

1                                   BEFORE THE LAND USE BOARD OF APPEALS  
2                                   OF THE STATE OF OREGON  
3

4 CORBETT/TERWILLIGER/LAIR HILL    )  
5 NEIGHBORHOOD ASSOCIATION,        )  
6 JEANNE GALICK, LARRY LINDSTROM   )  
7 and JOHN GILSON,                    )

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vs.

CITY OF PORTLAND,

Respondent,

and

DARIAN, INC.,

Intervenor-Respondent.

LUBA No. 92-208

FINAL OPINION  
AND ORDER

Appeal from City of Portland.

Edward J. Sullivan, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Preston, Thorgrimson, Shidler, Gates & Ellis.

Adrienne Brockman, Deputy City Attorney, Portland, filed a response brief and argued on behalf of respondent.

Richard M. Whitman, Portland, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Ball, Janik & Novack.

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

AFFIRMED                                   07/16/93

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

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city council order approving a  
4 conditional use permit for a planned unit development (PUD)  
5 preliminary development plan and a tentative plan for a  
6 major land division (subdivision).<sup>1</sup>

7 **MOTION TO INTERVENE**

8 Darian, Inc., the applicant below, moves to intervene  
9 in this appeal proceeding on the side of respondent. There  
10 is no objection to the motion, and it is allowed.

11 **FACTS**

12 This is the second time an appeal of a city decision  
13 approving a PUD and subdivision on the subject property has  
14 been appealed to this Board. In Gilson v. City of Portland,  
15 22 Or LUBA 343, 344-345 (1991) (Gilson), we stated the  
16 following concerning the characteristics of the proposal and  
17 the subject property:

18 "The subject property is a 5.02 acre strip of land  
19 located downhill from, and to the east of,  
20 Interstate-5 in the Corbett-Terwilliger-Lair Hill  
21 neighborhood. The property slopes steeply from  
22 west to east, with grades of 25 to 100 percent,  
23 and is in an area designated by the city as having  
24 severe landslide potential. The property is  
25 unimproved and is heavily vegetated with deciduous  
26 trees and thick understory cover.

27 "Besides Interstate-5 on the west, the subject

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<sup>1</sup>The challenged decision also approves a solar exemption, which is not challenged in this appeal proceeding.

1 property is bounded on the north by a condominium  
2 development and a medical laboratory, on the east  
3 by existing residences fronting on S.W. Corbett  
4 Avenue (Corbett), on the southeast by a  
5 neighborhood grocery store and on the south by  
6 existing residences and undeveloped land. The  
7 subject property is zoned Single-Family,  
8 High-Density Residential (R5). PUDs are a  
9 conditional use in the R5 zone. The surrounding  
10 property is zoned primarily R5 and Multi-Family  
11 Residential (R2).

12 "On August 24, 1990, intervenor-respondent  
13 (intervenor) submitted an application for  
14 preliminary development plan, tentative  
15 subdivision plan and major variance approval for a  
16 proposed PUD consisting of 43 dwelling units on  
17 lots ranging from 2,560 to 4,029 square feet. The  
18 proposed dwellings are 19 two-unit or three-unit  
19 townhouse structures. The S.W. Viewpoint Terrace  
20 (Viewpoint) right-of-way running north-south  
21 through the middle of the site would be improved,  
22 and the proposed dwellings would face onto  
23 Viewpoint. The rear yards of the dwellings on the  
24 east side of Viewpoint would abut the rear yards  
25 of the existing residences fronting on Corbett.

26 "The proposal also includes creation of a two acre  
27 common open space tract comprised of the southern  
28 end of the property and a strip along its western  
29 edge. Finally, the application also requested  
30 building height variances (from 35 feet to 40, 50  
31 and 55 feet) for 18 of the proposed lots on the  
32 east side of Viewpoint, and building story  
33 variances (from 2 1/2 to 3 stories) for eight of  
34 the proposed lots on the west side of Viewpoint."  
35 (Footnote omitted.)

36 We remanded the city decision approving the proposal in  
37 Gilson, on the basis that:

38 "The challenged decision does not determine that  
39 the PUD preliminary development plan complies with  
40 the R5 zone building height limitation in effect  
41 when the application was first submitted.  
42 Respondents do not contend that there is evidence

1 in the record which clearly supports a  
2 determination that the preliminary development  
3 plan complies with the R5 zone building height  
4 limitation in effect when the subject application  
5 was submitted. \* \* \*" Id. at 351-52.

6 On remand, the city council conducted a further  
7 evidentiary hearing, in which all parties participated.  
8 Thereafter, the city approved intervenor's application and  
9 determined that under the code provisions in effect when the  
10 application was first submitted, no height variances are  
11 required.<sup>2</sup> This appeal followed.

12 **MOTION TO SUBMIT OVERSIZED EXHIBITS**

13 After oral argument in this case, the city filed a  
14 motion to submit, as part of the local record, certain  
15 oversized exhibits, including a computer generated  
16 photograph, a site plan, two elevation diagrams and a slope  
17 analysis (documents). The city states these documents were  
18 identified as part of the local record by a statement in the  
19 table of contents to the record that "[t]apes, photographs  
20 and oversized drawings will be submitted at oral argument,"  
21 as provided in OAR 661-10-025(2).<sup>3</sup> Remand Record ii. The

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<sup>2</sup>The local record in this appeal includes the local record submitted by the city in Gilson. We refer to the record in Gilson as "Original Record" and the record compiled after remand as "Remand Record." Also, the decision challenged in this appeal consists of the findings from the decision challenged in Gilson, as well as the findings adopted on remand.

<sup>3</sup>OAR 661-10-025(2) provides:

"Transmittal of Record: The governing body shall, within 21 days after service of the Notice on the governing body, transmit to the Board the original or a certified copy of the

1 city states it inadvertently forgot to bring these oversized  
2 documents to the oral argument.

3 Petitioners object to the inclusion of the documents  
4 because they indicate that they cannot verify whether the  
5 documents are among those referred to at Remand Record ii or  
6 whether the documents were actually placed before the city  
7 council.

8 The table of contents of the record document submitted  
9 by the city after remand fails to "list each large map or  
10 document retained by the [city]" under OAR 661-10-025(2), as  
11 is required by OAR 661-10-025(4)(a)(B). (Emphasis  
12 supplied.) However, in the absence of evidence to the  
13 contrary, we accept the city's representation that the  
14 documents it seeks to submit are among those referred to at  
15 Remand Record ii, and in fact were placed before the city  
16 council during the proceedings below. While petitioners  
17 object to the inclusion of these documents in the record on  
18 the basis that they are not certain whether they were placed  
19 before the city council during the proceedings on remand,  
20 petitioners offer no other reason why we should not accept  
21 the documents.

22 The motion to submit oversized exhibits is allowed.  
23 The documents shall be considered part of the local record  
24 submitted for this appeal.

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record of the proceeding under review. The governing body may,  
however, retain any large maps or documents that are difficult  
to duplicate, until the date of oral argument."

1 **FIRST ASSIGNMENT OF ERROR**

2 "The respondent improperly construed the  
3 applicable law and made a decision inconsistent  
4 with ORS 227.178(3) and the applicable provisions  
5 of its zoning code when it granted PUD and  
6 subdivision approval based on the standards in the  
7 pre-1991 code for a proposal altered in 1992 so as  
8 to be a new or completed application in 1992 that  
9 must be measured against the standards in the new  
10 zoning code adopted in 1991."

11 Petitioners argue the city erred by applying pre-1991  
12 code provisions to the proposal. Petitioners state the  
13 original application included requests for height and story  
14 variances. Petitioners state the proposal has since been  
15 altered to eliminate the need for a story variance.  
16 Petitioners reason that because the proposal has been  
17 altered in this way, the application submitted in 1990 was  
18 "incomplete" and, under ORS 227.178(3), the standards in the  
19 pre-1991 code are not applicable.<sup>4</sup> Rather, petitioners  
20 argue the standards in effect at the time the proposal was  
21 altered in 1992 apply.<sup>5</sup>

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<sup>4</sup>ORS 227.178(3) provides:

"If the application was complete when first submitted \* \* \*  
approval or denial of the application shall be based upon the  
standards and criteria that were applicable at the time the  
application was first submitted." (Emphasis supplied.)

<sup>5</sup>Intervenor argues that petitioners are precluded by the "law of the case" doctrine from raising issues concerning the effect of the change in the proposal on the standards applicable to it. We fail to see how this issue could be waived under the doctrine of law of the case. The need for a story variance was eliminated due to changes to the proposal which occurred during city proceedings after remand from this Board. Petitioners

1           We do not believe the fact that the proposal was  
2 altered in 1992, to eliminate the need for story variances,  
3 causes the application submitted in 1990 to be incomplete.  
4 ORS 227.178(3) locks in the standards in effect at the time  
5 an application is submitted "[i]f the application was  
6 complete when submitted." Here there is no dispute that the  
7 application was complete when it was first submitted.  
8 Petitioners' arguments that subsequent changes to the  
9 application in 1992 relate back to the original application,  
10 do not change the fact that the application was complete  
11 when it was submitted in 1990.

12           One additional point leads us to believe that the  
13 standards in effect when the original application was  
14 submitted continue to apply under ORS 227.178(3).  
15 Petitioners concede:

16           "It is true that the overall design has stayed the  
17 same, that what has occurred is the redesign of  
18 one level to eliminate walls and interior living  
19 space. \* \* \*" Petition for Review 16.

20           We do not believe this change in the proposal prevents  
21 ORS 227.178(3) from locking in the standards in effect at  
22 the time the application was first submitted in 1990. The  
23 original proposal is "fundamentally intact," and the city  
24 did not err by allowing a rehearing, rather than requiring  
25 the submission of a new application. See Seitz v. City of

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were in no position in Gilson to raise issues concerning changes to the proposal which had not yet occurred.

1 Ashland, \_\_\_ Or LUBA \_\_\_\_ (LUBA No. 92-135, December 4,  
2 1992); Wentland v. City of Portland, 23 Or LUBA 321, 324-35  
3 (1992).

4 The first assignment of error is denied.

5 **SECOND ASSIGNMENT OF ERROR**

6 "The respondent misinterpreted and failed to  
7 comply with applicable provisions of its zoning  
8 code and comprehensive plan relating to its review  
9 of the stability and suitability of the steeply  
10 sloping land for development and failed to adopt  
11 findings supported by substantial evidence  
12 adequately addressing these standards."

13 **THIRD ASSIGNMENT OF ERROR**

14 "The respondent did not comply with the state  
15 statutes governing the procedure for local  
16 government land use hearings because it deferred  
17 significant factual and legal determinations  
18 concerning land stability and suitability to a  
19 later stage in the project approval process  
20 without affording affected property owners and  
21 residents an opportunity for notice and a public  
22 hearing at that stage to protect their interests."

23 PCC 34.50.090 provides:

24 "No land shall be subdivided \* \* \* which is found  
25 unsuitable for its intended use \* \* \* by reason of  
26 flooding, inadequate drainage, susceptibility to  
27 mud or earth slides, or any other reason harmful  
28 to the health, safety or well-being of the future  
29 residents or property of the proposed subdivision  
30 \* \* \* or of the community at large."

31 PCC 33.79.070(f) and (g) provide as follows:

32 "(f) Excavation, earth moving procedures, and  
33 utility construction, shall be planned and  
34 conducted so as to prevent despoilation, as  
35 practical, of the character of areas to be  
36 retained in natural condition.

1           "(g) All manufactured slopes, other than those  
2           constructed in rock, shall be promptly  
3           planted to stabilize the soil or otherwise  
4           protected from the effects of stormwater  
5           runoff and erosion, and shall be of a  
6           character to cause the slopes to blend with  
7           the surrounding terrain and development."

8           PCC 33.79.100(h) requires applicants to submit the  
9 following for PUD preliminary development plan approval:

10           "For PUDs containing lands of moderate or severe  
11           landslide potential, a preliminary assessment by  
12           an engineering geologist or geotechnical engineer  
13           addressing soil conditions, stormwater runoff, and  
14           groundwater; and a preliminary assessment by a  
15           geotechnical engineer addressing the project's  
16           feasibility and identifying potential problems and  
17           how they might be resolved."

18           PCC 33.106.010 requires that the proposal is not:

19           "\* \* \* detrimental or injurious to the public  
20           health, peace or safety, or to the character and  
21           value of the surrounding properties."

22           PCC 33.79.110(g) provides, in relevant part:

23           "\* \* \* The Hearings Officer shall approve the  
24           preliminary development plan if he finds that:

25           "\* \* \* \* \*

26           "(3) There is reasonable certainty that the  
27           development and services standards of [PCC]  
28           33.79.070 and 33.79.080 will be met.

29           "\* \* \* \* \*"

30           While it is not entirely clear, we understand  
31 petitioners to contend under these assignments of error that  
32 the city's findings are inadequate because they improperly  
33 defer compliance with PCC 34.50.090, 33.79.070(f) and (g),  
34 33.79.100(h), 33.106.010 and 33.79.110(g)(3), to the second

1 stage of the PUD approval process, in which no public  
2 hearings are required.<sup>6</sup> Petitioners also contend the city's  
3 findings of compliance with PCC 34.50.090, 33.79.100(h) and  
4 PCC 33.79.070(f) and (g), lack evidentiary support.<sup>7</sup> We  
5 address these issues separately below.

6 **A. Adequacy of Findings**

7 The challenged decision contains the following findings  
8 of compliance with these standards:

9 "There is evidence in the record that the site  
10 contains land of moderate to severe landslide  
11 potential. The applicant's own geotechnical  
12 expert has testified that this site is currently  
13 'marginally stable' due largely to slope and  
14 stormwater runoff from I-5.

15 "The applicant's geotechnical engineer has  
16 submitted a supplemental report that includes new  
17 information based on an additional site visit and  
18 a much more detailed review and assessment of how

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<sup>6</sup>Petitioners also suggest the challenged decision is erroneous because it fails to establish compliance with comprehensive plan policy 8.16(B). Plan policy 8.16(B) provides:

"Slope Protection and Drainage

"Protect slopes from erosion and landslides through the retention and use of vegetation, building code regulations, erosion control measures during construction, and other means."

We agree with the city that plan policy 8.16(B) is not worded as a standard applicable to individual development applications, but rather is a guide for the development of city land use regulations. Further, the challenged decision does not identify plan policy 8.16(B) as an applicable standard.

<sup>7</sup>Petitioners complain the record lacks evidentiary support for findings of compliance with PCC 33.79.100(h) and "other relevant code sections on stability." Petition for Review 29. We assume petitioners mean PCC 33.79.070(f) and (g) and PCC 34.50.090.

1 soil conditions, stormwater runoff and groundwater  
2 will be addressed through proposed design,  
3 engineering and construction management features  
4 of the project. The supplemental report  
5 identifies the design and/or engineering features  
6 and techniques that can be used to address each  
7 identified potential problem and indicates that  
8 these features and techniques are reasonably  
9 certain to succeed. In particular, the  
10 supplemental report makes it clear that the  
11 proposed plan is likely to improve the stability  
12 of the site by diverting the stormwater[, ] that  
13 now saturates the soils and make[s] them more  
14 prone to sliding[, ] to a collection system and by  
15 constructing a series of engineered retaining  
16 walls that will improve the stability of soils  
17 upslope from the walls.

18 "Based on the supplemental and original reports by  
19 the applicant's geotechnical engineer, the  
20 stormwater and grading plans in the application,  
21 and the supplemental report of the Bureau of  
22 Buildings, the Council finds that the proposed  
23 engineering, design and construction management  
24 techniques and features in the preliminary PUD  
25 plan and supplemental geotechnical report are  
26 feasible and reasonably certain to succeed in  
27 addressing and resolving any potential problems  
28 with soil conditions, erosion, stormwater runoff  
29 and groundwater. The features and techniques  
30 described in the preliminary PUD plan are, in  
31 fact, likely to improve the safety of properties  
32 downhill from the site from potential landslides  
33 and stormwater conditions. To the extent that  
34 there is any specific evidence to the contrary in  
35 the record, the Council finds the testimony of the  
36 applicant's geotechnical expert and the Bureau of  
37 Building[s] more credible.

38 \* \* \* \* \*

39 "Regarding PZC<sup>[8]</sup> Section 33.79.070(g), the Council

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<sup>8</sup>The PZC is the Portland Zoning Code. The PZC is Title 33 of the PCC.

1 finds that the provisions of the preliminary  
2 development plan and preliminary geotechnical  
3 reports described below assure that manufactured  
4 slopes will be promptly planted or otherwise  
5 protected. Areas of manufacture[d] slopes are  
6 confined to the areas between the uphill units and  
7 several small areas uphill of those units based on  
8 the preliminary grading plan. The development  
9 plan provides that these areas will be stabilized  
10 either through plantings or through retaining  
11 walls to protect from stormwater and erosion, and  
12 that the two stormwater drainages on the site be  
13 tied into the city stormwater sewer system. The  
14 preliminary geotechnical reports additionally  
15 provide that manufactured slopes be constructed  
16 only during the dry summer months to protect  
17 against erosion. Based on these provisions, the  
18 Council finds that the proposed preliminary plan  
19 provides for prompt planting or other measures to  
20 protect soil stability and to avoid the effects of  
21 stormwater runoff and erosion. The preliminary  
22 plan further provides that the plantings and other  
23 measures will blend these slopes with the  
24 surrounding terrain and development.

25 "Regarding [PCC] 34.50.090 \* \* \*, the Council  
26 finds that the land proposed to be subdivided is  
27 suitable for the intended uses of the property for  
28 the reasons stated above.

29 "In conclusion, after considering the evidence in  
30 the entire record, the Council finds that the  
31 geotechnical concerns raised by appellants either  
32 are without factual basis or are addressed through  
33 design, engineering, or construction management  
34 features of the preliminary development plan."  
35 Remand Record 18-19.

36 Other findings at Remand Record 20-21 determine  
37 compliance with PCC 33.106.010. Those findings generally  
38 outline the character of the area, describe the  
39 characteristics of the proposal, and explain how the  
40 proposed PUD will be screened, and why the proposal is not

1 detrimental to or incompatible with the characteristics of  
2 the area

3 In Meyer v. City of Portland, 67 Or App 274, 280,  
4 678 P2d 741, rev den 297 Or 82 (1984) (Meyer), the court of  
5 appeals recognized that a two stage approval process is a  
6 permissible way to make land use decisions concerning PUDs.  
7 In Meyer, the court stated that interested parties have a  
8 right to be heard concerning a PUD's compliance with all  
9 relevant and discretionary approval standards. Further, the  
10 court stated that if compliance with such approval standards  
11 is deferred until the second stage of the PUD approval  
12 process, then the city must ensure that interested parties  
13 have an opportunity to be heard on those discretionary  
14 standards during the second stage. However, the court  
15 determined that the issue to be decided to determine whether  
16 the compliance with relevant standards has been established  
17 or whether compliance with those standards has been deferred  
18 to a later stage is whether:

19       "\* \* \* substantial evidence supports findings that  
20       solutions to certain problems (for example  
21       landslide potential) posed by a project are  
22       possible, likely and reasonably certain to  
23       succeed."<sup>9</sup> Id. at 280 n 5.

24       We believe the above quoted findings are adequate to  
25       establish that there are solutions available to various

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<sup>9</sup>The court acknowledged this Board has used the shorthand term  
"feasibility" to describe these determinations.

1 landslide, drainage and related problems affecting the  
2 subject property that are possible, likely and reasonably  
3 certain to succeed.<sup>10</sup> In this regard the findings  
4 adequately determine compliance with SC 34.50.090 and  
5 PCC 33.79.070(f) and (g); 33.79.100(h); 33.106.010 and  
6 33.79.110(g)(3). The above quoted findings do not defer the  
7 determination of compliance with these standards to a later  
8 point.

9 The decision determines the proposal to be in  
10 compliance with PCC 34.50.090 because the land is suitable  
11 for the proposed development, based on the conclusions in  
12 the geotechnical report, provided to the city on remand.  
13 The geotechnical report analyzes the hazards associated with  
14 the property and articulates various solutions to solve  
15 landslide and drainage related problems on the property.  
16 The geotechnical report also concludes that the proposal  
17 will actually improve geologic conditions at the site.

18 Compliance with PCC 33.79.070(f) and (g) is also  
19 determined based on the extensive analysis provided in the  
20 geotechnical report as well as the applicant's plans.  
21 Further, the findings determine compliance with  
22 PCC 33.79.100(h) based on the preliminary assessment of the  
23 geotechnical engineer, which addresses the project's  
24 feasibility and identifies potential problems and

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<sup>10</sup>We examine the evidentiary support for these findings below.

1 articulates how those problems will be solved. The findings  
2 determine compliance with PCC 33.79.110(g)(3) by determining  
3 that compliance with the development and services standards  
4 of PCC 33.79.070 and 33.79.080 is reasonably certain.  
5 Finally, there are findings which determine the proposal's  
6 compliance with PCC 33.106.010. There is simply nothing in  
7 the decision to indicate that compliance with PCC 33.106.010  
8 was deferred to the second stage of the PUD approval  
9 process.

10 In short, this is not a situation where compliance with  
11 discretionary standards is deferred to a later point without  
12 provision for a public hearing. See Bartels v. City of  
13 Portland 20 Or LUBA 303, 309-18 (199). Compliance with the  
14 PCC provisions cited by petitioners in the petition for  
15 review is determined by the city. Petitioners had ample  
16 opportunity to, and did, participate in the processes that  
17 led to the city's determinations of compliance with these  
18 standards. Under the challenged decision, it seems  
19 reasonably clear that the only items to be resolved during  
20 the second stage of the PUD approval process are "detailed  
21 technical matters involved in selecting a particular  
22 solution to each problem." Meyer, supra, 67 Or App at 282 n  
23 6.

24 This provides no basis for reversal or remand of the  
25 challenged decision.

26 This subassignment of error is denied.

1           **B.    Evidentiary Support**

2           As we understand it, petitioners argue the record lacks  
3 evidentiary support for the city's findings of compliance  
4 with PCC 34.50.090, 33.79.100(h), 33.79.070(g) and (f),  
5 33.106.010 and 33.79.110(g)(3).<sup>11</sup> Petitioners argue the  
6 record lacks evidentiary support for the city's  
7 determinations that solutions to the problems posed by the  
8 project are possible, likely and reasonably certain to  
9 succeed. Meyer, supra.

10          Petitioners do not cite evidence that conflicts with  
11 the evidence relied upon by the city. Petitioners contend  
12 the findings in the original geotechnical report submitted  
13 during the local proceedings in Gilson were based on  
14 inadequate information. Petitioners argue the geotechnical  
15 report submitted during the proceedings on remand, and  
16 relied upon by the city in the challenged decision, was not  
17 based on additional geological tests. Therefore, according  
18 to petitioners, the geotechnical report relied upon in the  
19 challenged decision is also unreliable.

20          The geotechnical report relied upon by the city in the  
21 challenged decision begins by stating:

22           "\* \* \* These supplemental materials are being  
23           submitted to the city to demonstrate the project's

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<sup>11</sup>With regard to PCC 33.106.010, we simply review the evidentiary support for the determinations of compliance articulated above. We also review the challenged decision's compliance with PCC 33.106.010 in more detail under the fourth assignment of error.

1 compliance with each of the above issues and  
2 standards that they are based upon. No change in  
3 the PUD plan is proposed, nor is any modification  
4 needed to comply with the standards. Rather, the  
5 purpose of these supplemental materials is to  
6 provide a clear explanation in the record as to  
7 why the applicable standards are met." Remand  
8 Record 66.

9 In the geotechnical portion of the report, the report  
10 determines:

11 "Based upon the detailed analysis contained in  
12 these reports, the recommended design, engineering  
13 and construction measures are not only feasible to  
14 construct the proposed project, they will improve  
15 the stability of the site." (Emphasis in  
16 original.) Remand Record 71.

17 We have reviewed the evidence cited by petitioners, the  
18 city and intervenor. We conclude that a reasonable decision  
19 maker could rely on the detailed information included within  
20 the geotechnical report, and the other evidence cited by the  
21 parties, in reaching the decision that the city did. We  
22 therefore conclude that substantial evidence in the whole  
23 record supports the city's determinations of compliance with  
24 PCC 34.50.090, 33.79.070(f) and (g), 33.106.010,  
25 33.79.100(h) and 33.79.110(g)(3). Younger v. City of  
26 Portland, 305 Or 346, 752 P2d 262 (1988). Therefore, the  
27 city's determinations that solutions to landslide, drainage  
28 and other problems associated with the subject property are  
29 possible, likely and reasonably certain to succeed, are  
30 supported by substantial evidence in the whole record.

31 This subassignment of error is denied.

1 The second and third assignments of error are denied.

2 **FOURTH ASSIGNMENT OF ERROR**

3 "The respondent misinterpreted and failed to  
4 comply with the provisions of its comprehensive  
5 plan and zoning code relating to the proposed  
6 development's compatibility with the neighborhood.  
7 And, the city failed to adopt findings supported  
8 by substantial evidence adequately addressing  
9 these standards."

10 PCC 33.106.010 requires findings that:

11 "\* \* \* the use at the particular location is  
12 desirable to the public convenience and welfare  
13 and not detrimental or injurious to the public  
14 health, peace or safety, or to the character and  
15 value of the surrounding properties."

16 PCC 33.79.010(e) provides that the intent of the PUD  
17 regulations is to:

18 "[p]romote an attractive and safe living  
19 environment which is compatible with surrounding  
20 residential developments."

21 PCC 33.79.070(d)(2)(B) requires the proposal to:

22 "[b]e buffered from existing single family homes.  
23 The buffer area must be landscaped and screened by  
24 natural features and plant materials to  
25 harmoniously integrate the PUD with the  
26 surrounding neighborhood and to provide a  
27 transition from the PUD to the neighborhood."

28 Plan goal 3<sup>12</sup> provides the following standard:

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<sup>12</sup>The city argues in its brief that this plan goal, and the plan policy that follows, are not standards applicable to the proposal. However, the challenged decision states these plan provisions "are or may be among the applicable criteria" and includes findings addressing these criteria. Remand Record 19-21. In this circumstance, we cannot interpret these plan provisions in the first instance and determine them to be inapplicable. See Citizens for Responsible Growth v. City of Seaside, 116 Or App 275, 840 P2d 1370 (1992), rev den 315 Or 643 (1993). Therefore, we assume these

1            "[p]reserve and reinforce the stability and  
2            diversity of the city's neighborhood while  
3            allowing for increased density in order to attract  
4            and retain long-term residents and insure the  
5            city's residential and economic vitality."

6            Finally, Corbett/Terwilliger Planning Area Plan Policy  
7            A (policy A) provides the city is to:

8            "[p]reserve the existing residential neighborhoods  
9            \* \* \* by maintaining the existing dwellings and  
10            stimulating compatible housing development and  
11            supporting services."

12            Petitioners argue the proposal violates these standards  
13            because (1) the proposed units will be more expensive than  
14            other units in the area, causing area property values and  
15            housing costs to increase, (2) a large multi-family housing  
16            project, such as the one proposed, is out of character with  
17            the area, and (3) the proposed buildings are too tall.<sup>13</sup>

18            **A.    Increase in the Value/Cost of Area Properties**

19            Petitioners do not explain why any of the cited code or  
20            plan provisions require the city to determine that the  
21            proposal will not increase the value, or the cost of  
22            renting, residential properties in the area, and we do not

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policies are applicable to the proposal, and review petitioners' allegations regarding them.

<sup>13</sup>Petitioners also complain the challenged decision fails to address findings in the decision of the city design commission concerning compatibility issues. However, petitioners cite nothing that requires the city to address the findings of the design commission and we are aware of nothing that requires such a determination.

1 see that they do.<sup>14</sup> Thus, the city's failure to find that  
2 the proposal will not increase the value of area properties  
3 or area rents, provides no basis for reversal or remand of  
4 the challenged decision.

5 This subassignment of error is denied.

6 **B. Out of Character Multi-Family Project**

7 Findings in the challenged decision describe the  
8 characteristics of the surrounding neighborhood. Those  
9 findings state, among other things, that there are a "large  
10 number of townhouse and multifamily dwellings already  
11 existing in the surrounding area" and that the neighborhood  
12 is characterized as a mix of "older and newer single family  
13 and townhouse dwellings." Remand Record 21. The decision  
14 also explains how the proposal fits into the surrounding  
15 neighborhood and determines:

16 "The housing style [of the proposal] -- attached  
17 in two and three unit clusters -- is more  
18 compatible with the newer development in the area.  
19 There are row house projects along S.W. Corbett in  
20 the vicinity of John's Landing. There is a large  
21 three-story condominium project just north of the  
22 site, and one to two story detached residences  
23 just east of the site. There is enough variety of  
24 housing type in this area that an attached housing  
25 project can be considered compatible. \* \* \*"  
26 Original Record 65.

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<sup>14</sup>The challenged decision includes findings that the proposal will not be "detrimental or injurious" to the value of surrounding properties and will add to "the diversity of the neighborhood and provide home ownership opportunities," findings relevant to the approval standards quoted above. Original Record 51, 67.

1 Further, we have examined the record citations provided  
2 by the parties. While the evidence is conflicting, the  
3 evidence cited by petitioners does not so undermine the  
4 evidence relied upon by the city, that a reasonable decision  
5 maker would not rely upon the city's evidence. We conclude  
6 the city's findings of compliance with PCC 33.106.010;  
7 33.79.010(e); 33.79.070(d)(2)(B); plan goal 3 and policy A,  
8 as they relate to the general compatibility of the proposed  
9 multifamily housing project with the surrounding area, are  
10 supported by substantial evidence in the whole record.

11 This subassignment of error is denied.

12 **C. Height of Proposed Buildings**

13 Petitioners argue:

14 "[T]he city focused on the height of certain  
15 downhill units as the problem, ignoring the issue  
16 of the impact of the height of the uphill  
17 buildings as well." Petition for Review 44.

18 Petitioners also argue:

19 "\* \* \* The findings rely most heavily on the fact  
20 that '[t]he nine highest downhill units have been  
21 reduced in height by an average of 16 feet through  
22 the imposition of a condition requiring the top  
23 floor of these units be moved to the bottom of the  
24 structures.' \* \* \* No condition states this.  
25 Condition Y, the only relevant condition,  
26 continues to state only that these units 'shall be  
27 reduced in height and in the height of the  
28 understructure.' \* \* \*" (Emphasis in original.  
29 Record citations omitted.) Id.

30 The city cites findings in which it is reasonably clear  
31 that the city considered the height of both the uphill and  
32 downhill units and determined that, based on computer

1 generated photographs and other factors, the proposed height  
2 of all units is not incompatible with the surrounding  
3 neighborhood. Specifically, the findings determine that,  
4 considering the modifications to the height of the nine  
5 "taller" units, with the proposed design features,  
6 landscaping and setbacks, the height of the proposed units  
7 is not incompatible with the surrounding neighborhood.

8         Petitioners are concerned that condition of approval Y  
9 is not specific enough to ensure the height reductions  
10 relied upon by the city to determine compatibility with  
11 regard to height. However, we agree with the city that,  
12 reading condition Y together with the findings at Remand  
13 Record 20 stating the height reduction will be achieved by  
14 moving the top floor of the nine highest downhill units to  
15 the bottom of the structures, so that those units are 60 to  
16 65 feet above the ground at their downhill edge, condition Y  
17 will not be satisfied until such height reduction occurs.  
18 Accordingly, we believe that condition Y is adequate to  
19 ensure the height reductions relied upon by the city will be  
20 implemented.

21         The determination of compatibility is an inherently  
22 subjective determination. The city's findings illustrate  
23 that the city properly applied PCC 33.106.010; 33.79.010(e);  
24 33.79.070(d)(2)(B); plan goal 3 and policy A to determine  
25 that the height of the proposed buildings is not  
26 incompatible with the surrounding neighborhood. Of course,

1 there is a great deal of conflicting evidence in the whole  
2 record concerning the issue of compatibility between the  
3 proposal and the surrounding neighborhood with regard to  
4 height. It is not for this Board to substitute its judgment  
5 for that of the city. Rather, we must determine whether a  
6 reasonable decision maker could adopt the challenged  
7 decision based on the evidence in the whole record. We  
8 conclude a reasonable decision maker could do so.  
9 Therefore, the city's findings of compliance with  
10 PCC 33.106.010; 33.79.010(e); 33.79.070(d)(2)(B); Plan  
11 goal 3 and policy A, as they relate to height, are supported  
12 by substantial evidence in the whole record.

13 This subassignment of error is denied.

14 The fourth assignment of error, is denied.

15 The city's decision is affirmed.