

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

SAFE STREETS ROSEBURG,  
*Petitioner,*

vs.

CITY OF ROSEBURG,  
*Respondent,*

and

WINCO FOODS, LLC,  
*Intervenor-Respondent.*

LUBA No. 2021-071

FINAL OPINION  
AND ORDER

Appeal from City of Roseburg.

Charles W. Woodward IV filed the petition for review and reply brief and argued on behalf of petitioner.

No appearance by City of Roseburg.

Kelly S. Hossaini filed the response brief and argued on behalf of intervenor-respondent. Also on the brief was Miller Nash LLP.

RYAN, Board Member; RUDD, Board Member, participated in the decision.

ZAMUDIO, Board Chair, did not participate in the decision.

AFFIRMED

11/29/2021

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

Opinion by Ryan.

**NATURE OF THE DECISION**

Petitioner appeals a city council decision approving site plan review for a grocery store.

**MOTION TO INTERVENE**

WinCo Foods, LLC (intervenor), the applicant below, moves to intervene on the side of the city. The motion is unopposed, and it is granted.

**FACTS**

The subject property is approximately 9.45 acres, located south of the intersection of NW Stewart Parkway and NW Mercy Drive, and zoned General Commercial. It is developed with an unoccupied building which was formerly operated as a department store. Intervenor applied for site plan review to demolish the existing building, construct a new building, reconfigure the parking lot, and install new landscaping and related site improvements. On April 5, 2021, the planning commission held a public hearing on the application. On May 3, 2021, the planning commission deliberated and voted to tentatively approve the application. On May 17, 2021, the planning commission adopted findings approving the application. On June 1, 2021, petitioner appealed the planning commission's decision to the city council. On June 21, 2021, the city council held a public hearing on the appeal and, at the conclusion, voted to affirm the planning commission's decision.

This appeal followed.

1     **ASSIGNMENT OF ERROR**

2             Roseburg Municipal Code (RMC) 12.06.030(W)(3), one of the criteria for  
3     site plan review, provides:

4             “Each property in all Zoning Districts being newly developed or  
5             redeveloped \* \* \* shall provide internal sidewalks and walkways,  
6             subject to the requirements and exceptions set forth in this Section.

7             “a.    Each property subject to the provisions of this Section shall  
8                    provide pedestrian walks at or around the building of  
9                    sufficient extent to provide safe and convenient pedestrian  
10                   passage commensurate with the character of the development  
11                   and the nature of the intended use of the building.

12            “b.    Each such property shall provide pedestrian walkways,  
13                    crosswalks and other pedestrian facilities to allow safe and  
14                    convenient pedestrian access throughout the site, particularly  
15                    to routes between main building entrances and adjacent  
16                    pedestrian destinations, including uses on adjoining  
17                    properties, public sidewalks, and transit stops. Where the  
18                    nature of the development is such that several buildings  
19                    utilize a common internal pedestrian walkway system, such  
20                    internal walkway system shall extend to the street sidewalk  
21                    and shall serve to meet the requirements of this Section.”

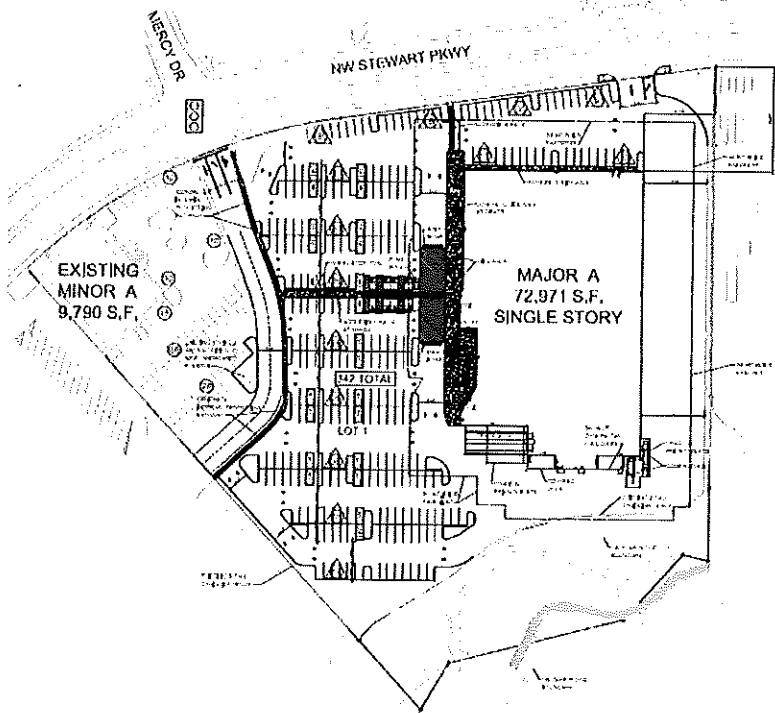
22     As explained below, the city council concluded that intervenor’s site plan  
23     complies with RMC 12.06.030(W)(3)(a) and (b). In two subassignments of error,  
24     petitioner argues that (1) the city council misconstrued those standards in  
25     concluding that intervenor’s site plan complies with them and (2) the city  
26     council’s findings of compliance with those standards are inadequate and not  
27     supported by substantial evidence.

1           **A.    Background**

2           Intervenor's site plan depicts the new building on the eastern portion of the  
3 subject property, with the front of the building facing west. The parking lot wraps  
4 around the front and north sides of the building. The site plan depicts five  
5 pedestrian pathways: one along the front, west-facing side of the building; one  
6 along the north side of the building; one extending from the northwest corner of  
7 the building north to NW Stewart Parkway; one extending from the front of the  
8 building west through the parking lot; and one along the west side of the parking  
9 lot, connecting to the intersection of NW Stewart Parkway and NW Mercy Drive  
10 in the north and to the neighboring property in the south.<sup>1</sup> Many parking stalls  
11 are not served directly by a pedestrian pathway, and there are no pedestrian  
12 pathways on the east and south sides of the building.

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<sup>1</sup> The pedestrian pathways are shown in heavy black on the site plan.



Record 98.

### B. First Subassignment of Error

In the first subassignment of error, petitioner argues that the city council misconstrued RMC 12.06.030(W)(3)(a) and (b) in concluding that intervenor's site plan complies with those standards.

#### 1. RMC 12.06.030(W)(3)(a)

RMC 12.06.030(W)(3)(a) requires that site plans "provide pedestrian walks at or around the building of sufficient extent to provide safe and convenient pedestrian passage commensurate with the character of the development and the nature of the intended use of the building." The purpose of RMC 12.06.030(W) is, in relevant part, to "provid[e] walkways and sidewalks for pedestrian access

1 from and within urban developments.” RMC 12.06.030(W)(1).<sup>2</sup> The city council  
2 concluded that intervenor’s site plan complies with RMC 12.06.030(W)(3)(a):

3 “RMC 12.06.030.W.3.a requires safe and convenient pedestrian  
4 walks ‘at or around the building.’ As provided on the site plans and  
5 in [intervenor’s] February 22, 2021, and April 12, 2021, submittals,  
6 there is a pedestrian facility along the front and north sides of the  
7 building. These are the two sides of the building where customers  
8 would be expected or allowed. These facilities include concrete  
9 sidewalks, speed bumps, and a large field of cross-walk striping  
10 between the speed bumps to allow for safe pedestrian passage. The  
11 south side of the building does not contain a sidewalk, because it is  
12 where truck docks and trash compactors are. These are not safe areas  
13 for customers or other members of the public, and so pedestrian  
14 passage should not invite them there. Similarly, the east side of the  
15 building is the back of the store where, again, customers and the  
16 public would not be expected nor allowed. The provided public  
17 facilities will, then, provide sufficient pedestrian passage at and  
18 around the building to ensure the safety and convenience of  
19 pedestrians commensurate with the character of the development  
20 and the nature of the building, i.e., a grocery store. This criterion  
21 does not require anything more.

22 “In [petitioner’s] April 19, 2021, letter, [petitioner] interprets the  
23 word ‘at’ in the phrase ‘at or around the building’ to mean between  
24 the store and the parking lot, and argues that the use of the word ‘at’  
25 requires something more than has been provided. If the Code had  
26 meant what [petitioner] contends, it would have used a different  
27 word, such as ‘between.’ A pedestrian facility ‘at \* \* \* a building’  
28 pretty clearly means at the building itself. Therefore, [petitioner] is

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<sup>2</sup> RMC 12.06.030(W)(1) provides, “The objective of this Section is to accomplish the construction of an efficient, connected, and safe system of pedestrian circulation, coordinated within and between various urban developments, by providing walkways and sidewalks for pedestrian access from and within urban developments and via extensions to street sidewalks.”

1 incorrect.” Record 211.<sup>3</sup>

2 In the first subassignment of error, petitioner argues that the city council  
3 misconstrued RMC 12.06.030(W)(3)(a) by concluding that that standard does not  
4 require pedestrian pathways on the east side of the building, which is the back of  
5 the building, or the south side of the building, which is where truck docks and  
6 trash compactors are located. By interpreting the standard as requiring pedestrian  
7 pathways only in areas where pedestrians are expected or allowed, petitioner  
8 argues that the city council inserted into the standard what has been omitted, in  
9 contravention of ORS 174.010.<sup>4</sup>

10 Petitioner also argues that the city council misconstrued RMC  
11 12.06.030(W)(3)(a) by concluding that that standard does not require each  
12 parking stall to be served directly by a pedestrian pathway. Petitioner argues that  
13 the city council interpreted the phrase “of sufficient extent to provide safe and  
14 convenient pedestrian passage” to require pedestrian pathways within an

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<sup>3</sup> This quote is from intervenor’s April 22, 2021 submittal. However, the planning commission specifically incorporated intervenor’s submittals into its findings, and the city council specifically incorporated the planning commission’s findings into its own. Record 2, 57-58.

<sup>4</sup> ORS 174.010 provides:

“In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.”



1 “undefined proximity” to the building. Petition for Review 9. In addition,  
2 petitioner points out that the standard requires that the pedestrian pathways be  
3 commensurate not only with the “nature of the intended use of the building,” *i.e.*,  
4 the grocery store itself, but with the “character of the development” as well,  
5 which includes the parking lot. Because the proposed pedestrian pathways do not  
6 directly serve each parking stall, petitioner argues that they are not commensurate  
7 with the character of the development. Thus, petitioner argues that the city  
8 council inserted into the standard what has been omitted and omitted from the  
9 standard what has been inserted. Petitioner further argues that its interpretation  
10 of RMC 12.06.030(W)(3)(a) is consistent with the purpose of the provision and  
11 that the city council’s interpretation is not.

12 **i. Waiver**

13 Intervenor first argues that the issues raised in the first subassignment of  
14 error were not raised below and are therefore waived under ORS  
15 195.195(3)(c)(B) and ORS 197.835(3).<sup>5</sup> Petitioner cites Record 50, 227, 268 to

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<sup>5</sup> ORS 197.195(3)(c)(B) provides that written notice of limited land use decisions must “[s]tate that issues which may provide the basis for an appeal to [LUBA] shall be raised in writing prior to the expiration of the comment period. Issues shall be raised with sufficient specificity to enable the decision maker to respond to the issue[.]” ORS 197.835(3) provides, “Issues shall be limited to those raised by any participant before the local hearings body as provided by ORS 197.195 or 197.763, whichever is applicable.”

We note that intervenor cites ORS 197.763(1) in support of its waiver argument in the response brief, which is the analog to ORS 197.195(3)(c)(B) for

1 269, and 373 to 374 in support of its response that it argued below that RMC  
2 12.06.030(W)(3)(a) requires each parking stall to be served directly by a  
3 pedestrian pathway. Petitioner contends that those arguments were sufficient to  
4 allow it to argue to LUBA on appeal that the city council's interpretation of the  
5 standard to require fewer pedestrian pathways misconstrues the applicable law.

6 We have reviewed the cited record pages, and we agree with intervenor  
7 that petitioner's argument that RMC 12.06.030(W)(3)(a) requires pedestrian  
8 pathways on the east and the south sides of the building was not raised below.  
9 Petitioner argued below that RMC 12.06.030(W)(3)(a) requires *each parking*  
10 *stall* to be served directly by a pedestrian pathway. Record 50, 227, 268-69, 373-  
11 74. There are no parking stalls on the east or south sides of the building, and  
12 petitioner did not argue that RMC 12.06.030(W)(3)(a) requires pedestrian  
13 pathways in those areas with sufficient specificity to afford the city council and  
14 intervenor an adequate opportunity to respond to that issue. *See Boldt v.*  
15 *Clackamas County*, 21 Or LUBA 40, 46, *aff'd*, 107 Or App 619, 813 P2d 1078

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land use decisions. Response Brief 5. However, elsewhere in the response brief, intervenor argues that the challenged decision is a limited land use decision. Response Brief 1. Petitioner does not dispute that the challenged decision is a limited land use decision, and we conclude that it is. *See* ORS 197.015(12)(a)(B) (defining "limited land use decision," in part, as "[t]he approval or denial of an application based on discretionary standards designed to regulate the physical characteristics of a use permitted outright, including but not limited to *site review* and design review" (emphasis added)). Accordingly, ORS 197.195(3)(c)(B) applies.

1 (1991) (“The purpose of [ORS 197.195(3)(c)(B)] is to prevent unfair surprise.”).

2 Accordingly, that issue is waived.

3 However, petitioner’s argument that RMC 12.06.030(W)(3)(a) requires  
4 each parking stall to be served directly by a pedestrian pathway was preserved.  
5 Petitioner’s arguments below afforded the city and intervenor an opportunity to  
6 respond to that issue. Accordingly, we proceed to address petitioner’s arguments  
7 regarding that issue.

8 **ii. Merits**

9 LUBA must affirm a governing body’s interpretation of its own land use  
10 regulation if the interpretation is not inconsistent with the regulation’s express  
11 language, purpose, or policy. ORS 197.829(1).<sup>6</sup> The test under ORS 197.829(1)

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<sup>6</sup> ORS 197.829(1) provides:

“[LUBA] 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:

“(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.”

1 is not whether the interpretation is correct, or the best or superior interpretation,  
2 but whether the governing body's interpretation is "plausible," given its text and  
3 context. *Siporen v. City of Medford*, 349 Or 247, 243 P3d 776 (2010).

4 We agree with intervenor that petitioner has not demonstrated that the city  
5 council's interpretation is inconsistent with the express language of RMC  
6 12.06.030(W)(3)(a) or (b). Petitioner largely mischaracterizes the city council's  
7 decision. The city council did not interpret RMC 12.06.030(W)(3)(a) to require  
8 pedestrian pathways within an "undefined proximity" of the building, nor did it  
9 ignore that that standard requires pedestrian pathways "of sufficient extent to  
10 provide safe and convenient pedestrian passage." Rather, it concluded that the  
11 extent of the pedestrian pathways depicted on intervenor's site plan *is* sufficient  
12 to provide safe and convenient pedestrian passage. The city council did not insert  
13 into the standard what has been omitted or omit from the standard what has been  
14 inserted.

15 In addition, the city council interpreted the express language of RMC  
16 12.06.030(W)(3)(a) as requiring only that pedestrian pathways *around the*  
17 *building itself* be "commensurate with the character of the development and the  
18 nature of the intended use of the building." The city council interpreted RMC  
19 12.06.030(W)(3)(b) as establishing the requirements for pedestrian facilities  
20 throughout the site, including the parking lot. That interpretation is consistent  
21 with the express language of the standards, since RMC 12.06.030(W)(3)(a)  
22 requires pedestrian pathways "at or around the building," while RMC

1 12.06.030(W)(3)(b) requires pedestrian facilities “throughout the site.” The city  
2 council’s interpretation gives effect to all provisions, consistent with ORS  
3 174.010.

4 In addition, a local governing body’s interpretation of a provision is  
5 implausible if it is *inconsistent* with the purpose of that provision. Petitioner has  
6 not demonstrated that the city council’s interpretation of RMC  
7 12.06.030(W)(3)(a) is inconsistent with the purpose statement at RMC  
8 12.06.030(W)(1). That petitioner’s interpretation may also be consistent with that  
9 purpose statement does not mean that the city council’s interpretation is not  
10 required to be affirmed.

11 Petitioner has not demonstrated that the city council’s interpretation of  
12 RMC 12.06.030(W)(3)(a) is inconsistent with the express language of that  
13 standard, and we defer to it.

14 **2. RMC 12.06.030(W)(3)(b)**

15 Again, RMC 12.06.030(W)(3)(b) requires that site plans “provide  
16 pedestrian walkways, crosswalks and other pedestrian facilities to allow safe and  
17 convenient pedestrian access throughout the site, particularly to routes between  
18 main building entrances and adjacent pedestrian destinations, including uses on  
19 adjoining properties, public sidewalks, and transit stops.” As explained above,  
20 intervenor’s site plan depicts five pedestrian pathways: one along the front, west-  
21 facing side of the building; one along the north side of the building; one extending  
22 from the northwest corner of the building north to NW Stewart Parkway; one

1 extending from the front of the building west through the parking lot; and one  
2 along the west side of the parking lot, connecting to the intersection of NW  
3 Stewart Parkway and NW Mercy Drive in the north and to the neighboring  
4 property in the south. The city council concluded that intervenor's site plan  
5 complies with RMC 12.06.030(W)(3)(b):

6 "[RMC 12.06.030.W.3.b] requires pedestrian facilities 'throughout  
7 the site,' as [petitioner] notes, but then the criterion goes on to  
8 provide specificity in that regard. The text of the criterion requires  
9 pedestrian routes between main building entrances and adjacent  
10 pedestrian destinations. The text also states that pedestrian  
11 destinations include uses on adjoining public properties, public  
12 sidewalks, and transit stops. [Intervenor's] memos, the site plan, and  
13 the April 5, 2021, staff report (the 'April Staff Report') demonstrate  
14 that all of those routes have been provided and have been provided  
15 safely. This criterion does not require anything more." Record 212.<sup>7</sup>

16 Petitioner argues that the city council misconstrued RMC  
17 12.06.030(W)(3)(b) by failing to require each parking stall to be served directly  
18 by a pedestrian pathway. Petitioner argues that the city council's interpretation  
19 fails to give effect to the terms "throughout" and "particularly." Petitioner cites  
20 the dictionary definition of "throughout" as "in or to every part" and argues that,  
21 because the pedestrian pathways depicted on intervenor's site plan do not directly  
22 serve each parking stall, they do not allow safe and convenient pedestrian access  
23 "throughout" the site. Petition for Review 14. Petitioner also cites the dictionary  
24 definition of "particularly" and argues that, although RMC 12.06.030(W)(3)(b)

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<sup>7</sup> This quote is also from intervenor's April 22, 2021 submittal. *See* n 3.

1 specifically mentions only routes between main building entrances and adjoining  
2 properties and public sidewalks, it does not automatically follow that those routes  
3 are by themselves sufficient to comply with the standard. Petition for Review 15.

4 Intervenor responds, and we agree, that the city council's interpretation of  
5 RMC 12.06.030(W)(3)(b) does not fail to give effect to the term "throughout."  
6 Rather, the city council interpreted that term in context. RMC  
7 12.06.030(W)(3)(b) does not necessarily require pedestrian walkways  
8 "throughout the site." Instead, it requires "pedestrian walkways, crosswalks and  
9 other pedestrian facilities *to allow safe and convenient pedestrian access*  
10 *throughout the site.*" (Emphasis added.) As intervenor explains, the city council's  
11 findings (1) identify the pedestrian facilities depicted on intervenor's site plan  
12 and (2) explain how shoppers use grocery store parking lots and how the design  
13 of the proposed parking lot minimizes shoppers attempting to maneuver heavy  
14 grocery carts full of groceries between vehicles. Response Brief 22-23 (citing  
15 Record 250-52). Relying on those facilities, the city council concluded that  
16 intervenor's site plan allows safe and convenient pedestrian access throughout  
17 the site, and therefore complies with RMC 12.06.030(W)(3)(b), notwithstanding  
18 that each parking stall is not served directly by a pedestrian pathway. The city  
19 council's interpretation gives effect to the term "throughout."

20 We also agree with intervenor that the city council's interpretation of RMC  
21 12.06.030(W)(3)(b) does not fail to give effect to the term "particularly." As the  
22 findings indicate, while the city council relied in part on the fact that intervenor's

1 site plan depicts pedestrian pathways between the building, NW Stewart  
2 Parkway, and the property to the south, the city council also relied on other  
3 pedestrian facilities such as speed bumps, safety-marked crosswalks, and “no  
4 parking” designations within the parking lot to conclude that intervenor’s site  
5 plan allows safe and convenient pedestrian access throughout the site. Record  
6 250-52. The city council’s interpretation gives effect to the term “particularly.”

7 Finally, while petitioner’s interpretation of RMC 12.06.030(W)(3)(b) may  
8 also be consistent with the purpose statement at RMC 12.06.030(W)(1),  
9 petitioner has not demonstrated that the city council’s interpretation is  
10 *inconsistent* with that purpose.

11 Petitioner has not demonstrated that the city council’s interpretation of  
12 RMC 12.06.030(W)(3)(b) is inconsistent with the text and context of that  
13 standard, and we defer to it.

14 The first subassignment of error is denied.

15 **C. Second Subassignment of Error**

16 In the second subassignment of error, petitioner argues that the city  
17 council’s findings that intervenor’s site plan complies with RMC  
18 12.06.030(W)(3)(a) and (b) are inadequate and not supported by substantial  
19 evidence. Findings must identify the relevant criteria, identify the evidence relied  
20 upon, and explain why the evidence leads to the conclusion that the criteria are  
21 met. *Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992) (citing *Sunnyside*  
22 *Neighborhood v. Clackamas Co. Comm.*, 280 Or 3, 20-21, 569 P2d 1063



1 (1977)).<sup>8</sup> We will reverse or remand a limited land use decision that is not  
2 supported by substantial evidence. ORS 197.828(2)(a). Substantial evidence is  
3 evidence a reasonable person would rely upon to reach a conclusion. *Dodd v.*  
4 *Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993) (citing ORS  
5 183.482(8)(c); *Younger v. City of Portland*, 305 Or 346, 351-52, 752 P2d 262  
6 (1988)).

7 Intervenor responds, and we agree, that the arguments in petitioner's  
8 second subassignment of error are largely derivative of the arguments in its first  
9 subassignment of error. As explained above, we conclude that the city council  
10 did not misconstrue RMC 12.06.030(W)(3)(a) and (b) by concluding that those  
11 standards do not require each parking stall to be served directly by a pedestrian  
12 pathway. Petitioner does not develop any argument that the city council's  
13 findings are inadequate to explain why intervenor's site plan complies with RMC  
14 12.06.030(W)(3)(a) and (b), as interpreted by the city council. Moreover, even if  
15 petitioner had developed such an argument, we agree with intervenor that the city  
16 council's findings are more than adequate to identify the pedestrian facilities  
17 depicted on intervenor's site plan and explain why they will provide safe and  
18 convenient pedestrian access, as required by RMC 12.06.030(W)(3)(a) and (b).  
19 Petitioner does not identify any evidence in the record that the pedestrian

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<sup>8</sup> We assume for purposes of this opinion that the requirement for adequate findings articulated in *Sunnyside Neighborhood* applies to limited land use decisions.

1 facilities depicted on intervenor's site plan will not provide safe and convenient  
2 pedestrian access.

3 The second subassignment of error is denied.

4 The assignment of error is denied.

5 The city's decision is affirmed.