BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DAVID DODDS
and SAVE OUR SUNSET PARK,
Petitioners,

vs.

CITY OF WEST LINN,
Respondent,

and

WEST LINN-WILSONVILLE SCHOOL DISTRICT,
Intervenor-Respondent.

LUBA No. 2016-071

FINAL OPINION
AND ORDER

Appeal from City of West Linn.

Peggy Hennessy, Portland, filed a petition for review and argued on behalf of petitioners. With her on the brief was Reeves, Kahn, Hennessy & Elkins.

Timothy V. Ramis, Lake Oswego, filed a joint response brief and argued on behalf of respondent. With him on the brief were Jordan Ramis PC and Mersereau Shannon LLP.

Peter R. Mersereau, Portland, filed a joint response brief. Thomas W. McPherson argued on behalf of intervenor-respondent. With him on the brief were Mersereau Shannon LLP and Jordan Ramis PC.

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

REMANDED 01/12/2017

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioners appeal a decision by the city approving a conditional use permit, design review, and variances to site an elementary school and associated facilities.

REPLY BRIEF

Petitioners move for permission to file a reply brief to respond to new matters raised in the response brief and to file an over-length reply brief. There is no opposition to the reply brief. Accordingly, the reply brief is allowed.

FACTS

In 2010, voters in the city approved the transfer of park land in the city to intervenor West Linn-Wilsonville School District (intervenor). Sometime after, 1.6 acres of city-owned park land adjacent to Sunset Primary School was transferred to intervenor. In 2015, intervenor applied for a conditional use permit, design review and two variances in order to construct a new school building and related facilities, including new stormwater facilities, on approximately 6.19 acres of property.

The existing school building is located in approximately the center of the property, and a small parking lot is located to the south of the existing school. Record 1672. Intervenor proposed to construct a new, smaller school to the east of the existing school. After construction is completed, the existing school will be demolished and the ground converted into a large playing field. The existing

parking lot will be reconfigured and expanded in size on the western boundary of the property. Forty bicycle parking spaces are proposed, with twenty located within 50 feet of the front entrance and the other twenty located approximately 130 feet west of the front entrance.

A stormwater infiltration pond is proposed in the southeast corner of the property, at the property's lowest elevation. The southeast corner of the property is sloped and residential development is located downslope from the property. A stand of mature Douglas fir trees is also located in the southeast corner of the property and construction of the pond would remove some of those trees. Of the 133 trees on the property, intervenor originally proposed to remove 52 trees to accommodate the new facilities, including the stormwater infiltration pond.

The planning commission approved the applications, and petitioners appealed the decision to the city council. The city council approved the application with conditions. This appeal followed.

FIRST AND SECOND ASSIGNMENTS OF ERROR

The proposed stormwater infiltration pond is the central issue in petitioners' first and second assignments of error, which challenge the city's findings regarding four related provisions of the West Linn Community Development Code (CDC). First, CDC 60.070(A)(6) requires the city to find that the applicable requirements of CDC 55.130 are met. Second, CDC 55.130

in turn requires submission of a grading and drainage plan and CDC 55.130(B) further specifically provides:

> "A registered civil engineer shall prepare a plan and statement that shall be supported by factual data that clearly shows that there will be no adverse impacts from increased intensity of runoff off site, or the plan and statement shall identify all off-site impacts and measures to mitigate those impacts. The plan and statement shall, at a minimum, determine the off-site impacts from a 10-year storm."

Third, CDC 92.010(E) includes standards for public improvements to be installed at the developer's expense, including as relevant here:

> "Surface drainage and storm sewer system. A registered civil engineer shall prepare a plan and statement which shall be supported by factual data that clearly shows that there will be no adverse impacts from increased intensity of runoff off-site of a 100-year storm, or the plan and statement shall identify all off-site impacts and measures to mitigate those impacts commensurate to the particular land use application. Mitigation measures shall maintain pre-existing levels and meet buildout volumes, and meet planning and engineering requirements." (underlining in original).

Finally, CDC 60.070(A)(2) requires the city to find that "the characteristics of the site are suitable for the proposed use considering size, shape, location, topography, and natural features."

In order to satisfy CDC 55.130(B) and CDC 92.010(E), and to establish under CDC 60.070(A)(2) that the topography and natural features of the site are suitable for the proposed stormwater facility, intervenor submitted a drainage and grading plan prepared by registered engineers. Record 1758. The submitted plan proposed a stormwater infiltration pond in the southeast corner

of the property, at the property's lowest elevation. As noted, a stand of mature Douglas fir trees is also located in the southeast corner of the property and construction of the pond would remove some of those trees. The southeast corner of the property is sloped and residential development is located downslope from the property.

The plan proposed that runoff from the property would be absorbed through the soils under the pond and through plantings in and around the pond. A layer of topsoil would be added to the subsurface of the pond area. Excess runoff would be detained in the pond, treated, and metered out incrementally through a flow control device into a new 12-inch storm sewer extension in Bittner Street, a north-south street that adjoins the southeast corner of the property. The new 12-inch storm sewer would connect to an existing east-west storm sewer at the intersection of Bittner and Long Streets, to the south of the property.[1] The submitted plan proposed that metered runoff would maintain peak flows at pre-development levels, and intervenor's engineer submitted data that supported that runoff from the new development would be less than pre-existing runoff levels.

During the proceedings before the planning commission, petitioners and others raised concerns that runoff seeping through the bottom of the pond into

[1] Runoff from the property currently drains to an existing storm sewer in Exeter Street that connects to Long Street, to the south of the property. Record 1680.

the subsoil could increase soil saturation and endanger Douglas fir tree roots and increase the risk of flooding and landslides in the residential areas downslope from the pond. On appeal of the planning commission's decision approving the conditional use permit, petitioners reiterated their argument to the city council.

The city council found that "the proposed design to retain and infiltrate stormwater into the ground in a single pond located in a vulnerable area of the property would lead to oversaturation of soils and offsite runoff with potential adverse impacts to significant trees, offsite city property, and private property in the vicinity downgradient." Record 31. The findings conclude that the application therefore failed to satisfy CDC 60.070(A)(2), CDC 60.070(A)(3), CDC 60.070(A)(6), CDC 55.130(B) and CDC 92.010(E).[2]

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[2] The findings provide:

> "A majority of the Council found that certain aspects of the stormwater management system did not satisfy the following code criteria identified by the Appellant: CDC 60.070.A(2); CDC 60.070.A(3); CDC 60.070.A(6)/CDC 55.130.B; and, CDC 92.010.E. Specifically, the proposed design to retain and infiltrate stormwater into the ground in a single pond located in a vulnerable area of the property would lead to oversaturation of soils and offsite runoff with potential adverse impacts to significant trees, offsite city property, and private property in the vicinity downgradient. However, with the additional conditions stated below, the Council finds that these code criteria can be reasonably satisfied and the solutions to the identified problems are possible, likely and reasonably likely to succeed:

However, the city concluded that with changes to the design of the pond, the unmet CDC criteria "can be reasonably satisfied * * *." Record 31. In its final decision, the city imposed conditions of approval that require intervenor to submit to the city engineer for review and approval a modification of the submitted grading and drainage plan to (1) require the infiltration pond to be lined with an impervious liner; (2) shrink the size of the pond to an unspecified size; and (3) preserve at least seven additional Douglas fir trees. The city council concluded that even though the application did not satisfy CDC 60.070(A)(2), CDC 60.070(A)(3), CDC 60.070(A)(6), CDC 55.130(B) and CDC 92.010(E), the city could approve the application as conditioned.

> "Condition A. Reconfigure and reduce the size of the proposed stormwater detention facility to provide for an impervious lined stormwater detention facility and to preserve a minimum of 7 trees that were originally proposed for removal to accommodate the stormwater detention facility.
>
> "Condition B. The stormwater discharge offsite from the modified detention facility must achieve or be less than the reduced discharge rates specified in the approved CUP application.
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> "Condition C. The Applicant shall submit to the City Engineer for review and approval, under adopted engineering standards, an amended stormwater management plan incorporating the modified detention facility, supported by the calculations required by the City's engineering standards and signed by a registered engineer." Record 31 (emphasis omitted).

According to petitioners, the city council improperly construed CDC 60.070(A)(2), CDC 60.070(A)(6), CDC 55.130(B), and CDC 92.010(E) by finding that the application, and in particular the submitted drainage and grading plan, did not meet those criteria, but then relying on a future modification of the submitted drainage and grading plan that is not part of the record to approve the application.[3] According to petitioners, the city council is required to determine, based on the evidentiary record and the drainage and grading plan before it, whether the *submitted* drainage and grading plan complies with the approval criteria. Petitioners also argue there is no authority in the CDC or in any LUBA decisions that allows the city effectively to defer a finding of compliance with those applicable approval criteria to a non-public proceeding.

Intervenor and the city (together, respondents) respond that the city found that although the drainage and grading plan as submitted did not meet the applicable criteria, it is feasible for intervenor to comply with the unmet criteria by submitting a modified drainage and grading plan to the city engineer for review and approval in a non-public proceeding. According to respondents,

[3] Petitioners' first assignment of error challenges the city's decision regarding CDC 60.070(A)(6) and CDC 55.130(B) and CDC 92.010(E). Petitioners' second assignment of error challenges the city's decision regarding CDC 60.070(A)(2).

the city permissibly followed an option articulated in *Rhyne v. Multnomah County*, 23 Or LUBA 442 (1992).[4]

While the city may believe it was merely following the first of the *Rhyne* options, what the city actually did is repeat the same kind of mistake that the Court of Appeals identified in *Gould v. Deschutes County*, 216 Or App 150, 171 P3d 1017 (2007). *Gould* involved the county's decision approving a

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[4] In *Rhyne*, LUBA relied on the Court of Appeals' decision in *Meyer v. City of Portland*, 67 Or App 274, 678 P2d 741, *rev den* 297 Or 82 (1984) to explain:

> "Where the evidence presented during the first stage approval proceedings raises questions concerning whether a particular approval criterion is satisfied, a local government essentially has three options potentially available. First, it may find that although the evidence is conflicting, the evidence nevertheless is sufficient to support a finding that the standard is satisfied or that feasible solutions to identified problems exist, and impose conditions if necessary. Second, if the local government determines there is insufficient evidence to determine the feasibility of compliance with the standard, it could on that basis deny the application. Third, if the local government determines that there is insufficient evidence to determine the feasibility of compliance with the standard, instead of finding the standard is not met, it may defer a determination concerning compliance with the standard to the second stage. In selecting this third option, the local government is not finding all applicable approval standards are complied with, or that it is feasible to do so, as part of the first stage approval (as it does under the first option described above). Therefore, the local government must assure that the second stage approval process to which the decision making is deferred provides the statutorily required notice and hearing, even though the local code may not require such notice and hearing for second stage decisions in other circumstances." 23 Or LUBA at 447-48 (citation and footnotes omitted).

conceptual master plan for a destination resort. The county's code included a requirement that the applicant submit a wildlife mitigation plan that demonstrated that all negative impacts from the development on fish and wildlife be completely mitigated. LUBA affirmed the county's decision that found that even though the applicant had not submitted a wildlife mitigation plan, it was "feasible" to meet that code requirement, and approved the application without the specifics of the required wildlife mitigation plan being known. The Court of Appeals reversed LUBA, and held that the county's decision was improper because it (1) was based on evidence not included in the record since the plan was not a part of the record, and (2) deferred the details and review of that plan to a future negotiation between the applicant and some other interested federal agencies, without any public participation. *Gould*, 216 Or App at 159-60.

In the present case, the city has provided in its code that the applicant must demonstrate that the submitted storm drainage plan "maintain[s] pre-existing levels and meet[s] buildout volumes, and meet[s] planning and engineering requirements." Again, a city determination that the code criteria are met must be supported by a plan that is (1) submitted by a registered engineer and (2) supported by factual data. As we understand what occurred, there is no factual data submitted by a registered engineer or any other evidence in the record that the city council-devised modifications to the submitted and unsatisfactory drainage and grading plan are feasible solutions to

those problems. That is because the city council identified the modifications in its final decision, without allowing either intervenor or any other participant in the proceeding to submit any evidence regarding the modifications. For that reason, the city has not merely deferred completion of the technical details necessary to make the *approved* storm water system work in a way that complies with the standards. *Meyer*, 67 Or App at 281-82 (a city determination that the property could be safely developed and that there were suitable methods of storm water and groundwater disposal was supported by a detailed geotechnical study of the area and extensive testimony from the city's experts, and the city could defer to the city's experts the selection of a particular solution to identified problems). The city instead instructed intervenor and the city engineer to meet in a non-public forum and devise a different storm water plan to meet the standards. That goes beyond working out the technical details necessary to make the approved storm water system work in a way that complies with the standards.

Respondents spend a fair number of pages of the response brief explaining how the modified storm drainage plan will satisfy the requirements in CDC 55.130(B) and CDC 92.010(E) that the plan "maintain[s] pre-existing levels and meet buildout volumes, and meet planning and engineering requirements." However, the city has provided in its code that that determination must be supported by a plan that is (1) submitted by a registered engineer and (2) supported by factual data. In that circumstance, it is not

sufficient for respondents to argue before LUBA that the future, as yet to be reviewed drainage and grading plan will meet the CDC requirements. *Gould*, 216 Or App at 159-60.

The first and second assignments of error are sustained.

THIRD ASSIGNMENT OF ERROR

CDC 60.070(A)(3) requires the city to find that "[t]he granting of the proposal will provide for a facility that is consistent with the overall needs of the community." Petitioners' third assignment of error contains two subassignments of error.

A. Need for Tree Preservation

The city council interpreted the phrase "overall needs of the community" to "include consideration of the community value placed on mature trees located in the vicinity of the proposed stormwater detention facility." Record 32. The city council found that the proposed stormwater facility that required removal of certain Douglas fir trees did not satisfy CDC 60.070(A)(3). The city then imposed conditions of approval that required modification of the stormwater facility in order to preserve at least seven trees in the vicinity of the facility. *See* n 2. In a portion of their third assignment of error, petitioners argue that for the same reasons set out in the first and second assignments of error it was improper for the city to impose conditions of approval that require preservation of trees by reducing the size of the facility. Respondents respond by incorporating their responses to the first and second assignments of error.

In our resolution of the first and second assignments of error, we agreed with petitioners that the city erred in finding that the specific and technical criteria at issue in those assignments of error, which require submission of a drainage and grading plan supported by factual data to show that there will be no adverse impacts from increased runoff, were not met by the submitted drainage and grading plan, but then concluding that feasible solutions to the flaws identified in the drainage and grading plan exist without those solutions being part of the evidentiary record. However, CDC 60.070(A)(3) does not require submission of a drainage and grading plan that meets the city's planning and engineering standards. Rather, it requires the city to find that the proposal is "consistent with the overall needs of the community." Given the subjective language in the criterion, we think the city could agree with the opponents below that more trees should be preserved, and find, as it did here, that the "needs of the community" to preserve more mature Douglas fir trees in the location of the stormwater facility are met by a requirement to preserve at least seven more mature trees, and to impose a condition of approval requiring that the trees be preserved.

B. 2010 Park Land Acquisition

In another portion of the third assignment of error, petitioners argue that the phrase "overall needs of the community" includes the need for the citizens to "be able to rely on local government assurance." Petition for Review 37-38. We understand petitioners to argue that in 2010 the city assured citizens that

the park land that voters approved to be transferred or sold to intervenor would be used to "maximize recreational opportunities while preserving significant trees." Petitioners argue that the proposal fails to maximize recreational opportunities because it fails to preserve most of the former park land as open, recreational space with significant trees, and instead removes most of the trees on the former park land and uses it for stormwater management, a fire lane, a parking lot and a portion of the new school building. Petition for Review 39-40.

Respondents dispute that the city gave assurances that development of the park land would "maximize recreational opportunities," but respond that in any case the site plan demonstrates that intervenor has maximized recreational opportunities. Respondents point out that 1.28 of the 1.6 acres of former park land is preserved in its natural forested condition, that the development uses only .32 acres of the park land for school facilities, and that many of the significant trees on the site are preserved. In addition, the school's playground located adjacent to the former park land will be expanded and include new playground equipment, and some acreage will be preserved in a natural park like setting.

We agree with respondents that the ballot measure that approved the sale or transfer of the park land to intervenor included a non-binding statement that the former park land would "maximize recreational opportunities while preserving significant trees." We also agree with respondents, however, that a

reasonable decision maker could find that intervenor has maximized recreational opportunities with an expanded playground and park like setting, and preserved as many significant trees as possible given development constraints.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Intervenor sought, and the city council approved, variances to CDC 46.070(B), which requires that off-street parking spaces be located not more than 200 feet "from an entryway to the building or use they are required to serve, measured in a straight line from the building," and to CDC 46.150(D), which requires bicycle parking to be located not more than 50 feet from the entrance to the building.[5] The parking lot is located on the western boundary of

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[5] CDC 46.070(B) provides in full:

> "Off-street parking spaces for uses not listed in subsection A of this section shall be located not farther than 200 feet from an entryway to the building or use they are required to serve, measured in a straight line from the building, with the following exceptions:
>
> "1. Shared parking areas for commercial uses which require more than 40 parking spaces may provide for the spaces in excess of the required 40 spaces up to a distance of 300 feet from the entryway to the commercial building or use.
>
> "2. Industrial and manufacturing uses which require in excess of 40 spaces may locate the required spaces in excess of the 40 spaces up to a distance of 300 feet from the entryway to the building.

the property; the new playing field is located to the east of the parking lot in the location of the existing school building that will be demolished; and the new school building is located to the east of the new playing field. To the north behind the new school building is the existing and future playground, and to the east of the playground is a 1.36-acre natural forested area. The parking lot is proposed to be located up to 560 feet from the front entrance of the new building and some of the bicycle parking is proposed to be located up to 130 feet from the front entrance.

CDC 75.020(B) contains the standards for granting a variance. CDC 75.020(B)(1)(a) requires in relevant part that "[t]he variance is the minimum variance necessary to make reasonable use of the property."[6] CDC

> "3. Employee parking areas for carpools and vanpools shall be located closer to the entryway to the building than general employee parking.
>
> "4. Stacked or valet parking is allowed if an attendant is present to move vehicles. If stacked parking is used for required parking spaces, the applicant shall ensure that an attendant will always be present when the lot is in operation. The requirements for minimum or maximum spaces and all parking area development standards continue to apply for stacked parking.
>
> "5. All disabled parking shall be placed closest to building entrances than all other parking. Appropriate ADA curb cuts and ramps to go from the parking lot to the ADA-accessible entrance shall be provided unless exempted by ADA code."

[6] CDC 75.020(B)(1)(a) provides in full:

75.020(B)(1)(c) requires the city to find that "[t]he need for the variance was not created by the applicant and/or owner requesting the variance."

In their fourth assignment of error, petitioners argue that the city's determination that CDC 75.020(B)(1)(a) and (c) were satisfied is not supported by substantial evidence in the record. ORS 197.835(9)(a)(C). Petitioners first argue that the city failed to consider whether the requested variances for the parking lot (560 feet) and the bicycle parking (130 feet) were the "minimum variance[s] necessary to make reasonable use of the property." Petitioners argue that the findings are inadequate because they do not explain whether intervenor could have located the parking lot within 300 or 400 feet of the

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> "1. Class II Variance Approval Criteria. The approval authority may impose appropriate conditions to ensure compliance with the criteria. The appropriate approval authority shall approve a variance request if all the following criteria are met and corresponding findings of fact prepared.
>
> "a. The variance is the minimum variance necessary to make reasonable use of the property. To make this determination, the following factors may be considered, together with any other relevant facts or circumstances:
>
> "1) Whether the development is similar in size, intensity and type to developments on other properties in the City that have the same zoning designation.
>
> "2) Physical characteristics of the property such as lot size or shape, topography, or the existence of natural resources.
>
> "3) The potential for economic development of the subject property."

entrance, rather than locating it 560 feet from the entrance, or could have located the bicycle parking closer than 130 feet from the front entrance. Petitioners also argue that the city erred in approving the variances because the need for the variance was created by intervenor when intervenor designed the property and adjacent facilities with the playing fields, rather than the parking lot, located adjacent to the school.

Respondents respond by pointing to the city's finding that elementary schools have requirements, including providing for the safety and security of the students and transportation and design issues, that are unique to elementary schools and that necessitate designing the property differently than a commercial or industrial property might be designed. First, schools have a single secured front entrance rather than multiple entrances typical to a commercial and industrial uses, for which the city council found the parking requirements appear to have been written. Record 37. Because of that single front entrance, the city council found that locating all of the parking within the code mandated distance would result in a single entrance surrounded by a parking lot around the building. That in turn would require students to walk through a parking lot to access the playing fields and play ground, creating safety issues between vehicles and students crossing the parking lots.[7] The city

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[7] The city council found:

> "a. The applicant proposes to construct a new primary school on a parcel currently utilized for primary school purposes. The parking

spaces are proposed to be located more than 200 feet from the school entrance and therefore do not comply with code requirements unless a variance is approved. The City of West Linn has four primary schools, all in residential zones, and similar to the proposed new primary school in size and intensity.

"b. A primary school must be designed to address unique issues associated with the provision of educational services to primary school-aged children.

"c. The applicant demonstrated that the application as proposed responds to unique needs of a primary school with respect to providing ongoing educational services to current and incoming students; ensuring the safety of primary age students; and accommodating transportation and design features that are unique to primary schools and the age range of students served * * *. The Council finds that based on the testimony of the Applicant's representatives and City Planning staff analysis * * * it is not reasonable to require all parking spaces be located within 200 feet of the main entrance and the related variance criteria are satisfied.

"d. The Council finds that in light of student safety and campus control concerns, the primary school facility is not reasonably comparable to general commercial development that can make use of multiple building entrances in order to comply with the requirement that all parking spaces be located within 200 feet of the main entrance. This standard would require the school's main entrance to be located a significant distance from the main street, and would require the main entrance to be surrounded with parking. To maintain appropriate campus security, the play fields and playgrounds need to be directly adjacent to the school building. Separating the playfields from the school building with a surface parking lot in order to comply with the requirement that all parking spaces be located within 200 feet of the main entrance would reduce the level of security for the students, as well as introduce unnecessary conflicts between vehicles and students crossing the parking areas.

council also found that the playing field must be located close to the school building for safety and security reasons, and placing a large parking lot between the building and the playing areas creates safety and security issues. Record 36-37. The city council also found that bicycle use at elementary schools is low and therefore locating some of the required bicycle parking within 50 feet of the building while seeking a variance to locate the rest of the required parking 130 feet from the entrance is reasonable. Record 37-38. The city council also found that the need for the variances was not created by intervenor, but rather by the unique safety and security needs in operating an elementary school:

> "The Council finds that the need for the variance was not created by the applicant and/or owner requesting the variance, as analyzed in detail under Council findings related to the question of reconstruction in the existing school footprint versus the footprint proposed by the Applicant and approved by the Council." Record 38.

> "e. The Council, having separately determined that it is not reasonable to require the school be reconstructed in the existing footprint, finds that this variance is the minimum necessary parking standard variance, which enables student safety and security to be maintained, while providing for disabled parking spaces closest to the building entrance and a covered walkway to the main entrance.
>
> "f. The Council finds that the placement of the play field and parking on the west side of the site, in the proposed configuration, is necessitated by physical characteristics of the property including lot size and shape, topography, and existence of natural resources." Record 36-37.

We agree with respondents that substantial evidence in the record supports the city's findings that the variance criteria are met. We also agree with respondents that nothing in the CDC requires the city to consider incremental increases in the variance from the parking or bicycle distance requirements, and the city could reasonably consider the fact that intervenor designed the location of the parking lot and the size and location of the playing fields with safety, security and transportation requirements in mind. Petitioners have not demonstrated that the city erred in finding that 560 feet for the parking lot and 130 feet for most of the bicycle parking are the minimum variances necessary to make reasonable use of the property for an elementary school. We also agree with respondents that the unique requirements for an elementary school, and not intervenor's actions or desires, create the need for the variance.

The fourth assignment of error is denied.

The city's decision is remanded.