BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DENNIS RANDAZZO,
Petitioner,

vs.

CITY OF EUGENE,
Respondent,

and

CHAMBERS INVESTORS, LLC,
GUARD PUBLISHING COMPANY, and
ACQUEST DEVELOPMENT, LLC,
Intervenors-Respondents.

LUBA No. 2012-004

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

John C. Pinkstaff, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief was Lane Powell PC.

Emily N. Jerome, City Attorney, Eugene, filed a response brief and argued on behalf of respondent.

Micheal M. Reeder, Eugene, filed a response brief and argued on behalf of intervenor-respondent Guard Publishing Company. With him on the brief was Arnold Gallagher Percell Roberts and Potter PC.

Bill Kloos, Eugene, represented intervenor-respondent Acquest Development.

James W. Spickerman, Eugene, represented intervenor-respondent Chambers Investors, LLC.

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

AFFIRMED 05/14/2012

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 council resolution that interprets the Eugene Code (EC).

MOTION TO INTERVENE

Guard Publishing Company, Chambers Investors, LLC, and Acquest Development, LLC separately move to intervene in this appeal on the side of respondent. There is no opposition to the motions and they are allowed.

FACTS

In December 2009, the United States Department of Veteran Affairs (VA) announced that it intended to lease property in the Eugene-Springfield area to construct and operate a new outpatient clinic for veterans (VA Clinic). A deadline of January 18, 2012 was ultimately established for submitting proposed sites for consideration for the proposed VA Clinic. Landowners who owned potential sites sought clarification from the city that the proposed VA Clinic could be constructed under the city zoning that applies to their property. The planning director issued a decision on November 23, 2010 in which he concluded that the proposed VA Clinic would be a permitted use in the Campus Industrial (I-1) zone. The planning director reasoned that the I-1 zone allows "Government Services" as a permitted use and that the VA Clinic qualifies as a Government Services use. EC Table 9.2450.

The planning director's decision was appealed to the city's land use hearings official. In a March 3, 2011 decision, the hearings official reversed the planning director's decision, finding that Government Services are only allowed as permitted uses in the I-1 zone if the proposed Government Services use is "not specifically listed in this or any other uses and permit requirements table." EC Table 9.2450.[1] The hearings official found that the VA

[1] The EC includes a number of "Land Uses and Permit Requirements" tables. Those tables set out the city's zoning districts and identify the uses that are permitted outright, permitted with conditional or other review approvals or permitted but subject to other special limitations. We set out the complete text regarding Government Services from EC Table 9.2450 later in this opinion.

Clinic could be permitted as a "Medical Health Facility" in a number of city residential zones and therefore could not be allowed as a Government Services use in the I-1 zone.

The city council first responded to the hearings official's March 3, 2011 decision by initiating an EC amendment process to amend the EC to expressly provide that the VA Clinic is permitted in the I-1 zone. On September 29, 2011, city staff provided notice and a copy of the proposed EC amendment to the Oregon Department of Land Conservation and Development, as required by ORS 197.610 and OAR 660-018-020. The city planning commission held a public hearing on the proposed amendment on November 15, 2011. The planning commission held the record open until December 2, 2011 and continued the hearing on the proposed EC amendment until December 12, 2011. But before the December 12, 2011 hearing was held, that hearing was cancelled. In a December 8, 2011 e-mail message city staff explained that in response to issues that had been raised about the proposed amendment, the city staff was suspending the proposed EC amendment and considering proposing that the city council instead adopt a resolution to clarify the scope of the Government Services use category. On December 29, 2011, city staff advised petitioner and others that the city council would consider a resolution to clarify the scope of the Government Services use category on January 9, 2012. Petitioner was advised that a copy of the resolution would be available for review on January 6, 2012. At the conclusion of the January 9, 2012 hearing, the city council adopted the resolution. In a January 17, 2012 letter to the VA, the city advised the VA that the city council had adopted Resolution 5051 to clarify that a VA Clinic is permitted on I-1 zoned property as a Government Services use. This appeal followed.

INTRODUCTION

The city's two-page resolution and two-page supporting summary document, petitioner's 48-page petition for review, respondent's 17-page brief, and intervenor Guard Publishing Company's (intervenor's) 20-page brief frequently seem to avoid directly

confronting and addressing the central and dispositive issue in this appeal. We set out below the critical EC language before identifying the critical issue and then turn to petitioner's assignments of error. The critical EC language appears in two places, EC Table 9.2450, which sets out uses that are allowed in the city's industrial zones, and EC Table 9.2740, which sets out the uses that are allowed in the city's residential zones.[2]

A. EC Table 9.2450

We turn first to EC Table 9.2450, which lists the following as a permitted use in the I-1 zone:

> "Government Services, not specifically listed in [EC Table 9.2450] or any other uses and permit requirements table. An example could include: a fire station." (Underscoring in original.)

To determine whether a proposed use (in this case the proposed VA Clinic use) might be allowed as a Government Services use in the I-1 zone, EC Table 9.2450 effectively requires that two questions be answered. The first question is: does the proposed VA Clinic qualify as a Government Services use? The term Government Services is not defined in the EC, but there does not seem to be any serious question presented in this appeal about whether a VA Clinic, operated by the United States Department of Veterans Affairs (a governmental agency) for the benefit of veterans qualifies as a "Government Services" use, within the meaning of EC Table 9.2450. Petitioner offers no argument that we can understand to suggest that it does not, and we conclude that a VA Clinic is a Government Services use, within the meaning of EC Table 9.2450.

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[2] Although our focus is on EC Tables 9.2450 and 9.2740, the critical language in those two tables appears in "Land Uses and Permit Requirements" tables for other zoning districts as well. Specifically the Table 9.2450 Government Services language appears with slight variations in all but one of the city's zones. And the critical language in Table 9.2740 described in the text below also appears with slight variations in other tables. The Medical Health Facilities that are allowed by Table 9.2740 in residential zones are also allowed in a number of other city zoning districts. That means the city council's interpretation in this case has ramifications beyond the I-1 zone. However, for simplicity, we limit our discussion to EC Tables 9.2450 and 9.2740.

The only real question concerns the second question that must be answered under EC Table 9.2450: is the VA Clinic a Government Services use that is "specifically listed in this or any other uses and permit requirements table." In other words is the VA Clinic a use that is "specifically listed in the I-1 or any other zone?" If it is, then the VA Clinic cannot be approved in the I-1 zone, even though it qualifies as a Government Services use. To answer that second question we must consider EC Table 9.2740.

B. EC Table 9.2740

EC Table 9.2740 permits the following use in the city's residential zones, subject to certain standards and limitations:

"Clinic, or other Medical Health Facility (including mental health)."

The city council found that the proposed VA Clinic could be approved as a Clinic or other Medical Health Facility in the city's residential zones, pursuant to EC Table 9.2740. We do not understand petitioner to dispute that finding, and indeed petitioner seems to view that finding as flatly inconsistent with the city council's ultimate finding that the proposed VA Clinic could nevertheless also be approved under Table 9.2450 as a Government Services use that is "not specifically listed in [Table 9.2450] or any other uses and permit requirements table." The critical issue reduces to the following question: if the VA Clinic is among the uses that fall within the general Clinic or other Medical Health Facility use category in the city's residential zones, does that necessarily mean that the proposed VA Clinic is a Government Services use that is "specifically listed" in the residential zones? In the previous proceedings described above, the hearings official seems to have concluded that it does, effectively equating the concept of (1) being "specifically listed" in Table 9.2450 or another table with (2) the concept of being allowed under a general category of uses listed in one of the EC Tables. However, although the city does not come right out and say so with a great deal of clarity, we understand the city council to have answered that question in the negative in the proceedings that led to the decision that is before us in this appeal. We

understand the city to reason that although the VA Clinic may be allowable under both the *general* Government Services and the *general* Medical Health Facility use categories, the general Medical Health Facility use category does not "specifically list[]" VA Clinics.[3] Intervenor Guard Publishing argues that VA Clinics such as the one proposed for Eugene-Springfield are not specifically listed in any of the EC tables that list allowable uses and that the VA Clinic is much more than a normal Clinic or Medical Treatment Facility:

> "A VA Clinic serves a variety of purposes; it is not merely a Medical Treatment Facility and it is certainly not a hospital. The VA Clinic is for the medical care, education, rehabilitation and prosthetic services for veterans. In other words, it is more than a Medical Treatment Facility; it is a multi-purpose facility for veterans. Medical treatment is certainly a component, and a significant component at that. However, the nature and scale of a VA Clinic is sufficiently different than a typical Medical Treatment Facility as to more appropriately fall within a the 'Government Services' use category. * * *." Intervenor-Respondent's Brief 3-4.[4]

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[3] The city council found:

> "An outpatient clinic operated by the United States Department of Veterans Affairs is not *specifically* listed in any 'Uses and Permit Requirements' table in the Eugene Code * * *." Record 5 (emphasis in original).
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> "* * * In the case of the potential VA facility, the [EC] contains a category called 'Clinic and other Medical health Treatment Facility.' While this broad medical category allows a variety of privately and publicly operated medical facilities in certain zones * * *, the [EC] provides additional accommodations for medical uses specifically operated by a governmental agency through the inclusion of the 'Government Services' category. With this understanding, it would be possible for the VA facility to fit within the 'Clinic and other Medical Health Facility' category as well as the 'Government Services' category. Staff believes the Hearings Official erred in determining that a use could not fall within more than one category in this way." Record 8.

[4] In testimony before the city, intervenor offered the following description of the VA's proposal:

> "The VA now rents a 16,000-square-foot building at 100 River Ave. where it provides medical and mental health care, and physical rehabilitation. A 6,500-square-foot building at 2400 River road offers vocational rehabilitation and services for homeless veterans, plus a substance abuse program.
>
> "The VA wants to consolidate services that are offered in both buildings, and expand such services as dental care, eye care, radiology and physical therapy, Carlson said." Record 136-37.

Before considering whether the city's council's interpretation is reversible or remandable under LUBA's limited scope of review, we note first that the example EC 9.2450 gives ("[a]n example could include: a fire station") is of little assistance. The example seems to have been intended as an example of a Government Services use that is not specifically listed in EC Table 9.240 or any other EC Table, and that appears to be the case. But fire stations typically (1) are government services, (2) include an understood array of equipment and facilities, and (3) perform a generally understood service. A "Clinic or other Medical Health Facility" could be public or private and could offer a variety of different services. The fire station example provides no help in determining how *specifically* a Government Services use must be listed in Table 9.2450 or another EC Table to preclude approval of that Government Services use in the I-1 zone.

Turning to our scope of review in considering the city council's interpretation of the Eugene Code, we are required to apply a highly deferential standard of review under ORS 197.829(1) and *Siporen v. City of Medford*, 349 Or 247, 259, 243 P3d 776 (2010).[5] For example, if the city had adopted the hearings official's view that the "Clinic, or other Medical Health Facility" language in EC Table 9.2740 means the VA Clinic is "specifically

[5] ORS 197.829(1) provides:

> "The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:
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> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> "(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> "(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
>
> "(d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

listed" in EC Table 9.2740 and therefore cannot be approved as a Government Services use under EC Table 9.2450, we have little doubt that we would be required to affirm that interpretation under ORS 197.829(1) and *Siporen*. Under *Siporen*, LUBA is only permitted to reverse or remand a city council interpretation if it is "implausible." The terms "specifically listed" and "Clinic or other Medical Health Facility" are sufficiently subjective and ambiguous to permit a plausible interpretation that the general use category "Clinic or other Medical Health Facility" is sufficient to "specifically list[]" the proposed VA Clinic use, even though "Clinic or other Medical Health Facility" is a somewhat general use category that does not describe the VA Clinic perfectly and is general enough to encompass other public and private uses as well.

But of course, the plausibility or implausibility of the *hearings official's* interpretation is not the issue in this appeal. The issue in this appeal is whether the city council's contrary interpretation is plausible. Again, the terms "specifically listed" and "Clinic or other Medical Health Facility" are sufficiently subjective and ambiguous to allow more than one plausible interpretation. The proposed VA Clinic is a particular kind of clinic that offers a particular array of services to veterans; some of those services may be typical of services provided by other public or private Medical Health Facilities, but others are not. The VA Clinic is therefore a use that is imperfectly described by the more general use category "Clinic or Medical Health Facility." Is the fact that the "Clinic or Medical Health Facility" use category imperfectly describes the VA Clinic a sufficient basis for the city council to say that the EC does "not specifically list[]" the VA Clinic use in Table 9.2450 or any other table in the EC? We can think of extremes in interpreting and applying the "specifically listed" requirement that even under the deferential standard of review required by *Siporen* the city

council's interpretation likely would not be affirmable.[6] However, this is not such a case. The city council's interpretation appears to have turned on the fact that the VA Clinic will offer a large array of services to veterans that are not typical of other public and private clinics or medical health facilities, with the result that the proposed VA Clinic is not a Government Services use that is "specifically listed in [Table 9.2450] or any other table in the EC," within the meaning of EC table 9.2450. As we explain above, that interpretation is not inconsistent with the text of EC Table 9.2450.

FIRST ASSIGNMENT OF ERROR

In his first assignment of error, petitioner offers 26 pages of argument in contending that the city council's interpretation and application of EC Tables 9.2450 and 9.2740 is erroneous. In the introduction above, we have already rejected petitioner's textual arguments. Many of petitioner's arguments under the first assignment of error challenge findings that are not essential to the city council's decision and we do not address those challenges. But some of petitioner's arguments contend that the city council's interpretation is inconsistent with rules of statutory construction and relevant context, and with relevant EC policies and purposes. We turn briefly to those arguments.

A. Giving Preference to the General over the Particular

Petitioner argues the city council's interpretation improperly gives preference to the general EC provision for Government Services over the more particular (and limited) provisions for "Clinics and other Medical Treatment Facilities:"

> "The city's interpretation does not overcome the fact that a VA Clinic fits within the 'Medical Health Treatment Facility' use which is a more specific use description for a VA Clinic than the broader 'Government Services not

[6] For example, if fire stations were listed as a permitted use in one or more Land Uses and Permit Requirements tables, a city council interpretation that a fire station with *red* fire trucks could nevertheless be approved as a Government Services use in the I-1 zone if the tables did not specifically list fire stations with *red* fire trucks, as opposed to some other color, probably would not be affirmable even under *Siporen's* deferential standard of review.

> specifically listed in this or any other uses and permit requirements table.' Therefore, the City interpretation is at odds with the statutory construction maxim under ORS 174.020 which provides: 'When a general and particular provision [are] inconsistent, the latter is paramount so that a particular intent shall control over a general one that is inconsistent with it.'" Petition for Review 25 n 11.

We generally agree with petitioner that the use category Government Services, standing alone, is more general than the "Clinics and other Medical Treatment Facilities" use category. However, we are not sure why petitioner believes those use categories are inconsistent. More to the point, the central interpretative issue in this case is whether a VA Clinic such as the one proposed is "specifically listed" in EC Table 2450 or any other EC Land Uses and Permit Requirements table. In answering that question we fail to see how the maxim of statutory construction set out in ORS 174.020 is of any particular assistance, since the issue is resolved by determining the meaning of the text of EC Tables 9.2450 and 9.2740, most particularly the meaning of "not specifically listed."

Petitioner's ORS 174.020 provides no basis for reversal or remand.

B. Policy/Purpose

Petitioner contends the city's council's interpretation of Tables EC 9.2450 and 9.2740 to permit the proposed VA Clinic as a Government Services use in the I-1 zone is inconsistent with the EC 9.2400 purpose of the I-1 zone, which is set out below:

> **"Purpose of I-1 Campus Industrial Zone.** The purpose of the I-1 Campus Industrial zone is to implement the Metro Plan by providing large areas for specialized light industrial firms to locate in a campus-like setting. In general, this zone is designed for firms that will help achieve economic diversification objectives and that typically have a large number of employees per acre. The activities of such firms do not generate offensive external impacts and usually do not tolerate substantial noise, pollution, or vibration from surrounding uses. The zone is designed to provide sites for large-scale offices that provide a scientific and educational research function or directly serve manufacturing uses or other industrial or commercial enterprises (and not the general public). Provision is also made for small- and medium-scale industrial uses within the context of business parks that will maintain the campus-like setting. On a limited basis, complementary uses are permitted, such as restaurants that

primarily serve employees in the immediate area." (Bold type and underscoring in original.)

EC 9.0050 specifically provides that EC zoning purpose statements "shall not constitute approval criteria or be used to interpret such criteria unless the sections are specifically referenced for that purpose in another section of this land use code." Even if EC 9.0050 does not render the EC 9.2400 purpose statement irrelevant, we fail to see any inconsistency between EC 9.2400 and the city council's interpretation. EC 9.2400 does not purport to give a comprehensive description of all the uses that are permitted in the I-1 zone. As intervenor-respondent Guard argues:

> "A quick review of EC Table 9.2450 will reveal that there are at least nine uses allowed in the I-1 zone that do not provide for 'special light industrial firms to locate in a campus-like setting' and that are also not 'complimentary uses such as restaurants that primarily serve employees of the immediate area.' * * * These include: Artist Gallery/Studio, Ballet, Dance, Martial Arts, and Gymnastic School/Academy/Studio, Library, Driving School, Athletic Facility and Sport Club, Live Entertainment Theater, Bank, Savings and Loan Office, Credit Union, Correctional Facility, and Residential Treatment Center. Like a VA Clinic, most, if not all, of the above-listed uses are <u>not</u> campus industrial uses nor are they 'commercial uses that are supportive of the primary industrial uses.' However, they are allowed, either as permitted uses or conditionally, because they are either not inconsistent with the purposes of the I-1 zone or, with conditional uses, can be made to be compatible with the primary purposes of the I-1 zone through conditions of approval." Intervenor-Respondent's Brief 8-9 (underscoring in original).

Neither the I-1 purpose statement nor the purpose statements from other less directly relevant portions of the EC are inconsistent with the city council's interpretation in this case. Petitioner's purpose/policy arguments provide no basis for reversal or remand.

C. Special Need for Government Services

The city council adopted the following findings:

> "* * * Like many municipal zoning codes, Eugene's land use code provides special accommodation for government services, allowing them in most city zones. Given the important community services that local, state and federal governments provide, the limited number of sites needed for these uses and the sometimes unique siting requirements attached to those uses (police and

> fire stations for example), the land use code provides a higher level of flexibility and opportunity for siting government services than it affords to similar privately operated uses. In other words, it is consistent with the land use code to determine that a government-operated service facility may be permitted in a zone that does not allow a privately operated facility offering similar services." Record 7-8.

Petitioner seems to challenge these findings, but we are not sure why. There is no dispute that Government Services are allowed in every city zoning district except one—with the limitation that such Government Services must not be specifically listed in other zones. That being the case, various publically operated uses are potentially allowable in those zones as Government Services, whereas those uses might not be allowed if they were privately operated. The city council apparently adopted the above-quoted findings to explain why allowing a VA Clinic to be sited in an I-1 zone as a Government Services use, whereas a private Clinic or Medical Health Facility could not be sited in the I-1 zone, does not present an anomaly. Government Services uses are simply treated more favorably under the EC.

Petitioner's arguments concerning the city's findings concerning the special need for Government Services uses present no basis for reversal or remand.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner contends under his second assignment of error that the city council's interpretation of Tables EC 9.2450 and 9.2740 is a *de facto* amendment of the EC without following the procedures required to amend the EC. As we have already explained, the city council initiated amendments of the EC to respond to the hearings official's decision but later abandoned the amendment process in favor of a city council interpretation of Tables EC 9.2450 and 9.2740. As far as we can tell, petitioner contends that abandoned amendment process along with the city council's expressed desire to clarify that the proposed VA Clinic could be sited in the city's I-1 zone and to render that clarification before the January 18, 2012 deadline for proposing sites is sufficient to establish that the challenged interpretation is

a *de facto* EC amendment. Petitioner cites a dissenting LUBA Board Member's opinion in *Bemis v. City of Ashland*, 48 Or LUBA 42 (2004), *aff'd* 197 Or App 124, 107 P3d 83, *rev den* 339 Or 66, 118 P3d 802 (2005) in support of his *de facto* amendment argument.

That the city initially sought to reverse the hearings official's interpretation via an amendment to the EC has no real bearing on whether the city council could also reverse that interpretation via an interpretation of its own. We have already concluded that the city council's interpretation is not reversible under ORS 197.829(1) and *Siporen*, and we reject petitioner's suggestion that the city council's interpretation is a *de facto* amendment of the EC.

Bemis lends no support to petitioner for two reasons. First, petitioner relies on the dissenting opinion in *Bemis*, rather than the majority opinion. Second, *Bemis* concerned a permit application proceeding in which the city council changed its past interpretation of a permit approval standard to an interpretation that was consistent with a land use regulation amendment that was adopted *after* the permit application had been submitted.[7] In *Bemis* the issue was whether the city council could properly apply that new interpretation to the permit application where the permit application could not be subject to the land use regulation amendment under ORS 227.178(3)(a) because the amendment did not take effect before the complete permit application was submitted. *See* n 7. In other words, could the interpretation apply in circumstances where the land use regulation amendment could not? This case simply does not present such a circumstance.

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[7] ORS 227.178(3)(a) is the "goal post" rule that applies to city decisions on permit applications. That statute provides:

> "If the application [for a permit] was complete when first submitted or the applicant submits the requested additional information within 180 days of the date the application was first submitted and the city has a comprehensive plan and land use regulations acknowledged under ORS 197.251, approval or denial of the application shall be based upon the standards and criteria that were applicable at the time the application was first submitted."

Petitioner also cites *Alexanderson v. Clackamas County*, 126 Or App 549, 552, 869 P2d 873 (1994) and suggests the city council's interpretation is the "product of a design to act arbitrarily or inconsistently from case to case." That argument is similarly without merit. The city has never applied its interpretation to an application for permit approval. In fact, the city council acted proactively to adopt its interpretation of EC Tables 9.2450 and 9.2740 to reverse the hearings official's interpretation *before* the city might be called upon to interpret and apply EC Tables 9.2450 and 9.2740 to a permit application for the VA Clinic.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

In his final assignment of error, petitioner argues the city council erred by failing to follow the statutory and city procedures for legislative land use regulation amendments. Alternatively petitioner contends the city was bound to follow ORS 197.763 and city procedures for quasi-judicial land use decision making.

Whether a decision is quasi-judicial or legislative is determined by the three-part inquiry set out in *Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 602-03, 601 P2d 769 (1979). Those three inquiries were described in *Hood River Valley v. Board of Cty. Commissioners*, 193 Or App 485, 495, 91 P3d 748 (2004) as follows:

> "First, does 'the process, once begun, [call] for reaching a decision,' with that decision being confined by preexisting criteria rather than a wide discretionary choice of action or inaction? Second, to what extent is the decision maker 'bound to apply preexisting criteria to concrete facts'. Third, to what extent is the decision 'directed at a closely circumscribed factual situation or a relatively small number of persons'?" (Citations to *Strawberry Hill* omitted.)

The city council's proceeding to adopt its interpretation could have been abandoned at any time, the interpretation was not confined by preexisting criteria, and it was not directed at a closely circumscribed factual situation or a small number of persons. Under the *Strawberry Hill* inquiries or factors, the city council's decision was legislative.

While the city council's interpretation decision was legislative, it was not a land use regulation amendment, and the city was therefore not required to follow statutory or city procedures for land use regulation amendments. Petitioner's third assignment of error provides no basis for remand.

The third assignment of error is denied.

The city's decision is affirmed.