

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 JAMES F. SQUIRES, and ARNOLD)

5 CREEK NEIGHBORHOOD ASSOCIATION,)

6)
7) Petitioners,)
8)

9) and)
10)

11 ELIZABETH CALLISON,)

12)
13) Intervenor-Petitioner,) LUBA

14 No. 95-187

15)
16) vs.) FINAL OPINION

17)) AND ORDER

18 CITY OF PORTLAND,)

19)
20) Respondent,)
21)

22) and)
23)

24 JOANNE STARR,)

25)
26) Intervenor-Respondent.)

27
28
29) Appeal from City of Portland.

30
31) Robert S. Simon, Oregon City, filed a petition for
32 review and argued on behalf of petitioner. With him on the
33 brief was The Robert S. Simon Law Firm.

34
35) Elizabeth Callison, Portland, filed a petition for
36 review and argued on her own behalf.

37
38) Ruth M. Spetter, Senior Deputy City Attorney, Portland,
39 filed a response brief and argued on behalf of respondent.

40
41) Jack L. Orchard and Linly A. Ferris, Portland, filed a
42 response brief. With them on the brief was Ball, Janik &
43 Novak. Jack L. Orchard argued on behalf of intervenor-
44 respondent.

1 LIVINGSTON, Chief Referee; HANNA, Referee, participated
2 in the decision.

3

4

REMANDED

07/01/96

5

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

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a decision of the city council
4 granting preliminary plan approval of a 20-lot planned unit
5 development.

6 **MOTIONS TO INTERVENE**

7 Elizabeth Callison (Callison) moves to intervene in
8 this proceeding on the side of the petitioner. Joanne Starr
9 (intervenor), the applicant below, moves to intervene on the
10 side of the respondent. There are no objections to the
11 motions, and they are allowed.

12 **FACTS**

13 On December 13, 1994, intervenor applied for
14 preliminary plan approval of a 20-lot planned unit
15 development on approximately 5.71 acres in the city's R10
16 zone.¹ A city hearings officer denied the application on
17 May 3, 1995; intervenor then appealed to the city council.
18 Intervenor submitted a revised site plan that amended the

¹The PCC provides for a two-step review of a planned unit development:
preliminary plan review and final plan review. The preliminary plan review

"examines the PUD concept plan with respect to items such as
density, including the number, type, and location of dwelling
units; parking; impact on surrounding areas; adequacy of
services; and conceptual plan for service improvements.
Preliminary approval will only be granted when there is a
reasonable certainty that the PUD will fulfill all requirements
of the City code." PCC 33.269.300(A).

The final plan review is an administrative and technical matter.
PCC 33.269.300(B).

1 storm water and dispersal design and increased the amount of
2 common open space.

3 At a hearing on July 12, 1995, the city council
4 tentatively approved the proposal and directed intervenor to
5 prepare findings. On August 9, 1995, the council adopted an
6 "Order of Council on Appeal Against Hearings Officer's
7 Decision" (council order).

8 This appeal followed.

9 **CALLISON'S PETITION FOR REVIEW**

10 Callison's petition for review does not comply with
11 LUBA's rules in various particulars. The most serious
12 omission is the failure to include assignments of error with
13 supporting legal argument. See OAR 661-10-030(3)(d). See
14 also Scholes v. Jackson County, 28 Or LUBA 407 (1994).
15 Callison's petition for review is a compilation of letters
16 and memoranda submitted to the city, together with a table
17 of contents and a short "statement of the case" that
18 describes a number of environmental concerns and makes
19 unsupported jurisdictional allegations. Callison refers to
20 no approval standards and provides no legal basis to justify
21 reversal or remand.

22 **FIRST ASSIGNMENT OF ERROR (PETITIONERS)**

23 Petitioners contend the challenged decision itself
24 contains no findings and, although it attempts to
25 incorporate findings, it does not do so with sufficient
26 clarity. We disagree with petitioners. In Gonzalez v. Lane

1 County, 24 Or LUBA 251 (1992), we explained:

2 "[I]f a local government decision maker chooses to
3 incorporate all or portions of another document by
4 reference into its findings, it must clearly (1)
5 indicate its intent to do so, and (2) identify the
6 document or portions of the document so
7 incorporated. A local government decision will
8 satisfy these requirements if a reasonable person
9 reading the decision would realize that another
10 document is incorporated into the findings and,
11 based on the decision itself, would be able both
12 to identify and to request the opportunity to
13 review the specific documents thus incorporated."
14 Id. at 258. (Footnote omitted.)

15 The council order states:

16 "On July 12, 1995, * * * City Council * * * voted
17 unanimously to tentative grant the appeal [from
18 the hearings officer's decision] and approve the
19 application * * *. Council * * * directed that
20 the [intervenor]'s representative adopt prepare
21 findings. On August 9, 1995 * * * the Council
22 adopted the findings with revised conditions."
23 Record 3.

24 The findings prepared by the intervenor's
25 representative are easily located, with three
26 attachments, in the record at 47-65. Indeed,
27 petitioners quote from them in their discussion of
28 this assignment of error. Petition for Review at
29 2.

30 Petitioners contend these findings "suffer from a
31 failure to identify what is being incorporated by
32 reference." Petition for Review 2. Again, we disagree with
33 petitioners. The findings state:

34 "The Hearings Officer's decision includes
35 extensive information about the site, the
36 Applicant's proposal and other general
37 information, all of which are incorporated by
38 reference in these Findings." Record 47.

1 The findings specify that they include

2 "* * * (1) the Hearings Officer's Report and
3 Decision, except as superseded by other findings
4 documents; (2) the [intervenor]'s revised site
5 plan; (3) the [bureau of planning] and [bureau of
6 environmental services] submittals prepared for
7 the July 12, 1995 appeal hearing; (4) these
8 Findings, including all Attachments; and (5) the
9 revised conditions adopted by the Council, insofar
10 as those conditions respond to issues raised by
11 the Hearings Officer or opponents." Record 55.

12 Petitioners maintain that

13 "the broad based incorporation is completely
14 unclear as to what is incorporated from the denial
15 decision [of the hearings officer] nor how the
16 conflicts between the decision and the 'findings'
17 are to be resolved." Petition for Review 3.

18 Once again, we disagree. The findings specifically
19 include all of the hearings officer's decision, except as it
20 is superseded (i.e. in conflict with) other identified
21 findings documents. In evaluating petitioners' argument,
22 the ultimate measure is whether we have any difficulty in
23 determining which documents to review. See Wilson Park
24 Neigh. Assoc. v. City of Portland, 24 Or LUBA 98, 106
25 (1992), aff'd 118 Or App 162, rev den 316 Or 142 (1993). We
26 do not. The city's intent is clearly apparent.

27 The first assignment of error is denied.

28 **SECOND ASSIGNMENT OF ERROR**

29 Petitioners contend the city misconstrued Portland City
30 Code (PCC) 33.269.135, in finding it to be satisfied by the
31 proposed development. PCC 33.269.135 states, in relevant
32 part:

1 "In residential zones, at least 40 percent of the
2 PUD not in streets must be devoted to open areas.
3 * * * At least half of the open area in all zones
4 must be in common ownership."

5 Petitioners contend the total lot area is 134,544
6 square feet, rather than the 126,903.49 square feet found by
7 the city. A larger total lot area results in a smaller
8 common open space area, which petitioners calculate as
9 70,976.04 square feet. Petitioners contend that smaller
10 common open space area, in relation to the total open area,
11 does not satisfy the requirement that "[a]t least half of
12 the open area in all zones must be in common ownership."

13 We do not dwell on petitioners' calculations because
14 they employ superseded numbers. Petitioners rely on the
15 numbers for approximate lot areas provided in an early
16 submission of intervenor's as part of the information
17 required on the tentative plan of the proposed subdivision.
18 PCC 34.20.040(A)(3)(c)(i).² Record 233-34. The challenged
19 decision itself states as conditions:

20 "A. The applicant shall provide 20 housing units
21 within the building areas indicated in
22 Exhibit I.2 and as revised on Attachments 2
23 and 3 of Council Findings, August 9, 1995.

24 "B. Setback and lot coverage standards shall
25 conform to figures presented in Exhibit I.3

²PCC 34.20.040(A)(3)(c)(i) requires:

"Approximate dimensions of all lots and parcels, lot and parcel size in square feet and, in the case of Subdivision which is a major land division, proposed lot and block numbers."
(Emphasis added.)

1 and as revised on Attachments 2 and 3 of
2 Council Findings, August 9, 1995." Record 4.
3 (Emphasis added.)

4 The specified revisions clearly specify that the area
5 in common open space is 78,616.55 square feet. Record 62.
6 The record contains a memorandum from a land development
7 consultant to a city planner explaining that a computer
8 program, accurate to the nearest one-hundredth of a foot,
9 was used to calculate the area. Record 124-25. The
10 findings themselves refer to these "computer design
11 calculations." Record 58.

12 Petitioners do not contest the mathematical formula
13 used to determine the percentage of common open space, but
14 only the actual number used for common open space,
15 notwithstanding the fact that their own number is an
16 approximation, while the actual number is exact.

17 The second assignment of error is denied.

18 **THIRD ASSIGNMENT OF ERROR**

19 Petitioners contend the city's finding that the
20 proposed development's common open space will be 78,616.55
21 square feet, rather than 70,976.04 square feet, is not
22 supported by substantial evidence. Petitioners argue the
23 challenged decision does not identify the "data or source of
24 data relied upon." Petition for Review 8.

25 The decision does identify the land development
26 consultant's computer calculations as the evidence relied
27 upon. Record 53-54, 58. However, petitioners contend that

1 the challenged decision does not identify the "source" of
2 the computer design calculations. If by "source,"
3 petitioners mean the computer program itself, we note that
4 the program is identified in a memorandum from the land
5 development consultant to a city planner. Record 124. The
6 memorandum also provides a detailed explanation of the
7 calculations and area figures, and explains that the
8 underlying data comes from a boundary survey. Id.

9 Petitioners contend further that because the survey
10 upon which the calculations were based is not itself in the
11 record, "the measurement of the site is completely without
12 evidence in the record." Petition for Review 11.

13 We disagree with petitioners. There is no absolute
14 requirement the survey evidence supporting the land
15 development consultant's calculations of area be included in
16 the record. Under ORS 197.835(9)(a)(C), LUBA must determine
17 whether, considering all relevant evidence in the record, a
18 reasonable person could rely on the consultant's
19 calculations. See Bates v. Josephine County, 28 Or LUBA 21,
20 29 (1994); ODOT v. Clackamas County, 27 Or LUBA 141, 147
21 (1994); Citizens for Resp. Growth v. City of Seaside, 26 Or
22 LUBA 458, 465 (1994). LUBA cannot reweigh the evidence, but
23 is required to consider whether supporting evidence is
24 refuted or undermined by other evidence in the record.
25 Wilson Park Neigh. Assoc. v. City of Portland, 27 Or LUBA
26 106, 113, aff'd 129 Or App 33, rev den 320 Or 325 (1994).

1 Petitioners point to no evidence in the record that
2 casts doubt either upon the land development consultant's
3 statement that he relied on a survey in using the computer
4 to calculate the common space area, or upon the reliability
5 of the survey itself. The consultant identified the
6 computer program used. Record 124.

7 Petitioners themselves rely on the consultant's
8 earlier, approximate figures to support their claim there is
9 a conflict in the evidence. However, as explained under the
10 second assignment of error, the earlier figures were
11 superseded and do not themselves cast doubt upon the figures
12 adopted in the city's findings. It was reasonable for the
13 city council to accept the common space area figure (and
14 other area figures) provided by the land development
15 consultant.

16 The third assignment of error is denied.

17 **FOURTH ASSIGNMENT OF ERROR**

18 The challenged decision finds an adjustment is required
19 to allow a higher percentage of building lot coverage than
20 is allowed under applicable provisions of the PCC.
21 Record 33. Petitioners contend the decision does not apply
22 the criteria for an adjustment stated in PCC 33.805.040.
23 Petitioners make two subassignments of error.

24 **A. Impact of Increase in Building Coverage.**

25 Petitioners argue that because the adjustment allowing
26 an increase in building coverage per lot reduces the amount

1 of total open area, it also reduces the amount of common
2 open space in violation of PCC 33.269.135. We disagree with
3 petitioners. The amount of common open space is calculated
4 by subtracting the total area in lots from the total
5 buildable area. Record 13. Building coverage per lot has
6 no effect on that calculation.

7 This subassignment of error is denied.

8 **B. PCC 33.805.040**

9 Petitioner contends the city's findings do not address
10 PCC 33.805.040(B)-(E), and are therefore inadequate to
11 support the conclusion that PCC 33.805.040 is satisfied.³

12 Findings must (1) identify the relevant approval
13 standards, (2) set out the facts which are believed and

³PCC 33.805.040 states, in relevant part:

"* * * [A]djustment requests will be approved if the review
body finds that the applicant has shown that * * * approval
criteria A. through E. * * * stated below have been met. * * *

"A. Granting the adjustment will equally or better meet the
purpose of the regulation to be modified; and

"B. If in a residential zone, the proposal will not
significantly detract from the livability or appearance
of the residential area * * *; and

"C. If more than one adjustment is being requested, the
cumulative effect of the adjustments results in a project
which is still consistent with the overall purpose of the
zone; and

"D. City-designated scenic resources are preserved; and

"E. Any impacts resulting from the adjustment are mitigated
to the extent practical.

"* * * * *"

1 relied upon, and (3) explain how those facts lead to the
2 decision on compliance with the approval standards.
3 Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 20-
4 21, 569 P2d 1063 (1977); Heiller v. Josephine County, 23 Or
5 LUBA 551 556 (1992). When a local government does not adopt
6 findings identifying and applying the applicable criteria,
7 it is not possible for this Board to perform its review
8 function. See Hoffman v. Dupont, 49 Or App 699, 705, 621
9 P2d 603 (1980); Laine v. City of Rockaway Beach, 26 Or LUBA
10 417, 418 (1994).

11 With respect to the lot coverage adjustment, the
12 challenged decision states:

13 "Building coverages require adjustments, which the
14 [intervenor] has justified by meeting standards
15 for the zoning categories corresponding to the lot
16 sizes. For all lots between 5,000-6,000 square
17 feet, a building coverage of no more than 45%
18 building area is satisfied (consistent with R-5
19 zoning); for lots 6,000-7,000 square feet, a 40%
20 coverage standard is maintained; for lots 7,000
21 square feet or greater, a building coverage of 35%
22 is satisfied (consistent with R-7 zoning). The
23 Council finds that these coverage maximums conform
24 to Table 110-3 (PCC 33.110.225 B) for Building
25 Coverages in Single-Dwelling Zones. Furthermore,
26 the total building coverage does not exceed the
27 allowable coverage under an R-10 subdivision. The
28 Council also finds that this variety of lot sizes
29 and the planning of the PUD with an emphasis on EC
30 and EP area preservation and mitigation plantings
31 exhibits the flexibility in land development
32 intended by the PUD ordinance, justifying any
33 needed adjustments to building area coverage
34 requirements." Record 33.

35 These findings are problematic, in that they do not

1 specifically identify and apply the individual approval
2 standards stated in PCC 33.805.040(B)-(E). PCC chapter
3 33.269, addressing planned unit developments, does not allow
4 building area coverage requirements to be varied without an
5 adjustment. However, we understand the challenged decision
6 to interpret the PCC to allow interaction between the
7 planned unit development chapter of the PCC, which
8 emphasizes flexibilitycity code last sentence quoted above to
9 say that building area coverage requirements may be
10 justified generally by "the flexibility in land development
11 intended by the PUD ordinance." the PCC chapter addressing
12 planned unit developments, building area coverage
13 requirements As the city points out, PCC 33.805.040(C)
14 clearly does not apply, as only one adjustment is being
15 requested; and PCC 33.805.040(D) also clearly does not
16 apply, as there are no city-designated scenic resources on
17 the site. Record 282. However, PCC 33.805.040(B) and (E)
18 do apply.

19 Finally, petitioners contend the challenged decision
20 does not adequately address PCC 33.805.040(A), which
21 requires that "[g]ranteeing the adjustment will equally or
22 better meet the purpose of the regulation to be modified."
23 We agree with intervenor that "the regulation to be
24 modified" is the building coverage standard of the R-10
25 zone, not PCC chapter 33.269, which regulates planned unit
26 developments. The purpose statement of PCC chapter 33.269,

1 which petitioners discuss in their brief, is therefore
2 irrelevant. However, we agree with petitioners the
3 challenged decision does not contain a required finding
4 addressing PCC 33.805.040(A).⁴

5 This subassignment of error is sustained, in part.

6 The fourth assignment of error is sustained, in part.

7 **FIFTH ASSIGNMENT OF ERROR**

8 Petitioners contend the adjustment to allow greater
9 building coverage on individual lots will have the effect of
10 reducing common open space "in contravention of PCC
11 33.269.135 standards, and the purpose statement of PCC
12 33.269.010." Petition for Review 19. As explained under
13 the fourth assignment of error, we disagree with
14 petitioners.

15 The fifth assignment of error is denied.

16 **SIXTH ASSIGNMENT OF ERROR**

17 Petitioners contend there is no evidence in the record
18 to support the city's finding that the proposed stormwater
19 system will be adequate to meet the requirements of PCC
20 33.269.270.⁵ Petitioners also object that the plan of the

⁴The briefs of the city and intervenor contain argument, supported by references to different parts of the challenged decision and to the record, that appears intended to persuade us that PCC 33.805.040(A), (B) and (E) are satisfied. We decline to interpret these code standards and apply them to the evidence in the first instance. See Marcott Holdings, Inc. v. City of Tigard, ___ Or LUBA ___ (LUBA No. 95-011, October-20, 1995), slip op 27-28; Waugh v. Coos County, 26 Or LUBA 300, 306-08 (1993).

⁵PCC 33.269.270 provides, in relevant part:

1 proposed stormwater system itself is not in the record,
2 specifically the "recalculations of stormwater flows to the
3 drainageway and downstream properties [and] the
4 recalculation of impervious surfaces." Petition for Review
5 26-27.

6 Substantial evidence is evidence upon which a
7 reasonable person would rely in reaching a decision. City
8 of Portland v. Bureau of Labor and Ind., 298 Or 104, 119,
9 690 P2d 475 (1984); Douglas v. Multnomah County, 18 Or LUBA
10 607, 617 (1990). In determining whether a decision is
11 supported by substantial evidence, we consider all the
12 evidence in the record to which we are cited, including
13 evidence which refutes or detracts from that relied on by
14 the local government decision maker. Younger v. City of
15 Portland, 305 Or 346, 360, 752 P2d 262 (1988).

16 Petitioners cite no evidence in the record that
17 detracts from the evidence relied upon by the city council.
18 That evidence is substantial. The city's environmental
19 services office (BES) advised the hearings officer prior to

"A. **Standard.** Facilities for the control and disposal of
stormwater and groundwater must be provided, and be
approved by the Bureau of Environmental Services and the
Bureau of Buildings.

"B. **Capacity.** The facilities must be adequate to serve the
PUD site and areas draining through the site. The
facilities must address undeveloped areas of the PUD as
well as stormwater runoff from all impervious surfaces on
private property.

"* * * * *"

1 her report and decision that, based on a March 27, 1995
2 submittal from the applicant, as well as earlier
3 submissions, the preliminary drainage plan was adequate for
4 tentative approval. Record 116, 336-42. The record does
5 contain a preliminary storm drainage plan. Record 540. The
6 hearings officer's report and decision, incorporated into
7 the challenged decision by reference, contains extensive
8 findings regarding the proposed stormwater system. It
9 concludes:

10 "Some final details [concerning the stormwater
11 system] will have to be worked out through the
12 public worked [sic] and building permit processes,
13 but the proposed system is feasible to preserve
14 the drainage way on this site and provide adequate
15 stormwater disposal for the proposed development."
16 Record 274-75 (Emphasis added.)

17 BES advised the city council on July 18, 1995 that
18 "[t]he land use review record shows how drainage, water
19 quality, and resource protection will be accomplished. In
20 relation to drainage management, this has been done."
21 Record 113.

22 All that is required at the preliminary approval stage
23 is a finding that it is feasible to manage storm water
24 drainage. See Meyer v. City of Portland, 67 Or App 274, 280
25 n5, 678 P2d 741, rev den 297 Or 82 (1984); Southwood
26 Homeowners Assoc. v. City of Philomath, 21 Or LUBA 260, 272
27 (1991). The hearings officer's finding of feasibility,
28 which was subsequently incorporated into the challenged
29 decision, is supported by substantial evidence.

1 The sixth assignment of error is denied.

2 **SEVENTH ASSIGNMENT OF ERROR**

3 This assignment of error is apparently based on
4 petitioners' erroneous conclusion that because PCC 34.12.050
5 requires a planned unit development "for major land division
6 requests where 50 percent or more of the land area of all
7 lots and/or parcels in common ownership is in an
8 environmental zone," and because the proposed planned unit
9 development does not meet the 50 percent standard, the
10 proposal should be denied. As the city and intervenor point
11 out, by requiring planned unit developments in one,
12 specified situation, the PCC does not prohibit them in other
13 situations.

14 The seventh assignment of error is denied.

15 **EIGHTH ASSIGNMENT OF ERROR**

16 Petitioners contend the challenged decision requires
17 the posting of a tree preservation performance bond without
18 specifying either the amount of the bond or the performance
19 to be guaranteed.

20 Performance guarantees are governed by PCC 33.700.050,
21 which states the amount of the guarantee

22 "must be equal to at least 110 percent of the
23 estimated cost of performance. The applicant must
24 provide written estimates by three contractors
25 with their names and addresses. The estimates
26 must include as separate items all materials,
27 labor, and other costs of the required action."
28 PCC 33.700.050(C).

29 The challenged decision includes a plan showing the

1 trees that are to be preserved. Record 41. Additional
2 technical work is required as a condition of approval.
3 Record 4. Preservation of the identified trees is the
4 "performance to be guaranteed." The calculation of the
5 amount of the bond is ministerial, and does not require
6 further city council review.

7 The eighth assignment of error is denied.

8 **NINTH ASSIGNMENT OF ERROR**

9 Petitioners contend their substantial rights were
10 prejudiced "when the city attorney failed to review and
11 approve the findings prior to final adoption as required by
12 PCC 33.730.030(h)(6)(b)."⁶ The record is silent as to
13 whether the city attorney reviewed and approved the
14 findings. However, since the city attorney's office does
15 not represent petitioners, we do not see how their
16 substantial rights could have been affected by the absence
17 of such a review.

18 The ninth assignment of error is denied.

19 The city's decision is remanded.

⁶PCC 33.730.030(h)(6)(b) provides, in relevant part: "* * * Prior to final Council adoption, all findings must be reviewed and approved by the City Attorney. * * *"