

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

JOHN C. BARTELS, BESS I. BARTELS, )  
and JOHN BARTELS, )  
Petitioners, )  
vs. )  
CITY OF PORTLAND, ) LUBA No. 90-111  
Respondent, ) FINAL OPINION  
and ) AND ORDER  
KELLY BRUUN and BARBARA BRUUN, )  
Intervenors-Respondent. )

## Appeal from City of Portland.

John Bartels, Portland, filed the petition for review and argued on his own behalf.

Peter Kasting, Portland, filed a response brief and argued on behalf of respondent.

Garry McMurry, Portland, filed a response brief and argued on behalf of intervenors-respondent. With him on the brief was Garry McMurry and Associates.

HOLSTUN, Referee; KELLINGTON, Chief Referee; SHERTON, Referee, participated in the decision.

REMANDED 12/03/90

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**

Petitioners appeal a city decision granting (1) preliminary planned unit development (PUD) approval, (2) tentative subdivision plat approval, (3) exemption from solar access requirements, and (4) two variances.

**MOTION TO INTERVENE**

Kelly Bruun and Barbara Bruun move to intervene on the side of respondent in this proceeding. There is no objection to the motion, and it is allowed.

**FACTS**

The subject property is located in a designated severe landslide hazard area in southwest Portland, between S.W Canyon Road and S.W. Humphrey Boulevard in the vicinity of the Washington Park Zoo, Oregon Museum of Science and Industry and the Western Forestry Center. The property includes 12.25 acres and is zoned one family residential (R-10).

Land within the R-10 zone may be subdivided for residential development, with a required minimum lot size of 10,000 square feet. Additionally, PUDs are allowed in the R-10 zone as a conditional use. Where a PUD includes subdivision of land, the Portland City Code (PCC) provides that preliminary approval of a PUD and tentative approval of the subdivision are to be granted concurrently. With PUD approval, minimum lot size, yard requirements, and other

standards imposed on residential subdivisions in the R-10 zone may be modified, as long as the overall residential density allowed in the R-10 zone is not exceeded.

Under the city's regulations, approval of a PUD is a two stage process involving "preliminary" (first stage) approval, followed by more detailed studies and plans and "final" (second stage) approval. The decision challenged in this appeal is first stage approval of intervenors' proposed PUD and subdivision.

The 40-lot PUD and subdivision granted by the challenged preliminary and tentative approvals is within the density allowed within the R-10 zone. However, in accordance with PUD approval standards, the required minimum lot size was reduced from 10,000 square feet to 7,000 square feet and other modifications in lot dimension and setback requirements were granted.<sup>1</sup> In addition, the 40 lots are to be served by a 1,850 foot long private road terminating in a cul-de-sac. Under PCC 34.60.010(D), cul-de-sacs may neither exceed 400 feet in length nor serve more than 18 lots. In its decision, the city granted variances from both of these requirements. The city also granted modifications of solar design standards, but apparently such modifications do not

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<sup>1</sup>Although the minimum lot size is reduced, the required overall density is preserved because three open space parcels will remain undeveloped.

require a variance.<sup>2</sup>

Following notice to various city bureaus, "neighborhood associations, and other agencies and organizations," a preapplication conference was held on the subject application on October 18, 1989. PCC 33.79.100 requires submission of a preliminary PUD development plan. Intervenors' preliminary development plan was submitted on March 22, 1990. Following notice, a public hearing was held on April 3, 1990 to consider the preliminary development plan. The hearings officer granted preliminary approval on April 11, 1990. In accordance with PCC 33.79.110(h), petitioners appealed the hearings officer's decision to the city council. The city council conducted an additional evidentiary hearing and rejected the appeal, affirming the hearings officer's decision and adopting additional findings. This appeal followed.

#### **JURISDICTION**

Respondent and intervenors-respondent (respondents) move to dismiss, citing the exception to our jurisdiction in ORS 197.015(10)(b)(B) for decisions concerning subdivisions located within urban growth boundaries.<sup>3</sup> See Southwood

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<sup>2</sup>Our copy of the PCC does not include the PCC sections governing solar design standards cited in the city's decision.

<sup>3</sup>We note that ORS 19.230 provides this Board may transfer appeals to circuit court, if it determines it lacks jurisdiction. Where respondents challenge our jurisdiction, any party may file a conditional motion for transfer to circuit court in the event the Board ultimately determines it

Homeowners Assoc. v. City of Philomath, \_\_\_ Or LUBA \_\_\_  
(LUBA No. 90-103, November 15, 1990); Meadowbrook  
Development v. City of Seaside, \_\_\_ Or LUBA \_\_\_ (LUBA No.  
90-060, September 18, 1990); Parmenter v. Wallowa County,  
\_\_\_ Or LUBA \_\_\_ (LUBA No. 90-034, June 11, 1990).

ORS 197.015(10)(b)(B) provides that land use decisions  
do not include a local government decision:

"Which approves, approves with conditions or  
denies a subdivision or partition, as described in  
ORS chapter 92, located within an urban growth  
boundary where the decision is consistent with  
land use standards \* \* \*[.]"

In the above cited decisions, we have explained that  
the exception to our review jurisdiction created by ORS  
197.015(10)(b)(B) is a relatively limited one. It is  
limited to urban partition and subdivision decisions which  
simply apply the existing standards governing such land  
divisions.<sup>4</sup> The exception does not apply in cases where a  
subdivision or partition decision includes or requires plan  
or zone changes. Southwood Homeowners Assoc. v City of  
Philomath, supra; Meadowbrook Development v. City of

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lacks jurisdiction. OAR 661-10-075(10); Southwood Homeowners Assoc. v.  
City of Philomath, supra; Anderson Bros., Inc. v. City of Portland, \_\_\_ Or  
LUBA \_\_\_ (LUBA No. 89-054, November 22, 1989). Petitioners have not filed  
a motion for transfer pursuant to OAR 661-10-075(10).

<sup>4</sup>In Southwood, Meadowbrook and Parmenter, we rejected arguments that the language in ORS 197.015(10)(B) requiring that subdivisions be "consistent with land use regulations" requires this Board to review the decision on the merits to determine whether we have jurisdiction to conduct a review in the first place. Instead, we concluded our jurisdictional inquiry is limited to whether existing land use standards are applied in making the decision.

Seaside, supra; Parmenter v. Wallowa County, supra. Neither does ORS 197.015(10)(b)(B) apply where a subdivision or partition requires modifications to or variances from the approval standards governing subdivisions and partitions. See Hoffman v. City of Lake Oswego, \_\_\_ Or LUBA \_\_\_ (LUBA No. 90-067, September 26, 1990), slip op 3.

The exception provided by ORS 197.015(10)(b)(B) does not apply to the decision challenged in this appeal because the decision involves, in addition to tentative approval of a subdivision, preliminary approval of a PUD and approval of variances. Through preliminary approval of the PUD, a number of standards that would otherwise apply to approval of a subdivision in the R-10 zone were modified. In addition, standards which would otherwise apply to the proposed cul-de-sac were eliminated through the variances. The subdivision is, therefore, not "consistent" with those standards which are modified through approval of the PUD or eliminated by the variances. See Southwood, supra, slip op at 9.

Intervenors-respondent also contend we lack jurisdiction because petitioners' assignment of error does not challenge the portion of the city's decision granting variances. We understand intervenors-respondent's argument to be based on an underlying assumption that if compliance with subdivision approval standards were the sole issue raised by petitioners in this appeal, we would lack

jurisdiction. However, as discussed below, petitioners' challenge is based on their contention that the decision does not comply with PCC 33.79.100(h). PCC 33.79.100(h) specifies requirements for approval of a PUD preliminary development plan, and PCC 33.79.100(h) would not apply were the decision simply to approve a subdivision in the R-10 zone. Because petitioners raise issues concerning compliance with PUD standards, we have jurisdiction regardless of whether intervenors-respondent's underlying assumption is correct.

Respondent offers one final argument in support of the motion to dismiss. Instead of allowing modifications of subdivision standards by concurrent approval of a PUD, respondent contends the city could just as easily have adopted separate subdivision standards for conventional subdivisions and for "flexible" subdivisions and eliminated the current requirement for PUD approval to achieve planning flexibility in approving subdivisions. Respondent's Brief 4. Respondent contends that if it had such a procedure for flexible subdivisions, the disputed decision would fall within the exception provided by ORS 197.015(10)(b)(B) and there should not be a different result in this appeal.

Our review is based on the land use regulations the city has adopted, not on land use regulations it could have adopted or might yet adopt. That we might not have jurisdiction to review the city's decision if the city's

land use regulations were written differently, has no effect on our jurisdiction over this appeal. Moreover, the decision challenged in this appeal includes variances that go beyond the flexibility provided by the city's PUD provisions.<sup>5</sup>

Respondents' motions to dismiss are denied.

#### **ASSIGNMENT OF ERROR**

"The decision of the Hearings Officer to approve the PUD and subdivision and decision of the City Council to uphold the decision of the Hearings Officer and deny the appeal improperly interprets and applies the Portland City Code title 33.79.100(h)."

#### **A. Introduction**

As noted earlier in this opinion, under the city's land use regulations, approval of PUDs such as the one challenged in this appeal occurs in two stages. PCC 33.79.010 through 33.79.180. A public hearing before the city land use hearings officer is required for first stage approval. All parties participating in the public hearing may appeal the hearings officer's decision concerning preliminary approval

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<sup>5</sup>Although we do not reach the issue, we question whether land use regulations establishing subdivision standards that could be modified on a case-by-case basis necessarily would result in subdivision decisions exempt from our review under ORS 197.015(10)(b)(B). Although it may be true such flexible subdivisions would simply be applying existing land use standards as modified, we question whether subdivisions requiring such planning flexibility and levels of discretion and judgment were intended to fall within the scope of ORS 197.015(10)(b)(B). But see Meadowbrook, supra, slip op at 4 (rejecting arguments that subdivision decisions exempted from the statutory definition of land use decision by ORS 197.015(10)(b)(B) require the same lack of discretion necessary for decisions exempted by ORS 197.015(10)(b)(A) and (C)).

to the city council. Once a decision granting preliminary approval is rendered, public hearings are not required for final (second stage) approval.<sup>6</sup> In addition, under the PCC, only the applicant has standing to appeal decisions by the planning director concerning second stage approval. PCC 33.79.040 explains the purpose of the city's PUD review procedure as follows:

"A PUD is reviewed in a two-step process. The purpose of this two-step approach is to help limit an applicant's development costs prior to determination on the preliminary plan for a PUD. Preliminary approval is for the PUD concept with respect to planning concerns including such items as: number, type, and location of units; parking; impact on surrounding areas; adequacy of services; conceptual plans for service improvements, etc. Preliminary approval is only granted when there is a reasonable certainty that the PUD will fulfill all requirements of this Chapter and other relevant parts of the City Code.

"To gain approval of the final plan, the applicant must submit the detailed and technical information necessary to demonstrate that all City standards, requirements, and conditions have, or will be met. Approval will only be granted if the final plan is in substantial conformance with the preliminary plan."

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<sup>6</sup>PCC 33.79.120(a) does require a development plan conference before an applicant submits a final development plan application. PCC 33.79.120(b) states:

"Representatives of the Bureau of Planning, Bureau of Buildings, City Engineer, Traffic Engineer, Fire Bureau, Water Bureau, appropriate neighborhood association, interested residents, and other agencies and organizations, as deemed appropriate, shall be notified of the time, date and location of the conference."

The city's two stage approval process has been reviewed by this Board and the Court of Appeals. In Margilus v. City of Portland, 4 Or LUBA 89, 98 (1981) we explained that, in granting preliminary approval for a PUD, the city must determine the proposed PUD "can \* \* \* reasonably be expected to meet applicable regulations and [is] 'feasible.'" We further noted a two stage approval process, with a requirement for finding "feasibility" at the initial stage, addresses somewhat competing public policies. Those public policies are the public policy that "inordinate expense" not be required at the preliminary plan stage, and the public policy favoring the avoidance of the "inordinate expense" that would result where preliminary approval for a project is granted, but the project is later found to be unfeasible. Id. See also Meyer v. City of Portland, 7 Or LUBA 184 (1983), aff'd 67 Or App 274 (1984).

In Meyer v. City of Portland, 67 Or App 274, 280 n 3, 678 P2d 741 (1984), the Court of Appeals explained that the required finding of "feasibility" for first stage approval requires "more than feasibility from a technical engineering perspective." The court explained:

"It means that substantial evidence supports findings that solutions to certain problems (for example landslide potential) posed by a project are possible, likely and reasonably certain to succeed."

Provided the required finding of "feasibility" is made when first stage approval is granted, precise solutions for

problems posed by a PUD and other detailed technical matters may "be worked out between the applicant and city's experts during the second stage approval process for the final plan." Id. at 282 n 6. Resolution of precise solutions and technical matters and final approval of the PUD need not include public hearings. Id.

With the above understanding of how the city's PUD process works, we turn to the city's decision granting preliminary PUD approval in this case.

#### **B. Petitioners' Arguments**

Petitioners contend the record includes studies identifying landslide, drainage and groundwater problems on the subject property. Petitioners further contend the city failed to demonstrate the proposed PUD is feasible, in view of these identified problems, and petitioners contend the evidentiary record does not include substantial evidence that the proposal is feasible.

In granting approval for a PUD preliminary development plan, the hearings officer is required to make the findings specified in PCC 33.79.110(g). One of the findings required by PCC 33.79.110(g) is that the proposal meets the requirements of PCC 33.79.100. PCC 33.79.100(h) requires that:

"For PUDs containing lands of moderate or severe landslide potential, [the preliminary development plan must include] a preliminary assessment by an engineering geologist or geotechnical engineer addressing soil conditions, storm water runoff,

and ground water; and a preliminary assessment by a geotechnical engineer addressing the project's feasibility and identifying potential problems and how they might be resolved."

PCC 33.79.100(h) is the only PCC provision petitioners specifically cite in alleging the city failed to demonstrate that the challenged PUD is feasible. As an initial point, it is not entirely clear that PCC 33.79.100(h) does more than impose a requirement that the preliminary development plan include certain technical reports. However, respondents do not dispute that the county must, in granting preliminary approval for the subject PUD, find that the proposal is feasible notwithstanding identified concerns regarding landslide, groundwater, drainage and subsurface instability problems. We, therefore, do not determine whether the requirement for the disputed findings of feasibility lies in PCC 33.79.100(h) or elsewhere in the PCC.<sup>7</sup>

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<sup>7</sup>As noted earlier in this opinion, PUDs are conditional uses in the R-10 zone and, in addition to the PUD requirements set forth in PCC 33.79.010 through 33.79.180, PUDs must satisfy the requirements imposed on conditional uses by PCC 33.106. In approving a conditional use, the city must find, inter alia, that "the use at the particular location is desirable to the public convenience and welfare and not detrimental or injurious to the public health, peace, or safety, or to the character and value of the surrounding properties." PCC 33.106.010.

Additionally, because the challenged PUD includes a request for subdivision of land, PCC 34.50.090 applies. That section provides, in part:

"No land shall be subdivided or partitioned which is found unsuitable for its intended use by the Hearings Officer by reason of flooding, inadequate drainage, susceptibility to mud

The application for preliminary PUD development plan approval included three geotechnical studies. A fourth report was prepared by the applicant's expert and a fifth report was prepared by petitioners' expert, in conjunction with petitioners' appeal of the hearings officer's decision. We discuss the studies submitted by the applicant before turning to petitioners' arguments.

A preliminary evaluation and soils investigation of the subject property (D&M report) was performed in 1975 by Dames and Moore, a consulting engineering firm. The D&M report was performed for a prior owner in anticipation of construction of a church on approximately 3 acres of the subject property. The D&M report states there are signs of past earth movement on the property and identifies a recent slide at the lower portion of the ridge between two major ravines that cross the property in a northeasterly direction.

Based on three hand auger borings, the D&M report describes the site as underlain by "moist medium stiff to stiff clayey silts." Record 270. The D&M report speculates that basalt bedrock would have been encountered at a dept of 30 feet at the site of one boring which was terminated at a depth of 18.5 feet.

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or earth slides, or any other reason harmful to the health, safety or well-being of the future residents or property owners of the proposed Subdivision or partition or of the community at large. \* \* \*

The D&M report concludes the site is relatively stable and could be developed, although with some limitations. It recommends that cuts and fills be limited to 10 and 5 feet, respectively. Finally, the D&M report states natural drainage channels would have to be improved to properly discharge increased surface runoff and stated "[i]t may be desirable to transfer the structural loads to foundations that bear on basalt bedrock." Record 271. The D&M report concludes with a recommendation that additional borings and studies be conducted.

A second general geologic reconnaissance of the subject property was performed in 1985 for a prior owner by L.R. Squire Associates Inc. (Squire report). The report was prepared to give the then owner "some indication of site constraints imposed by identifiable geologic hazards" and was based on published and unpublished data and a single site visit. Record 261.

According to the Squire report, the property is transected by two large drainage ravines and includes a third smaller ravine. Intermittent streams occupy the ravines. The report states the site includes some very steeply sloped areas, as well as areas of more modest slopes, and is covered with second growth Douglas Fir and deciduous trees and shrubs.

The Squire report includes a number of observations from the site visit. Although some evidence of ground

movement was noted, no major landslide activity was observed. The report identifies two areas of landslide activity or soil slump (Areas A and B) on the east sidewall of the central drainage ravine. The Squire report states the lower slump (Area A) appears to be relatively recent and speculates it probably failed after 1975, since it was not noted in the D&M report. The Squire report explains the slump observed further upstream (Area B) appeared to be older and no indications of recent movement or instability were noted. The report notes other evidence of "[s]oil creep, i.e., gradual downslope movement of soil evidenced by bent and bowed trees \* \* \* on the canyon walls of the drainage ravine as well as in other areas of the subject property." Record 264.

The Squire report also notes the landslide in the lower portion of the property previously identified by the D&M report (referred to in the Squire report as Area C). Although no springs or high water table are noted, the report states that stream channels on the site were experiencing active erosion in certain areas.

The Squire report concludes that the sideslopes near areas A and B are potentially unstable and recommends that development not occur in those areas. In addition, the Squire report concludes the lower portions of the property near the high cut slopes adjacent to S.W. Canyon Road are potentially unstable and suitable only for limited

development. However, the Squire report also concludes:

"\* \* \* The majority of the site appears to be presently relatively stable. Based on our observations, our current position is that much of the site is suitable for limited development."

"\* \* \* \* \*

"In our opinion, the site is developable as described [in the report] if geotechnical and geologic constraints are carefully considered during the design phase of the project. \* \* \* A qualified geotechnical consultant should be included in the design team throughout the conception and planning phases of the project." Record 266.

A third report (AW report), dated November 3, 1989, was prepared by AW Geotechnical Services, Inc. for intervenors' project consultants.<sup>8</sup> The AW report concludes:

"Based on a preliminary reconnaissance of the site, it is our overall opinion that the land and underlying soil conditions are suitable for the proposed road construction and residential development.

"\* \* \* \* \*

"A geologic reconnaissance of the subject property was conducted by L.R. Squier Associates Inc. \* \*. Two localized soil slump areas were identified over the north portion of the site and evidence of soil creep was indicated in the high slopes along SW Canyon Road. However, no deep seated landslides were indicated.

"In our opinion, the subject site is developable contingent on detailed geotechnical studies related to the stability of the proposed road cuts, embankments, road structures, and for site

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<sup>8</sup>The AW report is a one page letter. Record 260.

drainage, erosion control, and foundation support for residential structures." Record 260.

A fourth report (R-Z report), dated May 29, 1990, was prepared by Rittenhouse-Zeman and Assoc., Inc. for intervenors' project consultant. The R-Z report states in part:

"The purpose of our work was to explore subsurface conditions in order to provide recommendations for roadways, utilities, and site fills. Recommendations pertaining to individual lot foundations, lot drainage or residential construction were not part of our work at this time but will be evaluated on a lot by lot basis after site grading is completed. \* \* \*" Record 143.

The R-Z report notes the landslide area identified in the D&M report and noted as Area C in the Squire report. The R-Z report goes on to state

"Elsewhere on the site there does not appear to be any evidence of additional slumping or sliding failures. Some evidence of minor surface creep is evident on a number of steep slopes across the site but in general the larger trees appear to be growing straight and there are no scarp or ground tears present." Record 144.

Two test pits were dug in the identified landslide area (Area C) and showed evidence of the slide zone at depths of six to 12 feet. Record 145. The R-Z report acknowledges evidence of other slides on the property, but states these are ancient slides and are not currently active.

The R-Z report includes relatively detailed recommendations concerning site preparation for construction of the cul-de-sac, including recommendations concerning

fills, cuts, retaining structures and walls, and drainage. The R-Z report does not include specific recommendations concerning house foundations, stating "recommendations for individual lots will need to be developed on a lot by lot basis after the completion of site grading." Record 153. However, the R-Z report does note "[t]he soils present on this site are generally suitable for support of foundations on conventional spread or continuous footings." Id.

Regarding construction in the identified slide area, the R-Z report states:

"As previously described, a localized landslide is present on the north central portion of the site. In order to establish the road in this area, it will be necessary to found the roadway and any subsequent structures below the slide plane. It appears from preliminary site grading plans that the roadway will be located quite near the slide scarp. In addition, it appears that roadway cuts in this area \* \* \* will be on the order of 10 to 14 feet. Such cuts would be located at or near the slide plane. We recommend that the excavation be made in dry summer weather and that it be made below the slide plane. This may require overexcavating the roadway in some areas.

"For retaining structures in this area we recommend that they be founded on the weathered bedrock. In addition, the structures should be designed to retain the full pressure of the soil above the slide plane. \* \* \*." Record 154-155.

Petitioners complain the R-Z report does not adequately address drainage, especially in view of staff concerns about the ability to connect the development to sanitary and storm sewers. Petitioners' expert, K.E. Robbins, pointed out during local proceedings that the R-Z report does not

specifically address increased runoff that can be expected when impervious surfaces are placed on the property.

Petitioners also fault the R-Z report for not addressing possible problems with perched water between silt and clay layers and point to a discrepancy between a statement in the R-Z report that no fill was encountered with data from two test pits showing fill was encountered. Petitioners point out that while the R-Z report recommends limiting cut and fill slopes to 2:1, the site plan submitted by the applicant shows some slopes in excess of 2:1. In addition, while the D&M report recommends limiting cuts and fills to 10 feet and 5 feet respectively, the site plan includes a fill of 35 feet and cuts of 20 feet.

Petitioners next point out the R-Z report does not specifically address the soil slump and soil creep areas identified in the Squire report. Neither, according to petitioners, does the R-Z report adequately discuss the possible impact of the development on the older slide areas identified in the R-Z report.

Respondent points out that drainage and storm sewers are specifically discussed in the R-Z report, and one of the conditions of approval is that there shall be no site work allowed at all until final approval is granted and written verification of the availability of storm and sanitary sewer connections is provided. Furthermore, respondents contend each and every point of conflict in the expert testimony

offered to the city need not be specifically discussed or explained in the city's findings.<sup>9</sup>

In some respects the reports do appear to conflict, although some of the conflict is likely due to the different purposes for which the reports were prepared and the fact they were prepared over a 15 year time period. In any event, the reports read as a whole make it clear that the subject property, in view of the slopes and landslide hazards, will be a challenging property to develop in the manner proposed.

The focus of the R-Z report is road and utility construction.<sup>10</sup> A number of potential road and utility construction and fill problems are identified and the report suggests ways in which they may be resolved. As to those considerations, the R-Z report is adequate to demonstrate "the project's feasibility and [identify] potential problems and how they might be resolved," as PCC 33.79.100(h) requires.

Petitioners' expert, K.C. Robbins, pointed out the limited focus of the R-Z report and noted the lack of

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<sup>9</sup>Additionally, intervenors-respondent quote at length from city findings which address most of the conflicts in the expert testimony that petitioners identify. For example, the city's findings note that Areas A and B, which are identified as soil slump areas in the Squire report, but are not specifically identified in the R-Z report, are included in the open space areas which are not proposed to be developed.

<sup>10</sup>As noted earlier in this opinion, the R-Z report states its purpose "was to explore subsurface conditions in order to provide recommendations, for roadways, utilities, and site fills." Record 143.

discussion of potential problems which may be encountered in constructing residences on the proposed lots or solutions to such potential problems. According to petitioners' expert, "[g]rading on these [lots] could have as great or greater influence on the site as the access road." Record 140.

With one exception, the only discussion in the R-Z report arguably concerning residential construction on individual lots is an unexplained conclusion that the overall proposed "project" is feasible.<sup>11</sup> The one exception concerns the area where the reports agree there is an active landslide. The R-Z report notes that two test pits were dug in the active landslide area and states in part:

"House construction on the lots affected by the landslide will require lot specific, engineered foundations. These foundations will likely be quite deep in order to place them below the slide plane. \* \* \*" Record 155.

However, no test pits were dug in or near many of the lots outside the active landslide area. According to previous

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<sup>11</sup>As noted earlier in this opinion, the R-Z report explains it does not include specific recommendations concerning residential construction on individual lots:

"\* \* \* Recommendations pertaining to individual lot foundations, lot drainage or residential construction were not part of our work at this time but will be evaluated on a lot by lot basis after site grading is completed. \* \* \*" Record 143.

While the R-Z report states that the "project" is feasible, it is not entirely clear whether that statement refers to the roadway, utilities and site fills which are the focus of the R-Z report or whether the statement refers to all aspects of the proposed PUD, including residential construction. We assume the latter meaning is intended.

studies and the R-Z study itself, many of those lots include very steep slopes and may include unstable soils.

PCC 33.79.100(h) requires that the preliminary geotechnical assessment identify "potential problems and how they might be resolved." With regard to developing residences on the proposed lots, neither the R-Z report nor any of the other reports submitted during the local proceedings are sufficient to comply with PCC 33.79.100(h).<sup>12</sup>

We do not mean to suggest that the city necessarily must require the kind of detail in the preliminary geotechnical assessment that petitioners suggest. However, in view of the undisputed development constraints present on the site, the largely unexplained expressions of confidence in the R-Z and AW reports that the proposed residential development is feasible are not sufficient to comply with PCC 33.79.100(h). The R-Z report does state that while it defers detailed recommendations concerning individual lots until after completion of site grading, "[t]he soils present on this site are generally suitable for support of foundations on conventional spread or continuous footings." Record 153. In view of the admittedly limited scope of the

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<sup>12</sup>Although the R-Z report does state that residences constructed in the active landslide area will require engineered foundations placed below the slide plane, the report does not explain whether problems are expected in constructing such foundations or whether other problems may be encountered in residential construction on the lots in the active landslide area.

R-Z report, we do not believe this statement is sufficient to constitute substantial evidence that no problems are expected in developing residential foundations on the site or that development of such foundations is feasible.

Petitioners' assignment of error is sustained, in part.<sup>13</sup>

The city's decision is remanded.

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<sup>13</sup>Petitioners' single assignment of error is divided into five subassignments of error. However, the bulk of petitioners' argument discussed in the text is set forth under the second subassignment of error. Petitioners' other subassignments of error either add nothing to the second subassignment of error or state no basis upon which we may reverse or remand the city's decision. The first subassignment of error points to an erroneous identification of soil type that was later corrected by the applicant. The third subassignment of error concerns a letter submitted by intervenors-respondent after the city entered its oral decision denying petitioners' appeal, and the letter was specifically rejected by the city. We previously ruled the letter is not properly considered part of the record in this proceeding. The arguments presented in the fourth subassignment of error either repeat arguments made under the second subassignment of error or challenge findings which are not essential to the city's decision. The fifth subassignment of error simply points out that a city engineering staff person had reservations about whether the applicant's expert had adequately demonstrated the project is feasible. As respondent correctly notes, such unexplained reservations by a city staff person do not necessarily render the applicant's experts' testimony insufficient to demonstrate feasibility.