usual case would probably not result in a land use or limited land use decision, depends on whether the application in fact proposes a "property line adjustment" as defined by ORS chapter 92, or whether the application proposes something else. *See, e.g., Warf*, 43 Or LUBA at 466-68 (2003) (a decision that reconfigures three abutting parcels by means of several simultaneous lot line adjustments does not qualify as a "property line adjustment").

1 the city, the September 5, 2003 decision approved only the property line adjustment, and did
2 not purport to consolidate any of the four lots. The city argues that while lot consolidation is
3 necessary to achieve the desired configuration, there is nothing in the city's code that requires
4 that lot consolidation precede the property line adjustment.

5 PCC 33.675 does not assist the city's jurisdictional challenge. We agree with the city
6 that lot consolidation appears to be necessary in order to achieve the configuration desired by
7 the property owner.[10] We also agree that the September 5, 2003 decision does not approve a
8 lot consolidation. However, as explained, the decision appears to proceed under the
9 assumption, the source of which is still a mystery to us, that the desired lot configuration can
10 be achieved by means of a simple property line adjustment between lots 2 and 3. For the
11 reasons above, that assumption is highly debatable, if not plainly erroneous. As to whether
12 lot consolidation must precede the property line adjustment under the facts of this case, it is
13 true that nothing in the city's code requires a particular sequence of approvals. On the other
14 hand, nothing in the code or elsewhere brought to our attention authorizes the city to approve
15 the request to move the common boundary between lots 2 and 3 in the manner the city has,
16 *i.e.*, so that it crosses the still existing property line between lots 1 and 2. Absent a decision
17 that consolidates lots 1 and 2, or that in some fashion first moves or removes the property line
18 between those two lots, we do not understand how the city could lawfully move the boundary
19 between lots 2 and 3 as it has done here. As a practical matter, if lot consolidation is
20 necessary in order to achieve the desired lot configuration, as appears to be the case, it must
21 precede or be contemporaneous with the requested property line adjustment.

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[10] We do not mean to foreclose the possibility of other means besides lot consolidation. For example, it might be possible to achieve the desired configuration in a manner consistent with ORS 92.010(7), 92.010(11) and 92.017, as construed in *Goddard* and *Warf*, by using a consecutive series of lot line adjustments, as long as each of those adjustments is a separate decision that truly qualifies as a "property line adjustment." That is, each decision (1) moves one lot line between two abutting properties, (2) creates no new lot or parcel, and (3) reduces no lot or parcel below the applicable minimum parcel size. We note in passing that PCC 33.667.200 limits the number of property line adjustments on a site to three per calendar year.

1 For the foregoing reasons, we disagree with the city that the challenged decision was
2 made under "land use standards which do not require interpretation or the exercise of policy
3 or legal judgment." ORS 197.015(10)(b)(A). Because the challenged decision falls within
4 the definition of "land use decision" at ORS 197.015(10)(a), and does not qualify for any
5 exception to that definition, we have jurisdiction.

6 **THIRD ASSIGNMENT OF ERROR**

7 Petitioners contend that the property line adjustment approved by the city violates and
8 is prohibited by the applicable law. According to petitioners, as a matter of law the city
9 cannot approve the requested action in any manner consistent with ORS 92.010(7),
10 92.010(11) and 92.017.

11 The city does not specifically respond to the merits of this assignment of error. Even
12 assuming the city would advance the same arguments that it does in challenging our
13 jurisdiction, those arguments fail to set out any theory that we can understand under which
14 the city could lawfully do what its decision purports to do. We agree with petitioners that the
15 challenged decision violates the applicable law and is prohibited as a matter of law.
16 OAR 661-010-0071.

17 The third assignment of error is sustained.

18 **FIRST AND SECOND ASSIGMENTS OF ERROR**

19 The first assignment of error argues that the city erred in failing to process the
20 application as a "permit" defined by ORS 227.160(2), subject to the notice and other
21 requirements applicable to statutory permit applications, including the requirement at
22 ORS 227.173(3) to support a permit decision with findings.[11]

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[11] ORS 227.160(2) provides, in relevant part:

> "'Permit' means discretionary approval of a proposed development of land, under ORS 227.215 or city legislation or regulation. 'Permit' does not include:
>
> "(a) A limited land use decision as defined in ORS 197.015[.]"

1 We concluded in resolving the third assignment of error that the city's decision is
2 prohibited as a matter of law. Therefore, we need not and do not address the procedural and
3 findings challenges under the first and second assignments of error.
4 The city's decision is reversed.