



1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city council decision granting  
4 conditional use approval for a development to provide  
5 short-term housing and support services for homeless  
6 families.

7 **MOTION TO INTERVENE**

8 Housing Authority of Portland (HAP), the applicant  
9 below, moves to intervene in this proceeding on the side of  
10 respondent. There is no opposition to the motion, and it is  
11 allowed.

12 **FACTS**

13 This is the second time a city decision granting  
14 conditional use approval for the subject development has  
15 been before us. In Wilson Park Neigh. Assoc. v. City of  
16 Portland, 24 Or LUBA 98, 101-02 (1992), aff'd 117 Or App  
17 620, rev den 316 Or 142 (1993) (Wilson Park I), we described  
18 the proposal as follows:

19 "The subject 1.79 acre unimproved property is  
20 owned by intervenor and is zoned Residential 7,000  
21 (R7), a single family residential zone with a  
22 7,000 square foot minimum lot size. The subject  
23 property is generally at a lower elevation than  
24 the adjoining properties, and is heavily  
25 vegetated. A creek runs from north to south  
26 through the western portion of the property.  
27 Approximately the western third of the property,  
28 including the creek and adjoining wetlands, is  
29 subject to a regional storm water detention  
30 easement owned by the city.

31 "With one exception [not important here], the

1 surrounding properties are also zoned R7. SW  
2 Bertha Blvd. adjoins the subject property to the  
3 east. Across SW Bertha Blvd. are single family  
4 dwellings. Adjoining the property to the south is  
5 the unimproved right of way for SW Nevada Ct., on  
6 the other side of which is a vacant parcel.  
7 Adjoining the property to the west are single  
8 family dwellings and duplexes fronting on  
9 SW Capitol Hwy. To the north is a nonconforming  
10 bus parking area.

11 "[HAP] applied to the city for approval of a  
12 development (Turning Point) to provide  
13 transitional short-term housing and other services  
14 to homeless families. The proposal includes a  
15 two-story apartment style structure with 30  
16 furnished studio units, including living space,  
17 kitchen and bath, that can accommodate a family of  
18 four. The design provides for access between some  
19 units, to accommodate larger families. The  
20 proposal includes a multi-purpose structure  
21 located at the south end of the residential  
22 building which will include a manager's apartment,  
23 storage space, laundry, counseling room and a  
24 multi-purpose room for meetings, cooperative  
25 babysitting and recreation. A covered outdoor  
26 play area will adjoin the multi-purpose building.

27 "The structures are proposed to be located on the  
28 eastern portion of the property. There will be a  
29 single access point from SW Bertha Blvd. Parking  
30 spaces for residents and staff will be located to  
31 the west and north of the proposed structures.

32 "[HAP's] application states that homeless families  
33 will be referred to Turning Point after initial  
34 screening by Multnomah County social service  
35 providers at sites throughout the Portland area.  
36 Families who reside in Turning Point will sign a  
37 contract requiring them to follow a case  
38 management plan. Most activities related to case  
39 management, such as job training, health services  
40 and counseling will occur off-site. The average  
41 length of stay will be less than 60 days. In no  
42 case will families reside at Turning Point for  
43 more than six months." (Footnotes omitted.)

1           In Wilson Park I, we determined the city's findings  
2 were inadequate to demonstrate compliance with Portland City  
3 Code (PCC) 33.815.105(A) and (B)(2) or (3). We also  
4 determined the city's determination of compliance with  
5 PCC 33.815.105(C)(2) was not supported by substantial  
6 evidence concerning the effect of the proposed development  
7 on soil stability in the storm water detention area. After  
8 holding a hearing on remand limited to these three issues,  
9 the city council adopted the decision challenged in this  
10 appeal.<sup>1</sup>

11       **THIRD AND FOURTH ASSIGNMENTS OF ERROR**

12           PCC 33.815.105(A) establishes the following criterion  
13 for approval of the proposed use:

14           **"Proportion of Household Living Uses.** The overall  
15 residential appearance and function of the area  
16 will not be significantly lessened due to the  
17 increased proportion of uses not in the Household  
18 Living category in the residential area.  
19 Consideration includes the proposal by itself and  
20 in combination with other uses in the area not in  
21 the Household Living category and is specifically  
22 based on:

23           "1. The number, size, and location of other uses  
24           not in the Household Living category in the  
25           residential area; and

26           "2. The intensity and scale of the proposed use

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<sup>1</sup>The local record submitted in Wilson Park I, is part of the record in this appeal and is cited as "Record I." The local record of the city proceedings on remand is cited as "Record II." The challenged decision incorporates the findings from the city's first decision, "with the exception of those portions of the previous Findings that discuss the three issues addressed [in the challenged decision]." Record II 28.

1           and of existing Household Living uses and  
2           other uses."

3           Petitioners do not challenge the city's identification  
4 of the Wilson Park and Multnomah neighborhoods as the  
5 relevant "residential area" under PCC 33.815.105(A). With  
6 regard to the other determinations required by  
7 PCC 33.815.105(A), in Wilson Park I, 24 Or LUBA at 113, we  
8 stated:

9           "\* \* \* Under PCC 33.815.105(A), the city must  
10 base its determination of whether the 'overall  
11 residential appearance and function of [this  
12 residential] area will \* \* \* be significantly  
13 lessened' on the facts required by  
14 PCC 33.815.105(A)(1) and (2).  
15 PCC 33.815.015(A)(1) requires that the 'number,  
16 size, and location of' [Non-]Household Living uses  
17 in the residential area be identified. While the  
18 findings identify the number of some such uses,  
19 they do not identify their size and location.  
20 Additionally, the findings fail to identify the  
21 'intensity and scale of' the existing Household  
22 Living uses and other uses in the residential  
23 area, as required by PCC 33.815.105(A)(2).  
24 Finally, the findings fail to describe the overall  
25 residential appearance and function of the area.  
26 Without this information, the city is not in a  
27 position to determine compliance with  
28 PCC 33.815.105(A)." (Emphasis in original;  
29 footnotes omitted.)

30 Petitioners make several challenges to the city's  
31 determinations regarding the "number, size, and location of"  
32 Non-Household Living uses in the area, the "intensity and  
33 scale of" the uses in the area, the "overall residential  
34 appearance and function" of the area, and whether the  
35 proposed use would "significantly lessen" the area's overall

1 residential appearance and function.

2 **A. Reliance on Regional Land Information System**

3 The Regional Land Information System (RLIS) is a  
4 computerized mapping system developed and maintained by  
5 Metro, the Portland metropolitan area regional government.  
6 RLIS is compiled from data bases and digital maps from  
7 governmental sources such as the Multnomah County Tax  
8 Assessor's Office and the U.S. Bureau of the Census. The  
9 determinations in the challenged decision regarding the  
10 number, size, and location of Non-Household Living uses in  
11 the area, the intensity and scale of uses in the area, and  
12 the overall residential appearance and function of the area  
13 are based on RLIS data and an analysis by Metro of the RLIS  
14 data, submitted by HAP. Record II 30.

15 The Metro analysis separates uses in the relevant area  
16 into the categories "single family," "multi-family,"  
17 "non-household," and "other," and gives the number of units  
18 and total, minimum, maximum and mean values for "land area"  
19 and "building area" in each category. Record II 268. The  
20 Metro analysis also gives the minimum, maximum and mean  
21 values for "FAR"<sup>2</sup> and "building stories" in each category.  
22 Id. During the proceedings below, the Metro analysis was

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<sup>2</sup>As we understand it, "FAR" (floor area ratio) is the ratio of the total floor space of a building to the area of the parcel on which the building is located. Thus, a one-story building with a 500 sq. ft. footprint on a 1,000 sq. ft. lot would have an FAR of 0.5, whereas a three-story building with the same footprint and a total floor area of 1,500 sq. ft. would have an FAR of 1.5.

1 supplemented to include median values for FAR in each  
2 category. Record II 339.

3 Petitioners contend the RLIS is not reliable and,  
4 therefore, data derived from the RLIS cannot constitute  
5 substantial evidence supporting the challenged decision.  
6 Petitioners point to discrepancies between the RLIS data and  
7 the Multnomah County Tax Assessor's data base with regard to  
8 number of structures and building area for one parcel and  
9 with regard to land area for a second parcel. Petitioners  
10 argue a memo in the record by the Multnomah County Tax  
11 Assessor identifies deficiencies in that office's commercial  
12 properties computer data base (used in developing the RLIS)  
13 and concludes the county's commercial properties data base  
14 "may be confusing, misleading, and unreliable."  
15 Record II 179.

16 Petitioners also argue a memo in the record by a data  
17 analysis expert establishes that Metro's analysis of the  
18 RLIS data is fundamentally flawed in a variety of ways,  
19 among them its reliance on mean values (which may be heavily  
20 influenced by a few extreme values), the combination of  
21 heterogeneous classes of uses into a small number of  
22 categories for analysis, and inconsistent and unreliable  
23 reporting regarding the area and number of stories of  
24 buildings. The Metro analysis of the RLIS data reports a  
25 multi-family maximum FAR of 34.67, but a maximum building  
26 stories of only 4.00. Record II 268. According to the data

1 analysis expert, this is a logical impossibility which  
2 should have alerted the decision maker to "problems with the  
3 data base, [the Metro] analysis and/or [HAP's] report."  
4 Record II 197.

5 The city and HAP (respondents) argue that discrepancies  
6 between the county assessor's data base and the RLIS data  
7 with regard to two parcels out of thousands does not  
8 undermine the validity of the RLIS data. Respondents also  
9 argue that the tax assessor's concerns were rebutted in a  
10 letter by the author of the Metro analysis, who respondents  
11 contend is a qualified analyst with a background in  
12 geographic information systems. Record II 296-97, 337-38.  
13 According to respondents, the data analysis expert's  
14 concerns were rebutted by the submittal of figures showing  
15 that the median FAR's for the four use categories are not  
16 significantly different from the mean FAR values for those  
17 categories, and by the following city findings:

18 "[T]he City of Portland Bureau of Planning,  
19 Washington County Planning Department, US West  
20 Communications, Portland General Electric Company,  
21 and the City of Tigard have used and relied on  
22 RLIS. The [Metro analyst's letter] establishes  
23 that the problems described by the Multnomah  
24 County Tax Assessor would, at worst, understate  
25 the development of commercial properties so that  
26 any error would be to [petitioners'] benefit; that  
27 the Multnomah County Assessor database is the best  
28 available; and that while some errors exist in the  
29 database their frequency is insignificant in  
30 determining whether the appearance and function of  
31 the Area as a whole will be significantly  
32 lessened. [T]he errors and inaccuracies  
33 identified by [petitioners] in the RLIS database

1 are minor and do not significantly affect its  
2 reliability for purposes of supporting \* \* \*  
3 findings respecting PCC 33.815.105(A). \* \* \*

4 \* \* \* \* \*

5 "HAP submitted median ('middle') values for Floor  
6 Area Ratio ('FAR', the ratio of building area to  
7 site area) which tend to show that the mean values  
8 developed from RLIS are not significantly  
9 'skewed,' as feared by [petitioners' data analysis  
10 expert]. HAP's grouping of single family with  
11 multi-family uses, and commercial with other uses  
12 for purposes of analysis, identif[ies] the  
13 categories as required by PCC 33.815.105(A),  
14 namely, Household Living uses, and uses not in the  
15 Household Living category. Also, [petitioners]  
16 have not shown that consideration of these four  
17 categories separately leads to conclusions  
18 different from those reached by 'grouping' the  
19 data. HAP has submitted an area map showing uses  
20 in [sic] each individual parcel. \* \* \*

21 "[T]he concerns raised by [petitioners' data  
22 analysis expert] are adequately addressed by the  
23 evidence cited above, and \* \* \* such concerns go  
24 to the weight of the RLIS data as evidence and not  
25 its sufficiency as evidence. [T]he methodology  
26 used in compiling and analyzing the RLIS data does  
27 not invalidate the RLIS data." Record II 31-32.

28 We are required to reverse or remand the challenged  
29 decision if it is "not supported by substantial evidence in  
30 the whole record." ORS 197.835(7)(a)(C). Substantial  
31 evidence is evidence a reasonable person would rely on in  
32 reaching a decision. City of Portland v. Bureau of Labor  
33 and Ind., 298 Or 104, 119, 690 P2d 475 (1984); Bay v. State  
34 Board of Education, 233 Or 601, 605, 378 P2d 558 (1963);  
35 Carsey v. Deschutes County, 21 Or LUBA 118, aff'd 108 Or App  
36 339 (1991). In evaluating the substantiality of the

1 evidence in the whole record, we are required to consider  
2 whether supporting evidence is refuted or undermined by  
3 other evidence in the record, but cannot reweigh the  
4 evidence. Younger v. City of Portland, 305 Or 346, 358-60,  
5 752 P2d 262 (1988); 1000 Friends of Oregon v. Marion County,  
6 116 Or App 584, 588, 842 P2d 441 (1992).<sup>3</sup>

7 In this case, petitioners essentially contend the city  
8 council's reliance on the RLIS data and the Metro analysis  
9 derived from that data is unreasonable because other  
10 evidence in the record undermines or refutes the RLIS data  
11 and Metro analysis. We have reviewed the evidence cited by  
12 the parties. Many of the concerns expressed by the tax  
13 assessor and data analysis expert are rebutted by the Metro  
14 letter and supplemental analysis. We conclude the evidence  
15 shows there are some inaccuracies in the RLIS data, but does  
16 not undermine or refute the basic reliability of the RLIS  
17 data and the Metro analysis. We agree with respondents that  
18 a reasonable person could rely on the RLIS data and Metro  
19 analysis in making determinations required by  
20 PCC 33.815.105(A).

21 This subassignment of error is denied.

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<sup>3</sup>In 1000 Friends of Oregon v. Marion County, supra, the court of appeals observed "[t]he line between reweighing evidence and determining substantiality in light of supporting and countervailing evidence is either razor thin or invisible to tribunals that must locate it \* \* \*."

1           **B.    Number, Size and Location of Non-Household Living**  
2           **Uses**

3           The city's determination of compliance with  
4 PCC 33.815.105(A) must be based in part on the "number,  
5 size, and location of other uses not in the Household Living  
6 category in the residential area." PCC 33.815.105(A)(1).  
7 In this regard, the city's findings state:

8           "\* \* \* Non-Household Living uses are those uses  
9 which would not be included in the Household  
10 Living use category identified in PCC 33.920.110.  
11 Non-Household Living uses include those uses  
12 identified on [Record II 270-71.<sup>4</sup>]

13           "Based on information from RLIS, the number of  
14 Non-Household Living uses in the Area is 673 more  
15 or less, as shown [on Record II 268] and the Land  
16 Use maps submitted by HAP. HAP's Exhibit 4  
17 [(Record II 273-94)] is a listing of all  
18 Non-Household Living uses identified by street  
19 address and showing lot area, building area and  
20 number of stories and owner(s). We find the  
21 locations of these uses are listed in HAP's  
22 Exhibit 4 by street address and are shown on the  
23 Land Use maps by color coding. We find that  
24 Exhibit 4 identifies the size of each of these  
25 uses in that the building area and number of  
26 stories for each Non-Household Living use is  
27 identified. We accept and rely on the information  
28 in HAP's Exhibit 4 to establish the location and  
29 size of Non-Household Living uses in the  
30 residential area." Record II 32.

31           Petitioners contend the above findings are inadequate.  
32           Petitioners' entire argument in this regard is the

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<sup>4</sup>Record II 270-71 lists uses in categories such as "motel/hotel," "restaurant," "store," "office," "warehouse," "service station," "medical," and "recreation."

1 following:

2 "The City has an obligation to issue findings  
3 which have [sic] an explanation of what the City  
4 believes to be true, and connecting [sic] these  
5 truths to the criteria with an explanation.  
6 Findings which fail to so connect are conclusory.  
7 Ball v. Josephine County, [25 Or LUBA 525, 527  
8 (1993)]." Petition for Review 37.

9 PCC 33.815.105(A)(1) requires identification of the  
10 "number, size, and location" of Non-Household Living uses in  
11 the relevant area. The challenged findings state the number  
12 of such uses is "673 more or less." Record II 32.  
13 Petitioners do not explain how this finding is deficient.  
14 With regard to location and size, the final sentence of the  
15 above quoted findings states the city "accept[s] and  
16 rel[ies] on" HAP's Exhibit 4 to "establish" the location and  
17 size of Non-Household Living uses in the area. Id. We  
18 believe this statement indicates the city's intent to adopt  
19 the contents of HAP's Exhibit 4 as a statement of what the  
20 city believes to be the relevant facts and, therefore, is  
21 adequate to incorporate that document into the findings.  
22 Gonzalez v. Lane County, 24 Or LUBA 251, 259 n 5 (1992).  
23 HAP's Exhibit 4 consists of a listing, from the RLIS  
24 database, of all parcels in the area with a use code not in  
25 the Household Living category, including address, building  
26 size and number of stories. Record II 273-94. Petitioners  
27 fail to explain why these facts are inadequate to establish  
28 the location and size of Non-Household Living uses in the  
29 relevant area.

1           Petitioners also contend the above quoted findings are  
2 not supported by substantial evidence in the whole record  
3 because HAP's Exhibit 4 and Land Use maps, referenced in the  
4 findings, are derived from RLIS data.       However, this  
5 argument can provide no basis for reversal or remand because  
6 we reject petitioners' challenge to the substantiality of  
7 the RLIS data in the previous subassignment of error.

8           This subassignment of error is denied.

9           **C.    Overall Residential Appearance and Function**

10          In this subassignment of error, petitioners challenge  
11 the city's interpretation of the terms "appearance" and  
12 "function," as used in PCC 33.815.105(A), and contend the  
13 city's findings describing the "overall residential  
14 appearance and function" of the area are inadequate. Before  
15 addressing petitioners' arguments further, we first describe  
16 the city's determination of the "overall residential  
17 appearance and function" of the area in the challenged  
18 decision.

19          As explained above, PCC 33.815.105(A)(2) requires  
20 identification of the "intensity and scale" of uses in the  
21 relevant area.    The challenged decision identifies FAR,  
22 "housing units per acre" and "persons per acre" as  
23 indicators of intensity "because they reflect the extent of  
24 development and occupancy in the area," but notes that of  
25 these three indicators, only FAR relates to Non-Household  
26 Living uses as well as Household Living uses.   Record II 32.

1 The findings cite the average number of housing units per  
2 acre in the area, the average number of persons per acre and  
3 the minimum, maximum, median and mean FAR for Household  
4 Living uses and Non-Household Living uses in the area.  
5 Record II 33. The decision also interprets "scale" to mean  
6 the "height or number of stories of a development," and  
7 cites the range and mean number of stories for Household  
8 Living and Non-Household Living uses in the area. Id.  
9 These findings on "intensity and scale," like those on  
10 "number, size and location" discussed in the preceding  
11 subassignment of error, are derived from the RLIS data  
12 base.<sup>5</sup>

13 The city went on to determine the overall residential  
14 appearance and function of the area based on the data and  
15 findings concerning "intensity and scale" of uses and  
16 "number, size and location" of Non-Household Living uses,  
17 described above:

18 \* \* \* HAP argues that the overall residential  
19 appearance and function of the Area should be

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<sup>5</sup>Petitioners do not specifically challenge the city's interpretation of "intensity" or "scale." Petitioners challenge the findings on the intensity and scale of uses in the area only by stating they are inadequate because "the statistics fail to distinguish [the] character of differing uses" and by incorporating by reference their arguments concerning the findings on "appearance" and "function." Petition for Review 36. However, as discussed below, petitioners' arguments relating to the adequacy of the findings on appearance and function are based on the definitions of those terms. Consequently, petitioners' argument regarding the adequacy of the findings on intensity and scale is insufficiently developed to warrant review. Deschutes Development v. Deschutes County, 5 Or LUBA 218, 220 (1982).

1 identified using information from RLIS by  
2 determining the number, FAR, and stories (height)  
3 of single-family, multi-family, Non-Household, and  
4 other uses in the Area. [Petitioners] argue that  
5 this reduces the Area to numbers; that appearance  
6 and function cannot be identified by statistics;  
7 and that use, style and configuration is needed to  
8 identify appearance and where residents, work,  
9 play and attend church is needed to identify  
10 function. [Petitioners] state that the only way  
11 appearance and function can be identified is a  
12 visual lot-by-lot survey of the Area (a highly  
13 urbanized area of almost 1,500 acres).

14 "\* \* \* PCC 33.815.105(A) and [Wilson Park I]  
15 require the identification of the appearance and  
16 function of the residential area as a whole, based  
17 on the number, size and location, intensity and  
18 scale of various uses in the Area. The degree of  
19 detail which [petitioners] claim is necessary is  
20 not required [by] this approval criterion.  
21 Therefore, \* \* \* the overall residential  
22 appearance and function of the Area may be  
23 adequately identified using information from RLIS  
24 and the Land Use maps in the Record.

25 "[F]ifty-two percent of the Area is developed as  
26 single-family with an average FAR of 0.15 and an  
27 average of 1.09 stories. Ten percent of the Area  
28 is developed as multi-family with an average FAR  
29 of 0.38 and an average of 1.56 stories. Nineteen  
30 percent of the Area is developed as commercial  
31 \* \* \* with an average FAR of 0.14 and an average  
32 of 1.26 stories. Another nineteen percent of the  
33 Area is developed as uses other than Household  
34 [Living] and commercial \* \* \* with an average FAR  
35 of 0.03 and an average of 0.11 stories.

36 "Given this breakdown of uses in the Area, and  
37 upon review of the land use maps submitted by HAP,  
38 \* \* \* the overall function of the Area is  
39 residential, primarily single-family with a  
40 significant number of multi-family developments,  
41 with commercial and other uses common, but not  
42 predominant in the Area. The overall residential  
43 appearance of the Area is represented by the  
44 average uses identified above, i.e., single-family

1 with a FAR of 0.15 and one story; multi-family  
2 with a FAR of 0.38 and two stories; these  
3 residential uses exist in conjunction with  
4 non-residential uses in the Area with an average  
5 FAR of 0.14 and one story; and other uses with an  
6 average FAR of 0.03 and zero stories. (Emphases  
7 added.) Record II 33-34.

8 Petitioners point out PCC 33.910.010 states that words  
9 not defined by the code "have their normal dictionary  
10 meaning." Petitioners argue the normal dictionary  
11 definition of "appearance" is the "act or fact of appearing  
12 as to the eye, the mind, the public" or "the state,  
13 condition, manner, or style in which a person or object  
14 appears." Petition for Review 22. Petitioners argue it is  
15 impossible to satisfy the dictionary definition of  
16 appearance using FAR and average building heights because  
17 nothing in these statistics "tells the decision maker what  
18 the building looks like, nor how it is landscaped, what  
19 style of construction [it has], nor what size of parking  
20 area the building has." Id. Therefore, according to  
21 petitioners, the city's reliance on statistics is contrary  
22 to the express language of PCC 33.815.105(A) and 33.910.010.

23 Petitioners also argue the dictionary definition of  
24 "function," when used as a noun, is "the kind of action or  
25 activity proper to a person, thing or institution."  
26 Petition for Review 23.<sup>6</sup> Petitioners contend the RLIS data

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<sup>6</sup>The definitions of "appearance" and "function" relied on by petitioners and quoted in the text are from Webster's Encyclopedic Unabridged

1 does not describe any action or activity and, therefore,  
2 cannot be used to determine the "function" of the subject  
3 area. Petitioners argue a determination concerning the  
4 function of the subject area must "describe how people  
5 travel throughout, recreate, shop, commune with nature, and  
6 other actions or uses to which the residents put the  
7 [area]." Id.

8 This Board is required to defer to a local government's  
9 interpretation of its own enactments, unless that  
10 interpretation is contrary to the express words, policy or  
11 context of the local enactment.<sup>7</sup> Clark v. Jackson County,  
12 313 Or 508, 514-15, 836 P2d 710 (1992). This means we must  
13 defer to a local government's interpretation of its own  
14 enactments, unless that interpretation is "clearly wrong."  
15 Goose Hollow Foothills League v. City of Portland, 117 Or  
16 App 211, 217, 843 P2d 992 (1992). Where the local code  
17 contains a variety of arguably relevant provisions that  
18 equally support different interpretations, the selection of  
19 an interpretation is for the local government to make.  
20 Reusser v. Washington County, 122 Or App 33, 36-37, 857 P2d  
21 182, rev den 318 Or 60 (1993); West v. Clackamas County, 116

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Dictionary. Petitioners do not identify which edition of that dictionary they used.

<sup>7</sup>ORS 197.829, enacted in 1993, essentially codifies the Clark v. Jackson County decision, with the exception that we are not required to defer to a local government's interpretation of its regulations if that interpretation is contrary to a state statute, statewide planning goal or administrative rule which the regulations implement. However, here there is no contention that PCC 33.815.105(A) implements a state statute, goal or rule.

1 Or App 89, 93, 840 P2d 1354 (1992).

2 In this case, PCC 33.910.010 expresses a general  
3 requirement that words in the code are to be given their  
4 "normal dictionary meaning." The normal dictionary meanings  
5 of "appearance" and "function" support the interpretation  
6 advocated by petitioners. On the other hand,  
7 PCC 33.815.105(A) explicitly states that the consideration  
8 of effects on "overall residential appearance and function"  
9 of the relevant area "is specifically based on" (1) the  
10 "number, size and location" of Non-Household Living uses in  
11 the area, and (2) the "intensity and scale" of the proposed  
12 use and existing uses in the area. This explicit statement  
13 supports the interpretation expressed in the emphasized  
14 portion of the above quote from the challenged decision that  
15 the city's determination of the overall residential  
16 appearance and function of the area is required to be based  
17 on "number, size and location" and "intensity and scale" of  
18 various uses in the area. The city is entitled to follow  
19 the specific statement of PCC 33.815.105(A), rather than the  
20 general requirement of PCC 33.910.010, in selecting its  
21 interpretation. Reusser v. Washington County, supra; West  
22 v. Clackamas County, supra.

23 This subassignment of error is denied.

24 **D. Will Not Be Significantly Lessened**

25 PCC 33.815.105(A) requires the city to find that "[t]he  
26 overall residential appearance and function of the area will

1 not be significantly lessened due to the increased  
2 proportion of uses not in the Household Living category in  
3 the residential area." As explained above,  
4 PCC 33.815.105(A) also specifically requires this  
5 determination to be based on (1) the "number, size and  
6 location" of Non-Household Living uses in the area, and  
7 (2) the "intensity and scale" of the proposed use and  
8 existing uses in the area.

9 With regard to "number, size and location" of  
10 Non-Household Living uses in the area, the challenged  
11 decision states PCC 33.815.105(A) requires a determination  
12 of "whether the existing Non-Household Living uses in the  
13 Area are unusual in number, size or location, such that any  
14 increase may significantly lessen the residential appearance  
15 and function [of] the Area." (Emphases added.)  
16 Record II 35. The decision proceeds to compare the  
17 percentage, average building area and average number of  
18 stories of Non-Household Living uses in the subject area  
19 with the corresponding city-wide figures for Non-Household  
20 Living uses. Based on this comparison with regard to number  
21 and size, and a finding that existing Non-Household Living  
22 uses in the area are not concentrated in particular  
23 locations, other than where land is commercially zoned, the  
24 city concludes the proposed development will not  
25 significantly lessen the overall residential appearance and  
26 function of the area "in respect to the number, size or

1 location of Non-Household Living uses \* \* \*." Record II 35.

2 Petitioners argue the city interpretation described  
3 above is contrary to the express language of  
4 PCC 33.815.105(A). Petitioners argue the city erroneously  
5 interprets PCC 33.815.105(A) to be satisfied if the number,  
6 size and location of Non-Household Living uses in the  
7 subject area are not "unusual" compared to the city as a  
8 whole. Petitioners maintain PCC 33.815.105(A) does not  
9 require or allow consideration of the city as a whole, but  
10 rather limits consideration to the subject residential area.  
11 Petitioners further argue the interpretation that number,  
12 size and location of Non-Household Living uses in the  
13 subject area must not be "unusual," such that "any increase"  
14 would necessarily significantly lessen the residential  
15 function and appearance of the area requires that "a  
16 neighborhood be besieged and on the brink of losing its  
17 residential character before [a] finding [could be made]  
18 that its appearance and function will be lessened by the  
19 proposed use." Petition for Review 25.

20 **1. Waiver**

21 Respondents argue the interpretation of  
22 PCC 33.815.105(A) challenged in this subassignment of error  
23 was expressed in the city's first decision in this matter,  
24 by the emphasized finding in the quote below, and was not  
25 challenged by petitioners in Wilson Park I. According to  
26 respondents, because petitioners failed to raise this issue

1 in their first appeal, this argument has been waived. Mill  
2 Creek Glen Protection Assoc. v. Umatilla County, 88 Or App  
3 522, 526-27, 746 P2d 728 (1987); Portland Audubon v.  
4 Clackamas County, 14 Or LUBA 433, 436-37, aff'd 80 Or App  
5 593 (1986).

6 The city's first decision included the following  
7 findings addressing PCC 33.815.105(A)(1) (number, size and  
8 location of Non-Household Living uses in the subject area):

9 "Although it is true that at least three churches  
10 and their parking lots, a regional park, two  
11 public schools, and several water towers exist in  
12 the area[,] there is nothing unusual about the  
13 concentration of these nonhousehold related  
14 facilities in this residential area. As Staff  
15 points out, churches, parks, schools and water  
16 towers exist in most if not all neighborhoods in  
17 the City and are the usual nonresidential  
18 components in any neighborhood. These  
19 nonresidential uses, along with the Raz bus  
20 facility do not significantly reduce the  
21 residential appearance and function of the area  
22 due to the number, size and location of other uses  
23 not in the household living category in the  
24 residential area. The proposed use will not  
25 significantly impact the overall residential  
26 appearance and function of the area." (Emphasis  
27 added.) Record I 258.

28 The above emphasized finding does note that "there is  
29 nothing unusual" about the concentration of Non-Household  
30 Living uses in the subject area. However, it does not  
31 express the interpretation of PCC 33.815.105(A) adopted in  
32 the decision challenged in this appeal -- namely that with  
33 regard to number, size and location of Non-Household Living  
34 uses, PCC 33.815.105(A) is satisfied so long as the existing

1 Non-Household Living uses in the area are not "unusual" when  
2 compared to the city at large. Consequently, petitioners  
3 could not have challenged this interpretation in their first  
4 appeal and have not waived this issue.<sup>8</sup>

5 **2. Merits**

6 As stated above, we are required to defer to a local  
7 government's interpretation of its code, unless that  
8 interpretation is contrary to the express words, policy or  
9 context of the code. Clark v. Jackson County, supra. Here,  
10 the express language of PCC 33.815.105(A) requires the  
11 determination of whether the residential appearance and  
12 function of the subject area will be significantly lessened  
13 by the proposed use to be based on consideration of "the  
14 proposal by itself and in combination with other uses in the  
15 area not in the Household Living category," based on the  
16 "number, size and location of other uses not in the  
17 Household Living category in the residential area."  
18 (Emphases added.) An interpretation of PCC 33.815.105(A) as  
19 being satisfied simply because the number, size and location  
20 of Non-Household Living uses in the subject area is not  
21 "unusual," when compared to those of Non-Household Living  
22 uses in the city at large, is contrary to the express  
23 language of PCC 33.815.105(A) limiting consideration to the

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<sup>8</sup>We also note that petitioners did challenge the adequacy of the findings quoted in the text as part of their first appeal, and we sustained their challenge. Wilson Park I, 24 Or LUBA at 112-13.

1 proposed use and other Non-Household Living uses in the  
2 subject area.

3 This subassignment of error is sustained.

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

6 **SECOND ASSIGNMENT OF ERROR**

7 PCC 33.815.105(B) establishes the following criteria  
8 for approval of the proposed use:

9 **"Physical compatibility.**

10 **\*\* \* \* \* \***

11 "2. The proposal will be compatible with adjacent  
12 residential developments based on  
13 characteristics such as the site size,  
14 building scale and style, setbacks, and  
15 landscaping; or

16 "3. The proposal will mitigate differences in  
17 appearance or scale through such means as  
18 setbacks, screening, landscaping and other  
19 design features."

20 In Wilson Park I, 24 Or App at 114-18, we determined  
21 the city's original findings were inadequate to satisfy  
22 either PCC 33.815.105(B)(2) or (3).

23 **A. Alternative/Mutually Exclusive Standards**

24 Petitioners recognize that under  
25 PCC 33.700.070(D)(3)(b), use of "'or' indicates that the  
26 connected items or provisions may apply singly or in

1 combination."<sup>9</sup> However, petitioners argue that under the  
2 specific wording of PCC 33.815.105(B)(2) and (3), the city  
3 cannot find compliance with PCC 33.815.105(B)(3) if it does  
4 not determine the proposed use fails to meet  
5 PCC 33.815.105(B)(2). According to petitioners, the city  
6 must first identify the "incompatibilities" found under  
7 PCC 33.815.105(B)(2) before it can decide how to mitigate  
8 those incompatibilities under PCC 33.815.105(B)(3).

9 The challenged decision concludes PCC 33.815.105(B) may  
10 be satisfied by a demonstration of compliance with either  
11 PCC 33.815.105(B)(2) or (3).<sup>10</sup> The decision includes  
12 findings purporting to demonstrate compliance with both  
13 PCC 33.815.105(B)(2) and (3). The decision responds to  
14 petitioners' argument that these two standards are mutually  
15 exclusive as follows:

16 "Alternatively, approval criterion  
17 PCC 33.815.105(B) may be met if the proposed  
18 development will mitigate differences in  
19 appearance or scale through such means as  
20 setbacks, screening, landscaping and other design  
21 features. [Petitioners] argue that there can be  
22 no mitigation of incompatibility if no  
23 incompatibility is found. We disagree. Aspects  
24 of a development's siting, landscaping, etc.,  
25 which can minimize potential incompatibility exist  
26 whether or not the development is actually  
27 incompatible. \* \* \* (Emphasis added.)

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<sup>9</sup>As opposed to the use of "'either ... or'" [which] indicates that the connected items or provisions apply singly, but not in combination." PCC 33.700.070(D)(3)(c).

<sup>10</sup>There is no dispute that PCC 33.815.105(B)(1) is inapplicable here.

1 Record II 38.

2 PCC 33.815.105(B)(3) provides that PCC 33.815.105(B)  
3 may be satisfied by mitigation of "differences" (not  
4 incompatibilities) between the appearance or scale of the  
5 proposed use and that of adjacent residential development.  
6 The city interprets this provision to allow satisfaction of  
7 PCC 33.815.105(B) through mitigation of such "differences,"  
8 irrespective of any determination that those "differences,"  
9 if unmitigated, would result in the proposed use actually  
10 being incompatible. The city's interpretation is not  
11 inconsistent with the express language, purpose or policy of  
12 these code provisions, and we defer to it. ORS 197.829;  
13 Clark v. Jackson County, supra.

14 This subassignment of error is denied.

15 **B. Reliance on Design Proposals**

16 The city's findings on PCC 33.815.105(B)(2) and (3) are  
17 expressly based on elevation plans (Record II 350),  
18 computer-generated photographs (Record II 307-308), and two  
19 letters from a design consultant retained by HAP (Record II  
20 305, 348). Record II 37. The consultant's letters are  
21 themselves based on the site plans and artist's rendering in  
22 the Wilson Park I record, and on the subsequently submitted  
23 elevation plans and computer-generated photographs.  
24 Record II 348.

25 Petitioners argue the city erred in relying on the  
26 elevation plans and computer-generated photographs, and on

1 opinions of the consultant based on those documents.  
2 According to petitioners, the design features displayed in  
3 those documents, including roof style, window design, siding  
4 material, colors, etc., are not part of HAP's proposal and  
5 were not made conditions of approval and, therefore, can be  
6 changed at any time. See Neste Resins Corp. v. City of  
7 Eugene, 23 Or LUBA 55, 67 (1992) (non-binding promises by  
8 applicant are not substitute for conditions of approval).

9 In Perry v. Yamhill County, \_\_\_ Or LUBA \_\_\_ (LUBA No.  
10 93-072, October 7, 1993), slip op 18-19, aff'd 125 Or App  
11 588 (1993), we determined that if an applicant for  
12 subdivision approval submits a drainage plan for the  
13 proposed subdivision to the local government, and the local  
14 government relies on that drainage plan in determining  
15 compliance with a local drainage standard, the drainage plan  
16 is effectively made part of the approved subdivision plat,  
17 and it is not necessary for the local government to adopt a  
18 condition of approval requiring compliance with the drainage  
19 plan. See Friends of the Metolius v. Jefferson County, 25  
20 Or LUBA 411, 421, aff'd 123 Or App 256, on recon 125 Or App  
21 122 (1993) (where conditional use proposal included site,  
22 landscaping and building design plans, county approval is  
23 not required to be specifically conditioned on compliance  
24 with those plans).

25 In this case, the elevation plans, computer-generated  
26 photographs and consultant's letters were submitted to the

1 city by HAP, as part of its submittal on remand. Record II  
2 255-357. The second consultant's letter, to which the  
3 elevation plans were attached, specifically states the  
4 elevation plans were "provided by [HAP]" and, unlike the  
5 artist's rendering submitted previously, show "the  
6 architect's design intentions." Record II 348. We believe  
7 the situation here is similar to that in Perry v. Yamhill  
8 County, supra. The proposed elevation plans and photographs  
9 submitted by the applicant to establish compliance with the  
10 "physical compatibility" requirements of PCC 33.815.105(B)  
11 have become part of the applicant's proposal, and it is not  
12 necessary for the city to impose compliance with these plans  
13 as a condition of approval in order to rely on them in  
14 approving the proposed development.

15 This subassignment of error is denied.

16 **C. Mitigation**

17 The city's findings on PCC 33.815.105(B)(3) state:

18 "[T]he difference in site size is mitigated by the  
19 changes in topography (elevation) and extensive  
20 setbacks of the adjacent residential properties in  
21 that the adjacent lots appear to be much bigger  
22 than they actually are. [T]he difference in  
23 building scale is mitigated by the screening of  
24 the row of ash trees along Bertha Boulevard and  
25 the mature trees to the west which also mask and  
26 break up the scale of the proposed development; by  
27 the horizontal-lapped siding which reduces the  
28 appearance of height (scale); \* \* \* by the very  
29 large setbacks of the residential properties to  
30 the east in that the significant distance between  
31 the proposed development and these residences  
32 minimizes differences in scale; and by the changes  
33 in elevation and topography to both the east and

1 west sides [of the proposed development].

2 "[T]he difference in setbacks along Bertha  
3 Boulevard is mitigated by the strong row of ash  
4 trees along the street and other proposed  
5 landscaping. [A]nother factor contributing to  
6 this mitigation is the difference in grades  
7 between the two sides of Bertha Boulevard such  
8 that one experiences them as visually distinct  
9 from one another. [A]ny difference in setbacks to  
10 the west of the project is mitigated by the  
11 topography, extensive vegetation, and Stephens  
12 Creek. Therefore, \* \* \* any incompatibilities  
13 between the proposed development and adjacent  
14 residential properties are adequately mitigated  
15 through the use of setbacks, screening,  
16 landscaping, and other design features \* \* \*."  
17 Record II 38-39.

18 Petitioners challenge the adequacy of the above  
19 findings and the evidence in the record supporting them.

20 Petitioners argue:

21 "[T]he findings and [the evidence in] the record  
22 continue to lack specifics from which the City can  
23 articulate what exactly it is mitigating. Without  
24 at least a cursory explanation of what the  
25 adjacent properties look like[,] the city's  
26 findings are at best conclusory. \* \* \*

27 "A remand is required to repair the defective  
28 findings \* \* \* and to place in the record at least  
29 some evidence purporting to show what \* \* \*  
30 characteristics, lot configurations, building  
31 styles, and landscaping the adjacent residential  
32 uses have." Petition for Review 19.

33 Respondents argue that findings adequately addressing  
34 PCC 33.815.105(B)(3) are not required to be as detailed as  
35 petitioners contend. Respondents argue the above findings  
36 sufficiently explain how the differences in appearance and  
37 scale between the proposed development and the adjacent

1 residential uses will be mitigated through elevation  
2 differences, topography, setbacks, landscaping and design  
3 features. We agree with respondents.

4 Respondents also argue the above findings are supported  
5 by substantial evidence in the record. Record II 131-33,  
6 146-54, 243-53, 305-08, 348-50. Respondents specifically  
7 argue the city was entitled to base its decision in this  
8 regard on the expert opinion of the design consultant.  
9 Thormalen v. City of Ashland, 20 Or LUBA 218, 236 (1990).  
10 Respondents point out the consultant's expert qualifications  
11 are not challenged, and the letters themselves indicate the  
12 consultant spent "hours \* \* \* at the site viewing the site  
13 and the existing adjacent residences." Record II 131.  
14 Respondents further argue that an expert witness need not  
15 explain the basis for all assumption's that underlie the  
16 expert's evidence. Miller v. City of Ashland, 17 Or LUBA  
17 147, 170 (1988).

18 We have reviewed the evidence in the record cited by  
19 the parties. We agree with respondents that a reasonable  
20 person could have relied on the unrefuted expert testimony  
21 submitted by the design consultant. Thormalen v. City of  
22 Ashland, supra. That evidence supports the findings  
23 regarding mitigation quoted above.

24 This subassignment of error is denied.

1 The second assignment of error is denied.<sup>11</sup>

2 **FIRST ASSIGNMENT OF ERROR**

3 PCC 33.815.105(C)(2) requires that the proposed use  
4 "not have significant adverse impacts on the livability of  
5 nearby residential zoned land due to \* \* \* privacy and  
6 safety issues." As a safety issue under PCC  
7 33.815.105(C)(2), the city's first decision included a  
8 finding that soil stability in the storm water detention  
9 area occupying the western portion of the site will not be  
10 impacted by the proposed development.<sup>12</sup> Petitioners  
11 contended that finding was not supported by substantial  
12 evidence, and we sustained petitioners' assignment of error.  
13 Wilson Park I, 24 Or LUBA at 120-21.

14 Petitioners contend the findings supporting the  
15 decision challenged here are inadequate because they fail to  
16 address issues raised by petitioners in both the original  
17 city proceedings and the proceedings on remand concerning  
18 the effects of earthquakes and soil saturation on slope

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<sup>11</sup>Petitioners also challenge the adequacy of, and evidentiary support for, the city's findings of compliance with PCC 33.815.105(B)(2). However, PCC 33.815.105(B)(2) and (3) are alternative approval criteria, and we determine the city properly demonstrated compliance with PCC 33.815.105(B)(3). Consequently, even if there are deficiencies in the city's decision with regard to PCC 33.815.105(B)(2), that would not provide a basis for reversal or remand. Therefore, we do not consider petitioners' arguments regarding the findings addressing PCC 33.815.105(B)(2).

<sup>12</sup>We note the city apparently considers this issue relevant to the safety of nearby residentially zoned land because the western edge of the detention area forms a relatively steep slope below existing residences to the west of the proposed development.

1 stability. Petitioners argue in Wilson Park I, the city  
2 "lost on the issue of slope stability," and this Board's  
3 decision in Wilson Park I did not settle any aspect of the  
4 issue of evidentiary support for a determination of  
5 compliance with PCC 33.815.105(C)(2) with regard to slope  
6 stability. Petition for Review 4. Petitioners further  
7 argue that under Beck v. City of Tillamook, 313 Or 148, 831  
8 P2d 678 (1992), once the city reopened the record on the  
9 issue of soil stability, petitioners could submit evidence  
10 and raise new issues with regard to any aspect of the soil  
11 stability issue.

12 **A. Earthquakes**

13 The challenged decision finds that "risk of earthquake"  
14 is not within the scope of any of the three issues which  
15 formed the basis for our remand in Wilson Park I.  
16 Record II 40. Respondents argue the city is entitled to  
17 limit its consideration on remand to correcting the  
18 deficiencies that were the basis for remand.<sup>13</sup> Bartels v.  
19 City of Portland, 23 Or LUBA 182, 185 (1992). Respondents  
20 also contend petitioners did not raise the issue of  
21 earthquake hazard in their previous appeal and, therefore,  
22 are precluded from raising it here. Adler v. City of

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<sup>13</sup>The notice of the public hearing before the city council on remand stated that testimony would be "limited to those three errors which were identified by LUBA as the basis for the remand." (Emphasis omitted.) Record II 468. The third issue was stated as a lack of substantial evidence "to show that the soil stability in the storm water detention area will not be impacted by the proposed development." Id.

1 Portland, 25 Or LUBA 546, 552 (1993).

2 As explained above, in Wilson Park I, we determined the  
3 city's finding under PCC 33.815.105(C)(2) that soil  
4 stability in the storm water detention area will not be  
5 impacted by the proposed development was not supported by  
6 substantial evidence. Petitioners fail to explain how the  
7 issue of earthquake hazard relates to the impact of the  
8 proposed development on soil stability in the storm water  
9 detention area. Additionally, petitioners failed to raise  
10 any issue concerning earthquake hazard in their initial  
11 appeal to this Board. Consequently, we agree with  
12 respondents that the earthquake issue is outside the scope  
13 of our remand in Wilson Park I, and cannot be raised in this  
14 appeal. Bartels v. City of Portland, supra; Adler v. City  
15 of Portland, supra.

16 This subassignment of error is denied.

17 **B. Soil Saturation**

18 Petitioners contend the proposed development, which  
19 includes placement of a retaining wall and portions of the  
20 parking area on fill within the storm water detention area,  
21 will adversely affect the stability of the western slope of  
22 the storm water detention area by causing increased soil  
23 saturation. Petitioners raised this issue in their first  
24 appeal and in expert evidence submitted to the city after  
25 remand. Record II 203.

26 The findings in the challenged decision on soil

1 stability under PCC 33.815.105(C) address specifically only  
2 the issue of whether the proposed parking area fill and  
3 retaining wall within the storm water detention area will  
4 increase water flow velocity (and therefore erosion) and  
5 consequently have adverse impacts on the stability of the  
6 steeper western slope of the detention area. Record II 39.  
7 The only statement in the findings on soil stability that is  
8 not explicitly limited to the erosion issue is the  
9 following:

10 "[A geotechnical engineer, who] we find credible,  
11 \* \* \* also has concluded that no adverse impacts  
12 to the stability of the western slope of the  
13 detention area will result from the proposed  
14 development. \* \* \*" Record II 39-40.

15 We agree with petitioners that this finding does not address  
16 the issue raised by them concerning the impacts of the  
17 proposed development on soil stability through increased  
18 soil saturation.

19 However, respondents contend we must nevertheless  
20 affirm this portion of the challenged decision, because  
21 evidence in the record clearly supports a determination that  
22 there will be no adverse impact on soil saturation due to  
23 the proposed development. ORS 197.835(9)(b). Respondents  
24 argue the expert testimony of the geotechnical engineer  
25 referred to in the above quoted finding indicates he  
26 specifically concluded the proposed development will not  
27 have an adverse effect on slope stability due to  
28 "modification of subsurface soils" or "changes in

1 groundwater levels." Record II 424-25.

2 The "evidence \* \* \* which clearly supports the  
3 decision" standard of ORS 197.835(9)(b) imposes a higher  
4 evidentiary standard than the "substantial evidence"  
5 standard of ORS 197.835(7)(a)(C). Friedman v. Yamhill  
6 County, 23 Or LUBA 306, 311-12 (1992). Where the relevant  
7 evidence in the record is conflicting, or provides a  
8 reasonable basis for different conclusions, such evidence  
9 does not "clearly support" the challenged decision. Forster  
10 v. Polk County, 22 Or LUBA 380, 384 (1991); see Cummins v.  
11 Washington County, 22 Or LUBA 129, 133 (1991), aff'd 110 Or  
12 App 468 (1992). In this case, there is conflicting expert  
13 testimony in the record with regard to whether the proposed  
14 development will have an adverse effect on soil saturation  
15 and, therefore, slope stability, in the storm water  
16 detention area. Record II 203, 424. Accordingly, the  
17 evidence does not "clearly support" a determination of  
18 compliance with PCC 33.815.105(C)(2) on this issue.

19 This subassignment of error is sustained.

20 The first assignment of error is sustained, in part.

21 The city's decision is remanded.