

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON

3
4 BEAVERTON BUSINESS OWNERS, LLC,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF BEAVERTON,
10 *Respondent,*

11
12 and

13
14 LTF REAL ESTATE COMPANY, INC.,
15 *Intervenor-Respondent.*

16
17 LUBA No. 2019-079

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from City of Beaverton.

23
24 E. Michael Connors, Portland, filed the petition for review and a reply
25 brief, and argued on behalf of petitioner. With him on the brief was Hathaway
26 Larson LLP.

27
28 Peter Livingston, City of Beaverton Attorney's Office, Beaverton, filed a
29 joint response brief on behalf of respondent.

30
31 Dana L. Krawczuk, Portland, filed a joint response brief and argued on
32 behalf of intervenor-respondent. With her on the brief was Stoel Rives LLP.

33
34 RYAN, Board Member; RUDD, Board Chair, participated in the decision.

35
36 ZAMUDIO, Board Member, did not participate in the decision.

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38 AFFIRMED

03/09/2020

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

NATURE OF THE DECISION

Petitioner appeals a city council decision approving an athletic facility and office building, with associated accessory uses.

FACTS

Intervenor-respondent LTF Real Estate Company, Inc. (intervenor or Life Time) applied for design review approval to develop a 140,000 square foot athletic facility, a 45,000 square foot office building, a 37,000 square foot outdoor pool area, a parking structure and indoor tennis courts, and a surface parking lot on intervenor's nine-acre property.¹ Intervenor's property is a triangular shaped parcel zoned Commercial Corridor (CC), located at the intersection of SW Barnes Road and SW Cedar Hills Boulevard. A high speed on-ramp to US Highway 26 is located partially adjacent to the western boundary of the parcel, between the parcel and SW Cedar Hills Boulevard. The office building is proposed to be located in the northeast corner of the property, and the athletic facility building is proposed located to the south and west of the office building, connected by an enclosed breezeway. The outdoor pool proposed to be located south of the athletic facility building and a large surface parking area is located west of the athletic facility building.

¹ Life Time operates athletic facilities nationally. Record 627-50.

1 The subject property is approximately 10 percent of an 80-acre area that
2 was approved as a planned unit development in 2013 (the PUD). The PUD
3 included conditions 2 through 35 that required mitigation of transportation
4 impacts when property within the PUD develops. Condition 1 of the PUD
5 requires subsequent development proposals for property within the PUD to
6 submit a supplemental traffic impact analysis to identify which of the mitigation
7 measures included in the PUD conditions of approval 2 through 35 are triggered
8 by the development. Intervenor's application is the first application to propose
9 development of property included within the PUD.

10 The city planning commission approved the application, and petitioner
11 appealed the planning commission's decision to the city council. The city council
12 held a hearing and approved the application. This appeal followed.

13 **FIRST ASSIGNMENT OF ERROR**

14 Beaverton Development Code (BDC) 40.03.1.A provides that for a design
15 review application, the applicant must establish that "[a]ll critical facilities and
16 services related to the proposed development have, or can be improved to have,
17 adequate capacity to serve the proposed development at the time of its
18 completion." BDC 40.03.1.B provides that the applicant must establish that
19 "[e]ssential facilities and services related to the proposed development are
20 available, or can be made available, with adequate capacity to serve the
21 development prior to its occupancy." Further, the PUD requires an applicant for
22 development of property included in the PUD to provide a supplemental

1 transportation impact analysis to determine which transportation mitigations
2 required by the PUD approval the proposed development triggers.

3 As part of its application, intervenor submitted a supplemental
4 transportation impact analysis prepared by a traffic engineer (TIA). The TIA
5 estimated trip generation rates for the office portion of the development using
6 rates from the Institute of Transportation Engineers (ITE) trip generation manual.
7 The TIA estimated trips that would be generated by the athletic facility portion
8 of the development using trip generation rates based on a traffic generation report
9 prepared for Life Time in 2007 (2007 Traffic Generation Report). The 2007
10 Traffic Generation Report collected trip data at five Life Time facilities in other
11 states, all including outdoor pools. The TIA concluded that with recommended
12 mitigation, all of the affected intersections would continue to meet mobility
13 targets at occupancy. Record 1221. During the proceedings below, petitioner
14 submitted a memorandum from its traffic consultant, Kittleson (Kittleson
15 Memorandum), that included traffic counts collected on a single day at a nearby
16 fitness center that were higher than the traffic counts in the 2007 Traffic
17 Generation Report and that purported to identify deficiencies in the TIA. The city
18 council relied on intervenor's TIA to conclude that BDC 40.3.01.A and B and the
19 PUD conditions were satisfied.

20 In its first assignment of error, petitioner argues that the city council's
21 decision is not supported by substantial evidence in the record. Petitioner first
22 argues that the TIA underestimated trips to be generated by the proposed

1 development because the 2007 Traffic Generation Report that the TIA relied on
2 to estimate trips is “outdated,” and according to petitioner, more recent traffic
3 counts at other Life Time facilities in 2013 and 2018 showed more traffic at the
4 studied facilities than the traffic counts reported in the 2007 Traffic Generation
5 Report. Petition for Review 11. Finally, petitioner maintains that the city should
6 have required intervenor to utilize traffic generation numbers specific to the
7 proposed development.

8 Petitioner also argues that the actual trip numbers included in the 2007
9 Traffic Generation Report are not reliable because the facilities studied in the
10 2007 Traffic Generation Report were smaller than the proposed development
11 and, according to petitioner, did not include office space or outdoor pools.
12 Petitioner also argues that the Kittleson Memorandum identifies deficiencies in
13 the 2007 Traffic Generation Report and provides evidence that undercuts the TIA
14 and the city council’s reliance on the 2007 Traffic Generation Report, and that
15 the city failed to address the deficiencies and evidence.

16 The city and intervenor (together, respondents) respond that the city
17 council considered and adopted findings that rejected petitioner’s challenges to
18 the TIA’s reliance on the 2007 Traffic Generation Report, and that the TIA and
19 other evidence submitted by intervenor is substantial evidence to support the

1 decision.² We agree. First, the TIA compared monthly member check-in data for
2 the five studied facilities in 2007 and more recently in 2018, which remained
3 consistent, and concluded that the 2007 Traffic Generation Report traffic counts
4 are a reliable basis for projecting traffic at the athletic facility portion of the
5 proposed development. Record 1829. Second, petitioner is incorrect that the
6 facilities studied in the 2007 Traffic Generation Report did not include outdoor
7 pools. Third, petitioner is also incorrect that the 2013 and 2018 traffic counts at
8 other Life Time facilities produced higher trip counts. Intervenor’s traffic
9 engineer explained that the 2013 and 2018 traffic counts from other Life Time
10 facilities produced lower trip counts than the counts produced by the 2007 Traffic
11 Generation Report, and for that reason the 2007 report provides more reliable
12 traffic counts. Record 6, 416, 1829. Third, intervenor’s traffic engineer explained
13 that the smaller size of the facilities from the 2007 Traffic Generation Report did
14 not affect the projected number of trips from the development because (1) the
15 TIA took the larger size of the proposed facility into account and estimated future
16 trips based on the number of estimated vehicle trips per 1,000 square feet of gross
17 floor area (4.35 trips per 1,000 square feet), and (2) independently, the proposed
18 facility is a “Diamond-level” Life Time facility, which has fewer memberships
19 and therefore produces lower trip numbers. Record 11, 416-17.

² The city council adopted and incorporated as findings the July 9, 2019 staff memorandum and adopted supplemental findings. Record 6, 1828-30.

1 The city council adopted findings explaining why it declined to rely on the
2 traffic counts from petitioner’s Kittleson Memorandum, explaining that they
3 were based on single day traffic counts and therefore not particularly reliable.
4 Record 9. The city council also rejected petitioner’s argument that the 2007
5 Traffic Generation Report contained deficiencies, and adopted the staff findings
6 explaining that conclusion. Record 6, 419, 1829.

7 We agree with respondents that the city council could reasonably rely on
8 the TIA, which was prepared based on the 2007 Traffic Generation Report, and
9 other evidence submitted by intervenor, to determine that BDC 40.03.1.A and B
10 were met and to determine which transportation mitigations required by the PUD
11 approval the proposed development triggered. *Dodd v. Hood River County*, 317
12 Or 172, 179-80, 855 P2d 608 (1993) (substantial evidence is evidence a
13 reasonable person would rely on in making a decision).

14 The first assignment of error is denied.

15 **SECOND ASSIGNMENT OF ERROR**

16 BDC 20.10.20(23) allows “Recreational Facilities” as permitted uses in the
17 CC zone.³ BDC Chapter 90 defines “Recreational Facilities” to mean “[f]acilities

³ BDC 20.10.20(23) is a table of uses that are permitted as evidenced by a (P), allowed as a conditional use as evidenced by a (C), or prohibited as evidenced by an (N). The table includes superscript notations that refer to use restrictions that are provided in BDC 20.10.25.

BDC 20.10.30 sets out “Other NS Zoning Requirements,” BDC 20.10.35 sets out “Other CS Zoning Requirements” and BDC 20.10.40, quoted above, sets out

1 that are intended to provide amusement to the user, with limited allowance for
2 spectators.” The definition sets out a non-exclusive list of recreational facilities
3 “uses” that includes “swimming clubs or pools.”

4 BDC 20.10.40 is entitled “Other CC Zoning Requirements” and provides:

5 “Uses shall be subject to the following (excludes food cart pods,
6 parks and playgrounds):

7 “1. Activity is conducted *wholly within an enclosed structure*,
8 except for outside play areas for child care and educational
9 facilities, transit centers and as allowed in items 2 and 3
10 below.

11 “2. Accessory open air sales/display/storage shall be permitted
12 for horticultural and food merchandise only and shall
13 constitute no more than 5% of the gross building floor area of
14 any individual establishment.” (Emphasis added.)

15 BDC Chapter 90 includes two separate definitions of “structure:”

16 “Structure. Anything which is constructed, erected or built and
17 located on or under the ground, or attached to something fixed to the
18 ground.”

19 “Structure. A walled and roofed building including a gas or liquid
20 storage tank that is principally above ground. [ORD 3563; May
21 1987]”

22 The city council adopted alternative findings that (1) BDC 20.10.40 does not
23 apply to “Recreational Facilities” in the CC zone, and that (2) even if BDC

“Other CC Zoning Requirements.” BDC 20.10.35 includes a section that is identical to BDC 20.10.40(1).

1 20.10.40 prohibits Recreational Facilities that are not “wholly within an enclosed
2 structure,” intervenor’s outdoor pool is “wholly within an enclosed structure.”

3 The city council evaluated the non-exclusive list of uses included in the
4 definition of “Recreational Facilities” and concluded that because the BDC
5 definition of Recreational Facilities includes some uses that the city found must
6 occur outdoors, such as outdoor swimming pools and golf courses, and because
7 BDC 20.10.20(23) allows Recreational Facilities as uses permitted outright in the
8 zone, BDC 20.10.20(23) conflicts with BDC 20.10.40. Consequently, the city
9 council concluded BDC 20.10.40’s prohibition of uses that are not “wholly
10 within an enclosed structure” does not apply to Recreational Facilities uses.
11 Rather, the city council concluded that BDC 20.10.40 only restricts outdoor
12 storage and sales activities. The city relied on what it concluded is the purpose of
13 the enclosed structure requirement - to limit outdoor sales and storage activities.
14 In the alternative, the city council concluded that if BDC 20.10.40(1) applies to
15 intervenor’s Recreational Facility, the outdoor pool is “wholly within an enclosed
16 structure,” relying on one of the two BDC definitions of “structure.”

17 In its second assignment of error, petitioner argues that the city council
18 improperly construed the relevant provisions of the BDC and relevant terms
19 contained in BDC 20.10.40 and BDC 20.10.20(23) when it concluded that BDC
20 20.10.40 does not apply to Recreational Facilities. ORS 197.835(9)(a)(D). First,
21 according to petitioner, the city council’s interpretation of BDC 20.10.40 as
22 simply not applying to Recreational Facilities is inconsistent with the express

1 language of the provision, which requires “uses” to be subject to subsections 1
2 and 2. Subsection 1 is the enclosed structure requirement and specifically
3 exempts only “outside play areas for child care and educational facilities, transit
4 centers.” The uses described in subsection 2 as possessing a limited exemption
5 from the enclosed structure requirement are outdoor storage and sales uses. As
6 petitioner points out, all of the uses described in BDC 20.40.10(1) involve an
7 outdoor component, but none involve outdoor storage or sales. As petitioner also
8 points out, if BDC 20.10.40 intended to exempt Recreational Facilities from the
9 enclosed structure requirement, it could have done so by including it in the list of
10 exempted uses in subsection 1.

11 We are required to affirm a local governing body’s interpretation of its own
12 land use regulations if the interpretation is not inconsistent with the express
13 language, purpose, or policy of the comprehensive plan or land use regulations.
14 ORS 197.829(1); *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010)
15 (applying ORS 197.829(1) standard); *Gage v. City of Portland*, 28 Or LUBA 307
16 (1994), *aff’d*, 133 Or App 346, 891 P2d 1331 (1995) (LUBA is required to afford
17 deference under ORS 197.829 to local interpretations of local comprehensive
18 plans and land use regulations only when those interpretations are made by the
19 local governing body). We agree with petitioner that the city council’s
20 interpretation of BDC 20.10.40(1)’s enclosed structure requirement as
21 inapplicable to Recreational Facilities is inconsistent with the express language
22 of the provision. BDC 20.10.40(1) specifically exempts from the enclosed

1 structure requirement certain uses that do not involve outdoor sales and storage,
2 while BDC 20.10.40(2) exempts certain uses that do involve outdoor sales and
3 storage. The city council's interpretation of BDC 20.10.40(1) as only applying to
4 limit outdoor storage and sales is inconsistent with the express language of the
5 provision and omits entirely subsection 1. In addition, the city council's reliance
6 on what it determined is the purpose of BDC 20.10.40 - as only applying to limit
7 outdoor sales and storage activities - is not supported by the other BDC provision
8 that the city council relied on, BDC 20.10.10.4. BDC 20.10.10.4 sets out the
9 purpose of an entirely different commercial zoning district, the General
10 Commercial district, which is to provide "extensive land intensive outdoor
11 storage and/or display of merchandise, equipment or inventory." However,
12 merely because the purpose of the GC district is to provide extensive land and
13 intensive outdoor storage, it does not follow that the only purpose of BDC
14 20.10.40 is to limit outdoor sales and storage to the de minimis amount allowed
15 in BDC 20.10.40(2). The city council improperly construed BDC 20.10.40 when
16 it concluded that it does not apply to Recreational Facilities.

17 Petitioner next challenges the city council's conclusion that intervenor's
18 outdoor pool is "wholly within an enclosed structure." As noted, the city council
19 relied on the first of the two definitions of "structure" in BDC Chapter 90 to
20 conclude that the pool's enclosure by a variety of structures qualified it as
21 "wholly within an enclosed structure." The city adopted and incorporated by
22 reference findings from the staff's July 9, 2019 memorandum that "In the case of

1 the proposal the pool facilities are completely surrounded by retaining walls,
2 exterior building walls, and fences which qualify as structures and wholly enclose
3 the pools, thereby meeting the use restriction.” Record 13, 1832-33. The city
4 justified its reliance on the first definition of “structure” because that definition
5 was in effect when BDC 20.10.40 was first enacted, and because the second
6 definition was enacted as part of an ordinance that related to compliance with the
7 Federal Emergency Management Agency (FEMA)’s requirements to participate
8 in the National Flood Insurance Program. Record 15. Finally, the city relied on
9 the dictionary definitions of “wholly” and “enclosed” to conclude that an outdoor
10 pool that is surrounded by a combination of structures (building walls, retaining
11 wall and fence) satisfies the enclosed structure requirement.

12 Petitioner argues that the city council’s interpretation of the word
13 “structure” that relies on the first definition set out in BDC Chapter 90 improperly
14 construed BDC 20.10.40, and that the city council should have relied on the
15 second definition of structure in BDC Chapter 90, which would require the pool
16 to be enclosed within “[a] walled and roofed building.” Petitioner argues that the
17 city’s interpretation of BDC 20.10.40 is inconsistent with the purpose of the
18 enclosed structure requirement, which petitioner argues is intended to ensure that
19 non-exempted uses are conducted “indoors.” Petition for Review 27.

20 Respondents respond, and we agree, that the city’s interpretation of the
21 enclosed structure requirement by referring to the first definition of “structure” is
22 not inconsistent with the express language of BDC 20.10.40 or with the purpose

1 of the provision. First, we reject petitioner’s argument that the purpose of the
2 enclosed structure requirement is to make non-exempt uses be conducted
3 “indoors.” If the city had intended to require those uses to be conducted indoors,
4 it could or likely would have used the word “indoors” or stated that the uses “shall
5 not be conducted outdoors,” rather than the phrase “wholly within an enclosed
6 structure.” Second, the city’s reliance on the definition of structure that was in
7 effect when the enclosed structure requirement was first enacted was plausible.
8 Third, petitioner’s argument does not address the undisputed fact that the second
9 BDC Chapter 90 definition of “structure” was enacted to ensure that the BDC
10 complied with FEMA requirements for participation in the flood insurance
11 program. Response Brief, App D at 101.⁴ The city council properly interpreted
12 BDC 20.10.40 to allow a pool that is surrounded by a building wall, retaining
13 wall and fencing to meet the enclosed structure requirement.

14 The second assignment of error is denied.

15 **THIRD ASSIGNMENT OF ERROR**

16 The BDC includes Design Guidelines at BDC Chapter 60. BDC 60.05.35.6
17 provides as relevant here:

18 “A. Buildings should be oriented toward and located within close
19 proximity to public streets and public street intersections.
20 * * *

⁴ Respondents request that LUBA take official notice of Ordinance 3563, which adopted the second definition of “structure” that is now in BDC Chapter 90. The motion is granted.

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“ * * * * *

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“D. Primary building entrances should be oriented toward and located in close proximity to public streets and public street intersections. Property size, shape and topographical conditions should also be considered. (Standard 60.05.15.6.E).”⁵

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As noted, the office building is located in the northeast corner of the property,

8

and the athletic facility building is located to the south and west of the office

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building, connected by an enclosed breezeway.⁶ The outdoor pool is located

⁵ Standard BDC 60.05.15.6.E provides:

“Buildings subject to the street frontage standard shall have at least one primary building entrance oriented toward an abutting street or public pedestrian way. Where there is more than one abutting Class 1 Major Pedestrian Route, the primary entrance shall have a reasonably direct pedestrian connection to a minimum of one abutting Class 1 Major Pedestrian Route or shall be oriented to a Class 1 Major Pedestrian Route corner.

“1. A minimum of one primary building entrance shall not be set back more than 20 feet from the abutting public street or public pedestrian way.

“2. Pedestrian connections to street oriented primary building entrances shall not cross vehicular circulation and parking areas.”

There is no dispute that SW Barnes Road and SW Cedar Hills Boulevard are Class 1 Major Pedestrian Routes.

⁶ A building housing a covered parking garage and indoor tennis courts is located directly to the west of the office building. Record 662.

1 south of the athletic facility building and a large surface parking area is located
2 west of the athletic facility building.

3 The entrance to the office building is proposed at the northeast corner of
4 the property, at the corner of SW Barnes Road and SW Cedar Hills Boulevard.
5 The entrance to the athletic facility building is located on the west side of the
6 building, opening to the surface parking lot.

7 In its third assignment of error, we understand petitioner to argue that the
8 city council's decision that BDC 60.05.35.6(A) and (D) were met improperly
9 construes those provisions. ORS 197.835(9)(a)(D). According to petitioner, the
10 athletic facility is the main component of the development, and the location of
11 the entrance to the athletic facility fails to satisfy the requirement in BDC
12 60.05.35.6(D) that the entrance be "oriented toward and located in close
13 proximity to public streets and public street intersections," because it is located
14 on the opposite side of the property from SW Cedar Hills Boulevard and SW
15 Barnes Road and is oriented towards the parking lot. Petitioner also argues that
16 even if BDC 60.05.35.6(D) allows more than one "[p]rimary building entrance,"
17 for example, one primary entrance for the office building and a primary entrance
18 for the athletic facility, and even if the primary entrance to the office building
19 satisfies the entrance orientation and proximity guidelines for that building, the
20 city council's decision that the office building entrance is a primary entrance for
21 the athletic building is not supported by any evidence in the record. Finally,
22 petitioner argues that the city's decision that the athletic facility building

1 complies with BDC 60.05.35.6(A)'s guidance that "[b]uildings be oriented
2 toward and located within close proximity to public streets and public street
3 intersections" improperly construes that provision.

4 Respondents respond that the purpose of the Design Guidelines is "to allow
5 more flexibility and originality" than the safe-harbor Design Standards to which
6 they correspond, and "to recognize unique circumstances where corresponding
7 standards are found to be unnecessary or undesirable."⁷ Response Brief 37; BDC

⁷ BDC 40.20.05 provides:

"The purpose of Design Review is to promote Beaverton's commitment to the community's appearance, quality pedestrian environment, and aesthetic quality. It is intended that monotonous, drab, unsightly, dreary and inharmonious development will be discouraged. Design Review is also intended to conserve the City's natural amenities and visual character by ensuring that proposals are properly related to their sites and to their surroundings by encouraging compatible and complementary development. To achieve this purpose, the Design Review process is divided into two major components: Design Standards and Design Guidelines. Both standards and guidelines implement Design Principles, which are more general statements that guide development of the built environment. The Design Standards are intended to provide a 'safe harbor' approach to designing a project. Depending on the design thresholds, designing a project to the standards would result in an administrative review process. However, the applicant may elect to bypass design review under the Design Standards and go straight to Design Review under the Design Guidelines, where review is subject to a public hearing at the applicant's option.

"An applicant for Design Review approval can address design review requirements through a combination of satisfying certain

1 40.20.05. Respondents point to the use the word “should” in BDC
2 60.05.35(6)(A), and argue that use of the word “should” also signifies the city’s
3 intent to provide flexibility in design. Respondents argue that the city’s findings
4 explain why the city found that the project meets BDC 60.05.35.6(A) and (D).

5 We agree with respondents. The city found that the project includes two
6 primary building entrances, one primary entrance to the office building and one
7 primary entrance to the athletic facility. The city found that the development
8 complies with BDC 60.05.35.6(A) and (D), because the primary entrance to the
9 office building is oriented toward and in close proximity to the intersection of
10 SW Barnes Road and SW Cedar Hills Boulevard, and the primary entrance to the
11 athletic facility is “in close proximity to” the public streets and connected to the

Design Standards, and in instances where it elects not to utilize Design Standards, satisfy applicable Design Guidelines. In such a case, the public hearing and decision will focus on whether or not the project satisfies the requirements of the applicable Design Guidelines only.

“Because the Design Standards are a ‘safe harbor,’ there is no penalty for not meeting the Design Standards. Rather, the public hearing process would be required to consider the project by relying solely on the Design Guidelines which correspond to the Design Standards but are intended to allow more flexibility and originality. Design Guidelines are also intended to recognize unique circumstances where corresponding standards are found to be unnecessary or undesirable. Where Design Guidelines apply, the project proponent will simply be required to demonstrate how the project meets these Guidelines at a public hearing. The decision-making authority must make findings how the guidelines are met or if they apply to the proposal.”

1 public streets with multiple pedestrian connections, including a promenade with
2 overhead lighting. Record 16-17. The city found that the triangular shape of the
3 property was a “property size, shape and * * * condition[]” that the city could
4 consider when determining building orientation and front entrance orientation of
5 the athletic facility. Record 17. The city also found that the location of the high
6 speed on-ramp to US Highway 26, which is situated between SW Cedar Hills
7 Boulevard and the property and hinders access from the south half of the property
8 to SW Cedar Hills Boulevard, and the property’s size and shape supported
9 intervenor’s choice to cluster the buildings toward the northeast corner of the
10 property and provide a primary entrance to the athletic facility on the opposite
11 side of the property from the US Highway 26 on-ramp. Petitioner’s arguments do
12 not address these bases for determining that the project complies with the Design
13 Guidelines, or otherwise explain why the city improperly construed the Design
14 Guidelines.

15 The third assignment of error is denied.

16 The city’s decision is affirmed.