

1
2
3
4
5
6
7
8
9

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

REMANDED 10/15/93

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

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner seeks approval for a residential planned
4 unit development (PUD) on the subject property. Under the
5 city's land use regulatory scheme, the proposal requires
6 PUD, conditional use, and subdivision approval.¹
7 Responsibility for the initial decision concerning these
8 approvals lies with the city land use hearings officer. The
9 proposed PUD also requires design review approval, because
10 it is located within the Terwilliger Design Overlay Zone.
11 The city design commission is responsible for the initial
12 design review decision. The city land use hearings officer
13 granted PUD, conditional use and subdivision approval. The
14 design commission granted design review approval. After a
15 local appeal, the challenged city council decision reversed
16 the hearings officer's and design commission's decisions.²

17 **MOTION TO INTERVENE**

18 Thirteen individuals and two neighborhood associations
19 move to intervene on the side of respondent in this
20 proceeding. There is no opposition to the motion, and it is

¹Because the challenged PUD would be served by a dead-end private street more than 400 feet long, a variance is also required. The proposed PUD is also subject to review for compliance with "Temporary Prohibition on the Disturbance of Forest" criteria. However, these aspects of the challenged decision are not at issue in this appeal.

²In this opinion, we refer to the portion of the city council's decision reversing the hearings officer's decision as the "conditional use decision." We refer to the portion of the city council's decision reversing the design commission's decision as the "design review decision."

1 allowed.

2 **FACTS**

3 The relevant facts in this appeal are stated in the
4 city's findings, as follows:

5 **Description of Plan:** The applicants propose to
6 develop this 4.6-acre parcel with a 14-home [PUD].
7 This revised design consists of six single-family
8 homes on the downhill side of the proposed private
9 street, and four pairs of attached homes on the
10 uphill side of the street. The private street
11 would connect to S.W. Terwilliger Boulevard at the
12 south end of the site. * * *

13 "Each home would be on an individual lot, with
14 direct access to the private street. For the
15 single-family homes on the downhill side of the
16 street, lot sizes would vary between 5,200 and
17 6,700 square feet in area, with average widths of
18 80 - 120 feet and average depths of 50 - 70 feet.
19 For the attached units on the less visible, uphill
20 side of the streets, lot areas would vary between
21 3,700 and 4,400 square feet * * *. More than half
22 of the site, approximately 2.5 acres, would be
23 devoted to commonly-owned open space. The total
24 amount of open space, including portions of the
25 individual lots to be left undeveloped, would be
26 78 percent of the site.

27 "The town houses would share common design
28 elements. The primary exterior material would be
29 cedar shingle siding, with traditional composition
30 shingle roofs. Primary roof forms would be
31 pitched rather than flat. Units would be painted
32 a dark gray/green.

33 **Site and Vicinity Description:** The site is
34 heavily wooded and steeply sloped. The steepest
35 sloping occurs on the eastern edge of the site,
36 along Terwilliger. Trees are predominantly
37 deciduous, with a number of Douglas fir as well.
38 There are no improvements on the site, except for
39 the paved turnout at the southeast corner of the
40 site, along Terwilliger.

1 "The predominant feature in the immediate vicinity
2 is the Terwilliger Parkway, which borders the site
3 to the east. The parkway features a broad
4 boulevard, a separate paved pedestrian/bicycle way
5 on the downhill side of the boulevard, and
6 extensive naturalistic landscaping punctuated by
7 exceptional views of the City and mountains.

8 "There is virtually no development for several
9 hundred feet north of the site along either side
10 of the parkway, due in large part to steep slopes.
11 The Chart House restaurant lies about 500 feet
12 south of the site, on the east side of
13 Terwilliger. It is the only nonresidential
14 development in the vicinity. There are single-
15 family homes farther south (past the Chart House)
16 in close proximity to Terwilliger. There are also
17 homes to the southwest of the site, at higher
18 elevations. These latter homes are located along
19 Menefee." Record 2-3.

20 **INTRODUCTION**

21 Petitioner's assignments of error challenge one or more
22 aspects of the design review decision, the conditional use
23 decision, or both. A brief discussion of the relevant
24 comprehensive plan and land use regulation provisions
25 governing the challenged decisions is necessary before
26 turning to the parties' arguments concerning the city's
27 interpretation and application of those provisions.

28 **A. Design Review Decision**

29 The city's Design Zone provisions appear at Portland
30 City Code (PCC) Chapter 33.62.³ The Design Zone is an

³Although some of the PCC provisions at issue in this appeal have been amended, the city applied the version of the PCC in effect on the date the application was filed. ORS 227.178(3).

1 overlay zone which imposes restrictions on development, in
2 addition to the restrictions that apply by virtue of the
3 underlying base zone.⁴ The subject property is located
4 within the Terwilliger Design Overlay Zone, and by virtue of
5 that Design Zone designation, the subject property is
6 subject to review under PCC 33.62, the Terwilliger Parkway
7 Corridor Plan (Terwilliger Plan) and the Terwilliger Parkway
8 Design Guidelines (Terwilliger Guidelines). As explained
9 more fully below, there is significant overlap between the
10 provisions of the Terwilliger Plan and the Terwilliger
11 Guidelines.

12 **B. Conditional Use Decision**

13 As noted earlier in this opinion, the conditional use
14 decision actually includes a number of separate required
15 approvals. As relevant in this appeal, the city found the
16 proposal violated certain PUD and conditional use criteria.
17 However, the city's decision denying PUD and conditional use
18 approval relies on reasoning adopted by the city in its
19 decision denying design review approval. Petitioner
20 contends that because the city's design review decision is
21 erroneous, its reliance on the design review decision in its
22 conditional use decision is also erroneous.

⁴The subject property is zoned Residential R-7 and R-10. The proposed development is well within the development density allowed by the base zones.

1 **FIRST ASSIGNMENT OF ERROR**

2 **A. Petitioner's Arguments**

3 Under his first assignment of error, petitioner makes
4 two related arguments challenging the city's design review
5 decision. First, petitioner contends the city erroneously
6 treated the Terwilliger Plan and the Terwilliger Guidelines
7 as mandatory approval criteria. Petitioner contends the
8 provisions of those documents that the city relied upon in
9 denying its request for design review approval are advisory
10 rather than mandatory approval standards. Petitioner argues
11 that advisory standards cannot provide a basis for denying
12 his request for design review approval. Second, petitioner
13 contends the city may not deny requests for design review
14 approval outright. Rather, petitioner argues, the city is
15 limited to conditioning or modifying such requests.⁵

16 **1. Terwilliger Guidelines -- Advisory or**
17 **Mandatory Standards?**

18 By statute, respondent is required to make land use
19 decisions in accordance with its "acknowledged plan and land
20 use regulations." ORS 197.175(2)(d). This Board must
21 reverse or remand land use decisions which do not comply
22 with relevant acknowledged comprehensive plan or land use

⁵In the first part of his second assignment of error, petitioner argues the city failed to provide an adequate interpretation of relevant PCC, Terwilliger Plan and Terwilliger Guideline provisions for this Board to review in resolving the interpretational issues presented in the first assignment of error. We address this issue in our discussion of the first assignment of error.

1 regulations. ORS 197.835(6). However, as we have explained
2 on numerous occasions, these statutory requirements leave
3 open the more difficult task of determining which provisions
4 of the acknowledged plan and land use regulations impose
5 mandatory approval criteria for particular land use
6 decisions. See Stotter v. City of Eugene, 18 Or LUBA 135,
7 146-47 (1989); McCoy v. Tillamook County, 14 Or LUBA 108,
8 110-11 (1985). The court of appeals and this Board have
9 recognized two methodologies for determining whether plan or
10 land use regulation provisions operate as mandatory approval
11 criteria.

12 The first is a generic or categorical approach. A
13 local government's acknowledged comprehensive plan or land
14 use regulations may explicitly provide that particular
15 portions of the plan or land use regulations either do or do
16 not operate as mandatory approval standards. In Downtown
17 Comm. Assoc. v. City of Portland, 80 Or App 336, 722 P2d
18 1258, rev den 302 Or 86 (1986), the parking garage proposed
19 in that case exceeded numerical limits in the comprehensive
20 plan on the allowable number of parking spaces. However,
21 the court concluded plan parking space limitations were not
22 mandatory standards, because the PCC explicitly provided
23 those limits were to be used "as a guideline only." Id. at
24 339.⁶ The court explained it did not matter that the

⁶The court explained as follows:

1 parking limit itself was worded in mandatory terms, because
2 the PCC relegated the limitation to advisory (non-mandatory)
3 status.⁷ See also Miller v. City of Ashland, 17 Or LUBA
4 147, 167-69 (1988).

5 The second methodology is employed where the
6 comprehensive plan and land use regulations do not
7 explicitly establish whether disputed plan and land use
8 regulation provisions apply as mandatory approval criteria
9 for a particular land use decision. This methodology
10 involves a case-by-case inquiry, examining the wording and
11 context of the particular plan and land use regulation
12 provisions. See Bennett v. City of Dallas, 17 Or LUBA 450,
13 456, aff'd 96 Or App 645 (1989). With these principles in
14 mind, we turn to petitioner's arguments concerning the
15 Terwilliger Guidelines.

16 Petitioner argues both the generic and case-by-case
17 methodologies in contending that the Terwilliger Guidelines
18 are not mandatory approval criteria. Although it is not

"[T]he word 'guideline' is a term of art and, unless the context suggests otherwise, its meaning in local planning documents presumably duplicates its meaning in the statutory scheme. ORS 197.015(9) provides, as relevant:

"'Guidelines shall be advisory and shall not limit state agencies, cities, counties and special districts to a single approach.'" Id. at 340.

⁷We are aware of no Oregon appellate court or LUBA case that has addressed the reverse situation, i.e. plan or land use regulation provisions that are specifically designated as mandatory approval standards, but which are worded in non-mandatory terms.

1 entirely clear, we understand petitioner to argue that the
2 city's comprehensive plan, including the Terwilliger Plan,
3 does not apply directly in the subject design review
4 proceeding. We understand petitioner to argue that within
5 the Terwilliger Design Zone, relevant provisions of the
6 comprehensive plan and Terwilliger Plan are fully
7 implemented by the Terwilliger Guidelines.⁸ Petitioner
8 further contends the Terwilliger Guidelines were adopted as
9 standards by which the city can shape and change proposals
10 for development, but may not deny them outright. Petitioner
11 relies in large part on the following language in the
12 Terwilliger Guidelines:

13 "The guidelines in this document are to implement
14 the Goals of the Terwilliger Parkway Corridor and
15 the 'Character of Terwilliger' statement. They
16 are intended to aid developers and designers in
17 understanding the expectations of the City and the
18 concerns and objectives of the Design Commission
19 for development within the Terwilliger Plan Area.

20 "The guidelines are not intended to be inflexible
21 prescriptive requirements, and therefore
22 exceptions to them for particularly appropriate
23 proposals may be granted. The Design Commission
24 requires that every project address itself to all
25 applicable guidelines. However the Commission is
26 also interested in encouraging creative solutions
27 to design problems. The principal purpose of

⁸As noted earlier in this opinion, there is significant overlap between the Terwilliger Plan and the Terwilliger Guidelines. For example the Terwilliger Plan and Terwilliger Guidelines contain identical "Goals" and identical statements of the "Character of Terwilliger." Further, disputed provisions pertaining to screening of the development and scale appear in the Terwilliger Plan as Landscape Policies and in the Terwilliger Guidelines as Landscaping Guidelines.

1 these guidelines is to present a complete set of
2 the City's concerns on Terwilliger development.
3 The Design Commission or the City Council on
4 appeal may also address itself to aspects of a
5 project's design which are not covered in the
6 guidelines when one or more aspect of a proposed
7 development are deemed in conflict with the Goals
8 for Terwilliger or the 'Character of Terwilliger'
9 statement." Terwilliger Guidelines 2.

10 Petitioner bolsters the above argument by pointing out
11 the Terwilliger Guidelines are couched almost entirely in
12 non-mandatory terms. The Terwilliger Guidelines relevant in
13 this appeal are all expressed as "shoulds" rather than
14 "shalls."⁹ Moreover, petitioner contends the use of the
15 term "guidelines" shows the standards contained in the
16 Terwilliger Guidelines were not intended to operate as
17 mandatory requirements, in the sense a proposal could be

⁹For example Landscaping Guideline 1(a) provides that "[l]andscaping should be consistent with the Terwilliger Landscape Concept Plan shown on Map 1 and illustrated in Figures 3 through 10 * * *." Figures 3 (Forest Corridor) and 8 (Forest View) are relevant in this appeal. They provide as follows:

"Forest Corridor:

"A continuous, visually uninterrupted segment of the roadway which is heavily enclosed by native forest planting and hillsides. Development should be completely screened from view." Terwilliger Guidelines 11.

"Forest View:

"Continuous native forested hillside where distant views are focused as a result of a curved roadway alignment. Small scale development is partially visible but the forest character is preserved. Where this landscape pattern is viewed only from a distance, design review should be limited to maintaining small scale for new structures and preserving the forest character of the hillside."

1 denied if it were found to be inconsistent with one or more
2 of the Terwilliger Guidelines. Downtown Comm. Assoc. v.
3 City of Portland, supra.

4 **2. Authority to Deny Design Review Approval**

5 Petitioner's second argument under the first assignment
6 of error relies largely on PCC 33.62.040(3), which provides,
7 in relevant part, as follows:

8 "The Design Commission * * * shall have authority
9 to require changes in [certain specified features]
10 and to impose such conditions of development as
11 are necessary in [its] judgment to carry out the
12 purpose of the [Design] Zone * * *."

13 According to petitioner, PCC 33.62.040(3) limits the Design
14 Commission's and city council's authority to require changes
15 and impose conditions to address relevant regulatory
16 provisions in the Terwilliger Design Zone. According to
17 petitioner, PCC 33.62.040(3) does not authorize the city to
18 deny his request for design review approval, as the city
19 council did in this case. Petitioner acknowledges that
20 major projects such as the one at issue in this appeal are
21 required to be processed through the city's Type III
22 procedures, and that PCC 33.215.170 explicitly provides that
23 denial of a permit application is one of the options
24 available to the city under Type III procedures.¹⁰ However,

¹⁰As relevant, PCC 33.215.170 provides as follows:

"A decision [under Type III procedures] may be made to grant,
grant with conditions, modify, or deny an application, as

1 petitioner contends that denial of a request for land use
2 approval under PCC 33.215.170 is only permissible "as
3 provided by the applicable approval criteria." Here,
4 petitioner contends, the Terwilliger Guidelines (discussed
5 more fully below) are the only applicable criteria; and they
6 are advisory, rather than mandatory approval standards.
7 Therefore, petitioner argues, denial is not an option in
8 this case, despite the language in PCC 33.215.170 explicitly
9 providing that denial may be an option in other cases where
10 mandatory approval criteria that could provide the basis for
11 denial do apply.

12 **B. Respondent's Response**

13 In its brief, respondent contends petitioner misreads
14 the Terwilliger Guidelines. Respondent argues that while
15 the Terwilliger Guidelines "are not intended to be
16 inflexible prescriptive easements" and "exceptions to them
17 for particularly appropriate proposals may be granted," it
18 requires an erroneous leap in logic to conclude this
19 language renders the entire Terwilliger Guidelines

provided by the applicable approval criteria. * * *"
(Emphasis added.)

Petitioner argues the emphasized language requires reference to the Terwilliger Guidelines which, according to petitioner, are advisory rather than mandatory approval criteria. Because the applicable approval criteria are non-mandatory, petitioner contends the city may not deny a request for design review approval, despite the language in PCC 33.215.170 explicitly providing that denial is an option.

1 regulatory scheme merely "advisory."¹¹ According to
2 respondent, the language in the Terwilliger Guidelines upon
3 which petitioner relies simply provides that the city may
4 approve a project even though it is inconsistent with a
5 particular guideline, not that it must do so. Rather, the
6 city is free to allow exceptions for particularly
7 appropriate projects, where the principles embodied in the
8 Goals and the Character of Terwilliger Statement are
9 satisfied.¹² Respondent distinguishes the result in
10 Downtown Comm. Assoc. v. City of Portland by noting that in
11 that case, unlike the present one, the relevant PCC
12 provisions explicitly provided that the disputed parking
13 limitation was "a guideline only."

14 In response to petitioner's contention that
15 PCC 33.62.040(3) precludes denial, respondent argues in its
16 brief that its Type III procedures clearly allow denial as
17 an option and, under the construction of the regulatory
18 effect of the Terwilliger Guidelines respondent offers in
19 its brief, those criteria may provide a basis for reversal
20 or remand.

¹¹We note that in a case presenting a similar question based on code language that explicitly precluded outright denial of a permit application, the court of appeals construed the relevant code language in context with other code provisions to preserve the city's power to deny approval outright. Byrnes v. City of Hillsboro, 101 Or App 307, 311-12, 790 P2d 552, adhered to 104 Or App 95 (1990).

¹²The Character of Terwilliger Statement, discussed infra, is part of both the Terwilliger Plan and Terwilliger Guidelines.

1 **C. Waiver**

2 Respondent contends that because petitioner never
3 raised an issue about whether the city could deny his
4 request for design review approval, the issue may not be
5 raised for the first time at LUBA. ORS 197.830(10) and
6 197.835(2); Boldt v. Clackamas County, 21 Or LUBA 40, 46,
7 aff'd 107 Or App 619 (1991).

8 Petitioner first argues he could not have anticipated
9 that the city would construe the Terwilliger Guidelines and
10 PCC 33.62.040(3) and 33.215.170 as allowing the city to deny
11 the request for design review approval. Washington Co. Farm
12 Bureau v. Washington Co., 21 Or LUBA 51, 57 (1991).

13 We reject that argument. There is nothing more
14 fundamental in a local land use proceeding than the task of
15 identifying the relevant approval criteria. That task
16 necessarily includes separating mandatory approval criteria
17 from those that are merely advisory. Petitioner does not
18 argue the city failed to identify the Terwilliger Guidelines
19 as relevant approval criteria, as it is required to do under
20 ORS 197.763(3)(b) and (5)(a). Once a local government
21 satisfies that obligation, a party wishing to assert that
22 the identified approval criteria are advisory rather than
23 mandatory approval criteria, must raise that issue in
24 accordance with ORS 197.763(1) prior to the close of the
25 final evidentiary hearing. A party may not fail to do so
26 and then claim it could not have anticipated that the local

1 government would apply an identified criterion to deny the
2 requested approval.

3 In his petition for review, petitioner also argues that
4 he raised the issue presented in the first assignment of
5 error during the local proceedings. Petitioner cites the
6 following argument presented by his attorney during the
7 proceedings below:

8 "[Petitioner's attorney] argued that the
9 Terwilliger Guidelines are not meant to prohibit
10 development but to guide it and to balance
11 development with preservation of scenic qualities.
12 He said the guidelines are not intended to be
13 prescriptive requirements, only suggested
14 approaches and are not ironclad under state law. *
15 * *" Record 143.

16 We conclude the above quoted language is sufficient to
17 raise the issue of whether the city may, under
18 PCC 33.62.040(3) and 33.215.170 deny a request for design
19 review approval or rather is limited to conditioning the
20 request or requiring modifications.¹³ Admittedly,
21 petitioner could have raised the issue more precisely and
22 petitioner did not specifically cite PCC 33.62.040(3) or
23 33.215.170. However, as we explained in our decision in
24 Boldt v. Clackamas County, supra, petitioner is not required
25 to make exactly the same argument below that it makes before
26 this Board. See also Hale v. City of Beaverton, 21 Or LUBA

¹³Respondent does not appear to argue petitioner failed to raise the issue of whether the Terwilliger Guidelines are mandatory approval standards or merely advisory standards. To the extent respondent does make that argument, we reject it.

1 249, 254 (1991). Respondent's contention that petitioner
2 waived the arguments he makes under the first assignment of
3 error is rejected.

4 **D. Adequacy of the City Interpretation**

5 Under Weeks v. City of Tillamook, 117 Or App 449,
6 453-54, 844 P2d 914 (1992) and Larson v. Wallowa County, 116
7 Or App 96, 104 840 P2d 1350 (1992), this Board may not
8 interpret the Terwilliger Plan and Terwilliger Guidelines in
9 the first instance. See also Gage v. City of Portland, ___
10 Or App ___, ___ P2d ___ (September 22, 1993); O'Mara v.
11 Douglas County, ___ Or LUBA ___ (LUBA No. 92-166, March 10,
12 1993); Terra v. City of Newport, 24 Or LUBA 438 (1993).
13 While the challenged design review decision is generally
14 consistent with the interpretation offered in respondent's
15 brief, the interpretation set out in respondent's brief is
16 not included in the challenged decision. It may be that had
17 petitioner more precisely stated his position concerning the
18 limited options available to the city under design review
19 and the Terwilliger Guidelines during the local proceedings
20 the city would have provided the more detailed
21 interpretation that we conclude is required under Weeks and
22 Larson. However, having concluded the interpretational
23 issue may be raised to this Board, the required
24 interpretation must come from the city, and it must be
25 provided in the challenged decision or its supporting
26 findings. Respondent may not supply the missing

1 interpretation in its brief.

2 It is reasonably clear from the city's decision that it
3 views the Terwilliger Guidelines as mandatory approval
4 criteria and believes that it has the power to deny a
5 request for design review approval. What is missing from
6 the decision, however, is an explanation for why the city
7 believes the Terwilliger Guidelines operate as mandatory
8 approval criteria. Although the city may well subscribe to
9 part or all of the explanation offered in respondent's
10 brief, we may not assume such is the case. Weeks and Larson
11 require that an interpretation sufficient for our review be
12 included in the challenged decision.¹⁴

13 The first assignment of error is sustained.¹⁵

14 **SECOND, THIRD AND FOURTH ASSIGNMENTS OF ERROR¹⁶**

15 **A. Forest Corridor**

16 The Terwilliger Guidelines are divided into several
17 different types of guidelines, including landscaping

¹⁴We emphasize that we do not necessarily agree with petitioner's contention that the "Guidelines" portion of the Terwilliger Guidelines fully implements the Comprehensive Plan, Terwilliger Plan and other parts of the Terwilliger Guidelines. Nor do we necessarily agree with petitioner that the "Guidelines" are non-mandatory, either because they are generically relegated to such status or because individual guidelines are worded in non-mandatory terms.

¹⁵We address those portions of petitioner's remaining assignments of error that are not affected by our disposition of the first assignment of error.

¹⁶We address petitioner's challenges under these assignments of error under the particular PCC, Terwilliger Plan and Terwilliger Guidelines provisions challenged.

1 guidelines. Landscaping guideline 1(a) refers to a number
2 of figures, including Figure 3, "Forest Corridor." Figure 3
3 describes the Forest Corridor requirement as follows:

4 "A continuous, visually uninterrupted segment of
5 the roadway which is heavily enclosed by native
6 forest plantings and hillsides. Development
7 should be completely screened from view."
8 Terwilliger Guidelines 11.¹⁷

9 Approximately two-thirds of the subject property's
10 frontage on Terwilliger Boulevard is designated as "Forest
11 Corridor." The challenged design review decision describes
12 the applicant's proposal for the Forest Corridor portion of
13 the subject property and then provides the following
14 interpretation and application of the forest corridor
15 requirement quoted above:

16 "'Completely screening development from view' is
17 not the same thing as making that development
18 utterly invisible when seen from Terwilliger. It
19 is possible that someone walking or driving along
20 Terwilliger may get a brief glimpse of a small
21 portion of a building. However, the clear thrust
22 of the guideline is that the passer-by will only
23 see a dense forest as he or she passes alongside a
24 site which is designated as a forest corridor.
25 The Landscape Concept in the Terwilliger [Plan]
26 clearly illustrates this thrust. Figure 3 * * *
27 offers a rendering of the forest corridor
28 treatment - a solid continuous 'wall' of mature
29 trees, with no buildings or other development
30 visible behind that wall of vegetation."
31 (Emphases added.) Record 21.

32 Petitioner contends the city improperly interpreted and

¹⁷The forest corridor requirement is imposed in identical language as a
Landscape Policy in the Terwilliger Plan. Terwilliger Plan 8.

1 applied the Forest Corridor requirement that "[d]evelopment
2 should be completely screened from view." Petitioner first
3 argues the city should have interpreted the Forest Corridor
4 requirement consistently with the PCC provisions for
5 Landscaping and Screening, which impose specific numerical
6 opacity requirements.¹⁸ Had the city done so, petitioner
7 contends, the proposal would satisfy the Forest Corridor
8 screening requirement.¹⁹

9 Respondent answers that the PCC Landscaping and
10 Screening requirements cited by petitioner, see n 17, apply
11 to PCC Title 33 and are inapplicable to the Terwilliger Plan
12 and Terwilliger Guidelines because they are not part of
13 PCC Title 33. We agree with respondent.

14 Petitioner next argues that in the first sentence of
15 the above findings, the city states development need not be
16 invisible from Terwilliger, but the latter emphasized
17 findings contradict that finding by requiring invisibility.
18 Petitioner argues the city's inconsistent interpretation and

¹⁸PCC Chapter 33.520 "provides the standards for landscaping, screening and trees required for [PCC Title 33]." PCC 33.520.010. PCC 33.520.020(A)(3) and (4) impose a requirement that plants be of a density which will "be at least 75 percent opaque year around."

¹⁹Petitioner cites the testimony of his expert, who was a member of the planning team that prepared the Terwilliger Plan and Terwilliger Guidelines. Petitioner suggests that his expert's view that the Forest Corridor was intended to incorporate the numerical PCC Landscaping and Screening requirements should have been accorded deference. Petitioner is incorrect. See Von Lubken v. Hood River County, 19 Or LUBA 404, 411, rev'd on other grounds, 104 Or App 683 (1990), adhered to 106 Or App 226, rev den 311 Or 349 (1991) ("[P]ost enactment expressions of legislative intent are not competent legislative history.").

1 application of the Forest Corridor requirement is erroneous.
2 Moreover, petitioner contends the city's inconsistent
3 interpretation is inadequate to advise the applicants of
4 what is required to satisfy the Forest Corridor requirement.
5 See Commonwealth Properties v. Washington County, 35 Or App
6 387, 400, 582 P2d 1384 (1978); Philippi v. City of
7 Sublimity, 6 Or LUBA 233 (1982).

8 Respondent concedes the findings could be clearer, but
9 focuses on the first two sentences of the above findings,
10 which respondent contends establish that while invisibility
11 is not required, screening must be such that only brief
12 glimpses of the buildings will be possible. Respondent also
13 cites the following findings in which the city concludes the
14 proposal is inconsistent with the Forest Corridor
15 requirement:

16 "The proposal would fail to achieve this forest
17 corridor effect. By the applicant's own
18 admission, buildings would be visible from
19 Terwilliger. This would particularly be true
20 during the winter, when deciduous trees will have
21 shed their leaves. Council is not satisfied that
22 this visibility will constitute mere incidental
23 glances through a thickly wooded forest. Indeed,
24 the testimony of the applicants suggest[s] that
25 the effect which the proposed landscaping plan
26 will achieve would be more like the 'native
27 screening' * * * than the forest corridor
28 treatment. Council therefore concludes that the
29 proposal would not comply with the Landscape
30 Policies and Concept Plan with regard to the
31 Forest Corridor treatment." (Emphasis added.)
32 Record 21-22.

33 While some confusion may be possible, we believe the

1 above findings are adequate to express an interpretation of
2 the Forest Corridor requirement that while invisibility is
3 not required, the development must be sufficiently screened
4 so that only brief or incidental glimpses of the development
5 will result. The city's interpretation and application of
6 the Forest Corridor requirement is adequate to advise
7 petitioner of what is required to comply with that
8 provision.²⁰ Neither Commonwealth Properties nor our
9 decision in Philippi requires the interpretational precision
10 petitioner suggests.

11 This subassignment of error is denied.

12 **B. Character of Terwilliger Statement**

13 The Character of Terwilliger Statement in the
14 Terwilliger Plan and Terwilliger Guidelines provides, in
15 part, as follows:

16 "Buildings which are set back from the boulevard,
17 well but simply landscaped, small in scale, and
18 designed with care tend to add romance to the
19 drive or walk." Terwilliger Plan 6; Terwilliger
20 Guidelines 7.

21 The Terwilliger Guidelines include the following "Style,
22 Scale, Siting, Materials and Color" guidelines, which make
23 reference to the Character of Terwilliger Statement:

24 "1. Architectural scale, style, siting, lighting,
25 building material, color and finishes should
26 complement the landscape and be in keeping

²⁰Consistent with our resolution of the first assignment of error, the city still must explain its apparent view that the Forest Corridor requirement is a mandatory approval criterion.

1 with the 'Character of Terwilliger'
2 statement.

3 "2. Care should be taken with all aspects of the
4 project seen from the Boulevard and Trail,
5 including roofs, foundations, drives and
6 parking areas, to ensure that they are
7 aesthetically pleasing and in keeping with
8 the 'Character of Terwilliger' statement."

9 Petitioner complains the above portion of the Character
10 of Terwilliger Statement "is nothing more than a description
11 of what creates 'romance.'" Petition for Review 27.
12 According to petitioner, "[i]t is not a requirement that
13 everything along Terwilliger be small in scale * * *." Id.
14 With regard to the first of the above guidelines, petitioner
15 contends the city improperly emphasizes the reference in the
16 Character of Terwilliger Statement to "small in scale."
17 Petitioner contends the city has improperly created a
18 criterion that the project be small in scale, where no such
19 criterion exists.

20 Regarding the second guideline, petitioner argues the
21 city's findings improperly conclude "all aspects of a
22 project design should be aesthetically pleasing and in
23 keeping with the Character of Terwilliger statement."
24 (Emphasis in original.) Petition for Review 37. Petitioner
25 contends only aspects of the property that can be seen from
26 Terwilliger Boulevard are subject to the "aesthetically
27 pleasing" requirement.

28 Respondent concedes the Character of Terwilliger
29 Statement is not phrased as an approval standard. However,

1 respondent points out the Terwilliger Guidelines explicitly
2 state the guidelines "are to implement the Goals of the
3 Terwilliger Parkway Corridor and the 'Character of
4 Terwilliger' statement." Terwilliger Guidelines 2. Given
5 this relationship, and the lack of any other provision
6 establishing the required scale, respondent contends it is
7 entirely appropriate for respondent to rely on the reference
8 to small scale in the Character of Terwilliger Statement in
9 finding that the proposal is inconsistent with the first of
10 the above guidelines. Respondent contends LUBA should defer
11 to this construction and application of the Terwilliger
12 Guideline provisions.

13 Respondent's only answer to petitioner's concern about
14 the second guideline is that petitioner failed to raise an
15 issue about the challenged findings prior to the close of
16 the final evidentiary hearing in this matter and, therefore,
17 waived his right to contest those findings.

18 With regard to respondent's interpretation of the
19 Character of Terwilliger Statement and the first of the
20 above guidelines, we again conclude that the interpretation
21 must be included in the city's decision. Although the
22 interpretation offered in respondent's brief may well be one
23 that this Board would be required to defer to under Clark v.
24 Jackson County, 313 Or 508, 836 P2d 710 (1992), it is not
25 included in the challenged decision. However, assuming the
26 city concludes on remand that the above provisions require

1 the proposed development be small in scale, we do not agree
2 with petitioner that the city failed to explain what small
3 in scale means. The city adopted the following findings:

4 "The project is not sufficiently small in scale.
5 The height of the buildings on the downhill side
6 of the private street would be similar to the
7 height of much taller, non-residential structures,
8 if one were to include the substantial elevated
9 foundations and support structures." Record 28.

10 These findings are adequate to explain the city's view of
11 the small scale requirement, assuming such a requirement is
12 imposed by the Terwilliger Guidelines and Character of
13 Terwilliger Statement.

14 With regard to respondent's argument that petitioner
15 waived his argument concerning the city interpretation and
16 application of the second of the above guidelines, we do not
17 agree that petitioner was required to anticipate that the
18 disputed interpretation might be included in the findings
19 prepared and adopted after the final evidentiary hearing.
20 See Washington Co. Farm Bureau v. Washington Co., supra.

21 This subassignment of error is sustained, in part.

22 **C. Grading Requirements**

23 Petitioner argues the city relied on the following
24 Terwilliger Guidelines requirements:

25 "Preservation of the existing topography to the
26 extent practical by reducing necessary grading and
27 limiting cuts and fills to slopes of less than 2
28 to 1 (retaining walls are permitted if they
29 conform with the 'style, scale, siting, materials
30 and color guidelines')." Terwilliger Guidelines
31 10.

1 "Access Guidelines:

2 "New access points, if required and justified,
3 should provide 300 foot sight distances along
4 Terwilliger; a 1-5% grade for twenty feet from the
5 roadway; and a grade less than 20% thereafter.
6 Cuts and fills should be minimized and limited to
7 2 to 1 slopes. * * *" Terwilliger Guidelines 17.

8 Petitioner argues as follows:

9 "Neither the phrase 'to the extent practical,' nor
10 the term 'unavoidable' are defined or interpreted
11 in the City's decision. Nor is the specific
12 extent of the 'access areas' for this project
13 identified. The City's decision simply finds that
14 grading will occur, and that in some areas the 2
15 to 1 slope guideline may be exceeded.

16 "If these guidelines are approval standards, they
17 are ambiguous as to exactly how much grading is
18 allowed, where it is allowed, and under what
19 conditions it is allowed. The City's findings
20 fail to address these ambiguities * * *." (Record
21 citation omitted; emphasis in original.) Petition
22 for Review 30-31.

23 Respondent's only response to petitioner's argument is
24 that petitioner waived his right to raise these
25 interpretational issues, because he failed to raise them
26 during the local proceedings below. We do not agree with
27 respondent that a local government may escape its
28 responsibility under Weeks v. City of Tillamook, supra, to
29 interpret ambiguous provisions in its land use regulations
30 in this manner. Under Weeks, the city is obligated to
31 provide interpretations of relevant plan and land use
32 regulation provisions where necessary. The parties in a
33 land use proceeding are entitled to expect that such

1 interpretations will be provided in the city's final
2 decision at the conclusion of a land use proceeding, and
3 they need not anticipate that they may disagree with the
4 interpretation ultimately adopted nor anticipate that needed
5 interpretations will not be provided. See Washington Co.
6 Farm Bureau v. Washington Co., supra.

7 This subassignment of error is sustained.

8 **D. Conditional Use Decision Compatibility Requirement**

9 PCC 33.79.010 and 33.106.010 require findings
10 concerning the compatibility of the proposed development
11 with surrounding properties.²¹

12 **1. Identification of Surrounding Properties**

13 Petitioner contends PCC 33.79.010 and 33.106.010
14 require that the city identify the relevant "surrounding
15 residential developments" and "surrounding residential

²¹PCC 33.79.110(g)(1) requires that a PUD fulfill "the purpose and intent of [PCC] 33.79.010 * * *." PCC 33.79.010 provides as follows:

"The purpose and intent of this Chapter is to allow more site design flexibility than the conventional zoning and subdivision regulations provide. The intent is to:

** * * * *

"(e) Promote an attractive and safe living environment which is compatible with surrounding residential developments."

PCC 33.106.010 provides, in part, as follows:

** * * In permitting [conditional uses] it shall be determined 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. * * *"

1 properties." Petitioner contends the city's findings
2 addressing these requirements fail to do so.

3 Respondent concedes the findings addressing these
4 standards do not identify the "surrounding residential
5 developments" and "surrounding residential properties."
6 However, respondent contends the challenged decision
7 includes a "Site and Vicinity Description" section and that
8 the vicinity described there has the same meaning as the
9 "surrounding residential developments" and "surrounding
10 residential properties."

11 The city must identify, in its findings, the relevant
12 "surrounding residential developments" and "surrounding
13 residential properties" under PCC 33.79.010 and 33.106.010.
14 We may not assume, as respondent argues, that the "Site and
15 Vicinity Description" concerns the same area.

16 This subassignment of error is sustained.

17 **2. Relevance of the Terwilliger Guidelines**

18 In addressing PCC 33.106.010, the city adopted the
19 following findings:

20 "The Terwilliger Plan and the attendant goals,
21 policies and the [Terwilliger Guidelines], serve
22 as an important expression of the 'public
23 convenience and welfare' as well as the 'character
24 and value' of the surrounding area. Council finds
25 that the proposal does not fully comply with the
26 [Terwilliger Plan] or with some of the most
27 important of the [Terwilliger Guidelines].
28 Insofar as the proposal fails to meet these
29 guidelines, it would not be sufficiently desirable
30 for the public convenience and welfare, and would
31 to some extent be detrimental to the safety,

1 character and value of surrounding properties."
2 Record 8.

3 "[T]he failure of the project to fully comply with
4 the Terwilliger [Guidelines] (particularly with
5 regard to scale and landscaping) means that the
6 project would negatively affect the character and
7 value of surrounding neighborhoods, at least
8 insofar as the design guidelines represent a
9 succinct expression of that character and value."
10 Record 14.

11 Petitioner first argues "[t]he city's findings
12 equivocate with regard to whether the policies of the
13 Terwilliger [Plan] and [Terwilliger] Guidelines may or
14 should be used to construe the PUD and Conditional Use
15 Criteria regarding surrounding properties." Petition for
16 Review 29.

17 We agree with respondent that the city's findings make
18 it clear the city believes the Terwilliger Guidelines are
19 relevant in determining whether the proposal complies with
20 the PUD and conditional use "compatibility" requirements.
21 The findings are not equivocal.

22 Petitioner also challenges the propriety of the city's
23 reliance on its design review decision and the Terwilliger
24 Guidelines in finding the proposed PUD is inconsistent with
25 the requirements of PCC 33.79.010 and 33.106.010.²²

²²Although we conclude above the challenged decision explains the city did rely on the design review decision and the Terwilliger Guidelines in finding the PUD is inconsistent with the requirements of PCC 33.79.010 and 33.106.010, the fact of this reliance on the design review decision and Terwilliger Guidelines is different from the questions regarding how the city relied on the design review decision and Terwilliger Guidelines and whether such reliance is appropriate.

1 Petitioner complains that such an approach effectively
2 writes in the Terwilliger Guidelines as PUD and conditional
3 use approval standards.

4 It is not clear to this Board whether the city (1)
5 relied on certain Terwilliger Guidelines referenced in the
6 challenged conditional use decision as surrogate standards
7 for determining compatibility as required by PCC 33.79.010
8 and 33.106.010, (2) considered evidence regarding compliance
9 with the referenced Terwilliger Guidelines as also relevant
10 to the required compatibility determination, or (3) used
11 some combination of these approaches. Moreover, regardless
12 of the manner in which the city used the Terwilliger
13 Guidelines in determining compatibility under PCC 33.79.010
14 and 33.106.010, the required explanation for why such use of
15 the Terwilliger Guidelines is appropriate is missing from
16 the challenged decision.

17 We have already determined the city must, on remand,
18 consider petitioner's contention that some or all of the
19 Terwilliger Guidelines are not properly applied as approval
20 criteria. We do not mean to suggest that the Terwilliger
21 Guidelines necessarily may not be used in any way in
22 determining compliance with PCC 33.79.010 and 33.106.010, if
23 the city ultimately determines the Terwilliger Guidelines
24 are not themselves mandatory approval criteria. However,
25 regardless of the city's ultimate determination concerning
26 the legal status of the Terwilliger Guidelines, it must

1 explain how it uses those Guidelines in determining
2 compliance with PCC 33.79.010 and 33.106.010, and why such
3 use is appropriate.

4 This subassignment of error is sustained.

5 The second, third and fourth assignments of error are
6 sustained in part.

7 **FIFTH ASSIGNMENT OF ERROR**

8 Petitioner's final assignment of error is primarily a
9 substantial evidence challenge. Petitioner contends the
10 city's findings regarding the Forest Corridor and Forest
11 View²³ concepts are not supported by substantial evidence.
12 Petitioner also challenges the evidentiary support for the
13 city's findings concerning noncompliance with the
14 compatibility requirements of PCC 33.79.010 and 33.106.010,
15 discussed supra.

16 By virtue of our resolution of the first four
17 assignments of error, the city will be required to revise
18 its findings to further explain the manner in which it
19 interprets and applies the criteria applicable to the
20 decision challenged in this matter. Because the findings at
21 issue in the fifth assignment of error may be revised, our
22 review of the evidentiary support for those findings would
23 serve little purpose, and we decline to conduct such a
24 review. DLCD v. Columbia County, 15 Or LUBA 302, 305

²³See n 9, supra.

1 (1987).

2 However, petitioner's challenge to the city's findings
3 concerning the conditional use standard PCC 33.106.010²⁴ is
4 not really a substantial evidence challenge. Rather it is a
5 challenge to the manner in which the city applied
6 PCC 33.106.010. The findings first conclude that a PUD
7 would be superior to a conventional subdivision on the
8 subject property, for a variety of reasons. However, the
9 findings ultimately conclude that the proposal does not
10 comply with the Terwilliger Plan and certain Terwilliger
11 Guidelines and, for that reason, violates the requirement of
12 PCC 33.106.010 that the proposal is "not detrimental or
13 injurious to the public health, peace or safety, or to the
14 character and value of the surrounding properties."

15 Petitioner argues as follows:

16 "* * * Residential development on the Property is
17 not a conditional use; only the PUD is a
18 conditional use. As the City recognizes * * *, a
19 PUD 'would better protect the safety, character
20 and value of surrounding properties than would a
21 standard subdivision.' * * * A PUD is the best
22 approach to residential development of this site."
23 Petition for Review 45-46.

24 As we understand this portion of petitioner's fifth
25 assignment of error, he contends that under PCC 33.106.010
26 the only relevant question is whether a PUD, as opposed to a
27 conventional subdivision, is "not detrimental or injurious

²⁴See n 21, supra.

1 to the public health, peace or safety, or to the character
2 and value of the surrounding properties." We agree with
3 petitioner that the city did not apply PCC 33.106.010 in the
4 limited manner petitioner suggests is required. The city
5 did not limit its inquiry under PCC 33.106.010 to
6 determining whether a PUD on the subject property would be
7 preferable to a conventional subdivision. We express no
8 view concerning the merits of petitioner's argument.
9 However, it presents an interpretational question that the
10 city must address on remand. Weeks v. City of Tillamook,
11 supra.

12 The fifth assignment of error is sustained in part.

13 The city's decision is remanded.