

LAND USE
BOARD OF APPEALS

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

MAR 30 12 40 PM '81

1 JAMES ATWOOD,)

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LUBA NO. 80-095

v.

FINAL OPINION
AND ORDER

CITY OF PORTLAND, CLARK
BINGHAM, STUART BINGHAM,
SELWYN A. BINGHAM, JR. AND
SOPHIA BINGHAM,

Respondents.

Appeal from City of Portland.

Diane W. Spies, Portland, filed a brief and argued the cause for Petitioner.

Ruth Spetter, Portland, filed a brief and argued the cause for Respondent City of Portland.

Michael Schmeer, Portland, filed a brief and argued the cause for Respondents Bingham.

Cox, Referee; Reynolds, Chief Referee; Bagg, Referee; participated in the decision.

AFFIRMED

3/30/81

You are entitled to judicial review of this Order.
Judicial review is governed by the provisions of Oregon Laws
1979, ch 772, sec 6(a).

1 COX, Referee.

2 NATURE OF PROCEEDING

3 Petitioner requests reversal and remand of Ordinance No.
4 150134 adopted by Respondent City of Portland on July 30,
5 1980. That ordinance changed the zoning of tax lots 1, 3, 4,
6 13, 15, 16, 17 and 18, Block 51, CARTER'S ADDITION from AO
7 (high density apartments), A2.5 (low density apartments) and R7
8 (one-family residential) to A1 (medium density apartments).
9 The ordinance also allowed for five development variances.

10 STANDING

11 Standing is not an issue in this case.

12 ALLEGATION OF ERROR

13 Petitioner sets forth the following as allegations of
14 error.

15 "A. RESPONDENT'S FAILURE TO FOLLOW ESTABLISHED
16 PROCEDURES HAS PREJUDICED THE SUBSTANTIAL RIGHTS
OF PETITIONER.

17 "1. Respondent did not provide an unbiased
18 hearing before an impartial tribunal.

19 "2. Respondent failed to make adequate findings
of fact in support of its decision.

20 "3. Respondent failed to make, maintain and
21 designate an adequate record of its
decision-making process.

22 "B. RESPONDENT'S DECISION AND FINDINGS WERE NOT
23 SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE WHOLE
RECORD.

24 "C. RESPONDENT HAS IMPROPERLY CONSTRUED AND APPLIED
25 THE LAW ON VARIANCES, AND HAS IMPROPERLY USED THE
VARIANCE PROCESS EITHER TO EFFECTIVELY REZONE THE
26 PARCEL, OR TO LEGISLATIVELY MODIFY THE ZONE.

1 "D. RESPONDENT FAILED TO SPECIFY, PRIOR TO ITS FINAL
2 DECISION THE STANDARDS AND CRITERIA ON WHICH THE
3 DECISION IS BASED.

4 "E. RESPONDENT FAILED TO ADDRESS THE APPLICABLE GOALS
5 AND DEVELOP ADEQUATE FINDINGS THEREON."

- 6 1. Goal 1
- 7 2. Goal 2
- 8 3. Goal 7
- 9 4. Goal 10
- 10 5. Goal 12

11 FACTS

12 Petitioner appeals the City of Portland's granting of a
13 zone change for three parcels of land within the city limits of
14 Portland. Prior to the zone change request, the three parcels
15 were zoned AO (high density apartments), A2.5 (low density
16 apartments) and R7 (single-family residential). As a result of
17 the zone change the property has a zoning designation of A1
18 (medium density apartments). In addition, the City of Portland
19 granted applicant variances to A1 zone standards which allow
20 for an increase in lot coverage, an increase in building
21 height, reduction in minimum side yards, an increase in front
22 yard projections and an increase in the maximum height of a
23 wall in the front yard. The subject site contains
24 approximately 1.10 acres and is located south of the Vista
25 Bridge near the intersection of SW Vista Avenue and SW Market
26 Streets in the Portland Heights Area.

The purpose of the zone change and variances is to allow

1 the applicant (participant herein) to construct a 31 unit
2 multi-family structure known as the Vista House. Included in
3 the project configuration is a two-story parking garage
4 containing approximately 63 parking spaces. The project
5 includes 10 stories; however, the stairstep design is such that
6 the proposed structure does not exceed six stories in height at
7 any given point. Adjacent land to the site is composed of
8 large single family dwellings to the west, north and south. To
9 the east is mixed use containing residential, institutional and
10 commercial establishments. Site access is proposed from both
11 SW Vista Avenue, classified as a neighborhood collector street,
12 and SW Market Drive, a narrow, local service street. On-street
13 parking is not allowed on either street in the vicinity of the
14 site.

15 The site of the proposed project has several natural and
16 legal constraints which have impacted the project design and
17 the city council's approval. The site is extremely steep.
18 There is a history of landslides on the property. The property
19 is considered to be prime view location and there was much
20 concern over the blocking of neighboring residents' views. The
21 site is in Portland's city limits and within one mile of
22 Portland City Hall. The proposed site design includes a
23 projected 1 million dollar engineered site stabilization
24 system, including drainage systems, retaining walls, etc. The
25 property was the subject of a 1948 Multnomah County Circuit
26 Court order limiting the height of any structure placed on the

1 site to not more than 30 feet above S.W. Vista Avenue at the
2 property's southwest corner. Bingham v. City of Portland,
3 Circuit Court No. 170588 (June 7, 1948).

4 The 1948 decision and concerns of the neighborhood
5 residents dictated that the project's height be limited to one
6 story, with flat roofs, above SW Vista Avenue in order to
7 protect the views of the homeowners to the west of the
8 project. The cost of site development and the estimated size
9 of each living unit within the project (3,600 square feet)
10 result in expensive housing units.

11 DECISION

12 ASSIGNMENT OF ERROR A

13 Petitioner argues that respondent's failure to follow
14 established procedures has prejudiced the substantial rights of
15 petitioner. Petitioner then breaks this allegation of error
16 into three specific parts which, in summary, are bias,
17 inadequate findings, and failure to make, maintain and
18 designate an adequate record.

19 Bias

20 Petitioner alleges that respondent did not provide an
21 unbiased hearing before an impartial tribunal. He points to
22 statements by council members regarding their beliefs they were
23 down-zoning the parcel and reducing impacts on the neighbors as
24 indicative of a biased view which flavored the entire
25 proceeding before the city council. As best we can ascertain
26 from the petitioner's argument, he believes that references to

1 however, in light of the fact that at the time of the contested
2 zone change hearing, the city had no adopted comprehensive
3 plan.

4 Petitioner next argues that the city failed to determine
5 and make findings on the need for additional A-1 zoned land as
6 opposed to the need for the three zones presently existing on
7 the property. In addition, petitioner argues that there are no
8 findings as to the availability of the various zones and their
9 location throughout the city. In the petition for review
10 petitioner cited no authority which would require the city to
11 make such findings. We do know from the Supreme Court case of
12 Neuberger v. City of Portland, 288 Or 155, 603 P2d 771 (1979),
13 that neither public need nor availability of other property
14 findings are required in a zone change case unless such
15 consideration is imposed upon the city by local ordinance,
16 state statute, or LCDC requirement. This Board asked for
17 additional memoranda of law on this subject at the time of oral
18 argument. In his memorandum petitioner cites us to Portland
19 Municipal Code 33.114.060(b)(2) which requires:

20 "The findings and conclusions of the hearings
21 officer shall set forth and demonstrate:

22 "* * * *

23 "(2) The manner in which the decision is
24 consistent with the public need, the extent to which
25 the general welfare of the public is served by the
26 decision and how the public need is best met by the
request."

We do not view the above cited ordinance as requiring the

1 down-zoning and reducing impacts on neighbors indicates a
2 preference or bias in favor of expensive condominium units and
3 the people who own "expensive homes" in the neighborhood.
4 Petitioner argues that the expensive nature of the proposed
5 project has dominated the decision-making process and obscured
6 the valid considerations of zoning. He argues that "indeed, if
7 the project were not expensive, it is possible the respondent's
8 council would not allow high-rise zoning at all * * * *"

9 Petitioner cites no authority which would support his argument
10 that the council's alleged preferences, even if true, amount to
11 a legally prohibited bias. This Board finds nothing to support
12 petitioner's argument in the record. The impact of a proposed
13 development on a surrounding neighborhood is a valid
14 consideration by a local government and the fact that the
15 neighborhood contains "expensive" homes does not convert that
16 concern into some sort of prohibited bias. Therefore,
17 petitioner's allegation of error regarding bias is denied.

18 Inadequate Findings of Fact

19 Petitioner here argues that respondent failed to make
20 adequate findings of fact in support of its decision. At best
21 this allegation of error amounts to a shot-gun attack at the
22 city's findings. Petitioner first argues that proper findings
23 must relate the zoning proposed to the comprehensive plan and
24 that such a requirement was not complied with in this case;
25 citing Baker v. City of Milwaukie, 271 Or 500, 533 P2d 772
26 (1975). Petitioner fails to explain this allegation of error,

1 city to make findings setting forth need for the requested
2 zoning as opposed to the present zoning and a lack of other
3 available property in the city to fill that need as required in
4 Fasano v. Washington County, 264 Or 574, 507 P2d 23 (1973) and
5 repudiated in Neuberger, supra. First of all, there is no
6 requirement that other available property be considered in the
7 above cited portion of the City of Portland's Code. As regards
8 need, Section 33.114.060(b)(2) requires the hearings officer to
9 find that a public need exists for whatever the applicant is
10 requesting and show how the applicant's proposal satisfies that
11 need in the context of the public's welfare. The city's
12 findings indicate that this property is undeveloped, is within
13 the city limits of the City of Portland, and is within a short
14 distance of the city center. In addition, the findings
15 indicate the development will add an additional 31 housing
16 units to the city's supply of housing, the units will
17 contribute to the housing alternatives available to the
18 citizens of Portland and the proposed structure is an ideal
19 configuration for a multi-family housing project in the area
20 considering existing restrictions, both legal and
21 topographical. Further the findings state that the proposed
22 project will be more compatible with the residential
23 neighborhood surrounding the site than would a building
24 permitted under the zoning existing prior to the zone change.
25 In addition the city found the development will stabilize a
26 hazardous slide area, and that housing, energy and

1 transportation concerns will be satisfied by the development.

2 Petitioner next argues that respondent failed to make
3 findings which address the requirements for granting variances
4 set forth in Portland's Municipal Code Sections 33.98.010 and
5 33.98.015. Specifically, petitioner argues that the city
6 failed to find that the exceptional or extraordinary conditions
7 which apply to the subject property do not apply generally to
8 other properties as required by Portland Municipal Code
9 33.98.010(b)(2)(A). That provision states:

10 "Major Variances. A major variance as specified
11 in Section 33.98.015 (b) may be granted when the
following applicable conditions can be satisfied:

12 "A. The variance is required in order to modify
13 the impact of exceptional or extraordinary
14 circumstances or conditions that apply to the subject
property or its development that do not apply
generally to other properties in the vicinity; or

15 "B. The variance is required in order to allow
16 enjoyment by the appellant of a property right
17 possessed by a substantial portion of the owners of
properties in the same vicinity, while resulting in
the comparatively trivial detriment to the
neighborhood." Emphasis added.

18 As can be seen, the test is stated in the alternative and
19 the mere fact that the city failed to make findings on Part (A)
20 is not controlling. Nevertheless, the city's findings cover
21 both halves of the alternative test and, we therefore deny
22 petitioner's allegation. Regarding Section 2(A) for instance,
23 finding no. 20 relates to exceptional, extraordinary
24 circumstances and includes by incorporation the 1948 circuit
25 court case height restrictions covering the property. Those
26

1 restrictions do not apply to other properties in the vicinity.

2 As regards, Section 2(B), Finding No. 18 states in part
3 that:

4 "Approving these variances in order to authorize a
5 sound architectural and engineering scheme adapted
6 specifically to the difficulties of this site is in
7 the public interest and supports the intent and
8 purpose of Title 33. This is so because it will
9 preclude the less compatible high-rise development
10 under pre-existing zoning which could result in
11 obliteration of the view enjoyed by the public from SW
12 Vista Avenue and from nearby residences above the
13 site, and will reduce the density otherwise possible
14 on this site whose street capacities argue strongly
15 for reduced density."

16 The record in support of Finding No. 18 indicates that numerous
17 surrounding properties have obtained one or more of the type of
18 variances requested by petitioner in order to construct
19 residences which take advantage of the view. In addition,
20 Finding No. 21 indicates that the variances will "result in
21 comparatively trivial detriment to the neighborhood and
22 substantially less detriment than the incompatible development
23 which could be authorized under pre-existing zoning."

24 Petitioner next argues that Portland Code Section 33.98.005
25 is violated because there are no findings relating to public
26 health, safety and welfare.¹ Respondent City of Portland
27 argues section 33.98.005 is only an introductory paragraph to a
28 chapter and does not require any findings specifically
29 addressing it. While we tend to agree with the position taken
30 by respondent, (see Anderson v. Peden, 284 Or 313, 320, 587 P2d
31 59 (1978)) we also note that the Supreme Court in Sunnyside

1 Neighborhood v. Clackamas Co. Comm., 280 Or 3, 569 P2d 1063
2 (1977), stated that there is no specific form required for
3 findings in a land use case. A reading of the city's findings
4 as a whole reveals its concern for the public health, safety
5 and welfare. Such concern is evidenced by findings relating to
6 topography, and engineering characteristics and requirements of
7 the site.

8 Petitioner next states that Portland Municipal Code
9 33.98.010 requires that a variance not permit the establishment
10 of a use which is not a permitted use within the zone.
11 Petitioner argues that the findings do not state that the use
12 is a permitted use within the zone before it was changed by the
13 variance. If petitioner is here arguing that the city has
14 granted a use variance, we refer the reader to our discussion
15 of that point infra. On the other hand, if petitioner is
16 arguing only that such a finding is required, he points us to
17 no authority to support his contention.

18 Petitioner next alleges that finding no. 10 does not
19 explain the effect the proposed building will have on the
20 unstable site. Petitioner again fails to cite this Board to
21 any requirement that mandates the city make such a finding. In
22 addition, petitioner fails to read the rest of the findings,
23 such as 18, 19, 20, and 21 which reveal the city's
24 consideration of the structure's compatibility with the site
25 and the neighborhood.

26 Petitioner next attacks finding no. 16 on the ground it

1 does not explain why the variance granted to allow construction
2 of an "architectural wall" will meet the requirements of
3 Portland Municipal Code 33.98.010. He also asserts that the
4 finding fails to fully explain all the requirements of
5 33.98.010 for the front yard variance and the lot coverage
6 variance. Petitioner again fails to address to this Board the
7 legal basis for his allegations. This Board does not require
8 of a local government that all possible concerns be addressed
9 in a single finding. Objectively read, the findings of fact
10 made by the city, do address the reasons for the variances.
11 Based on the foregoing reasons, petitioner's allegations
12 regarding the Respondent City of Portland's findings are denied.
13 Failure to Make, Maintain and Designate Adequate Record.

14 Petitioner in this allegation of error attempts to renew
15 complaints about the record which respondents supplied in this
16 matter. These allegations have been made numerous times before
17 by petitioner and were ruled on by interim orders of this
18 Board. Once again, petitioner alleges that certain findings
19 which were purportedly made for the purpose of denying the
20 requested zone change were prepared by the City Attorney but
21 are not in the record. Petitioner had an opportunity to ask
22 for an evidentiary hearing regarding this matter pursuant to
23 LUBA Procedural Rules. Petitioner failed to request such an
24 evidentiary hearing and cannot bring up the matter at this
25 point.

26 Therefore, based on the foregoing, petitioner's Allegation

1 of Error A with its three subparts is denied.

2 ASSIGNMENT OF ERROR B

3 Petitioner asserts that respondent's decision and findings
4 are not supported by substantial evidence in the whole record.
5 We disagree.

6 Specifically, petitioner seems to be alleging that the City
7 made an error similar to that which was the subject of Heilman
8 v. City of Roseburg, 39 Or App 71, 75, 591 P2d 390 (1979)
9 wherein the Roseburg City Council voted to deny a zone change
10 and then directed the city attorney to prepare findings. The
11 respondent in Heilman, supra, approved the findings without
12 discussion at a later meeting. As we read petitioner's
13 allegation of error, he seems to be alleging that the same sort
14 of process took place in this case. Petitioner's rendition of
15 the facts is an incorrect statement of the events which
16 actually took place. Pages 20 and 21 of the record, as well as
17 the history of this proceeding clearly indicate that the
18 findings which were ultimately adopted by the city council were
19 distributed to the city council members at least a day before
20 their adoption. The findings were adopted after consideration
21 by the city council and were the basis for its vote to approve
22 the project and deny petitioner's appeal therein.

23 Petitioner next asserts finding no. 5 which concludes that
24 "a substantial portion of [the project's residents] will make
25 trips to downtown Portland by foot or bicycle rather than
26 automobile" is not supported by substantial evidence in the

1 record. Even if we agreed with petitioner, such an error would
2 not mandate that this Board reverse the city's decision. The
3 quoted statement is unnecessary to granting the zone change.
4 In any event, it is more in the form of a conclusion which
5 might logically be drawn given the facts contained in the
6 record and found by the city regarding the project's location
7 and surrounding transportation corridors.

8 Petitioner next asserts that finding no. 5 is further in
9 error when it states that the project is in compliance with
10 statewide goals 12, 13 and 14. Petitioner is not here alleging
11 a violation of Goals 12, 13 or 14, but rather attacks the form
12 of the findings. Petitioner's attack on the goals is addressed
13 infra. Petitioner argues the findings failed to relate the
14 substance and facts of the testimony and statements upon which
15 respondent's council relied in making its decision. Once
16 again, petitioner fails to show this Board any reason, given
17 the remaining findings of the City of Portland that such
18 deficiencies amount to reversible error.

19 The remainder of petitioner's assertions regarding lack of
20 substantial evidence to support numerous findings such as
21 findings 7 and 20, suffer from the same defects as those set
22 out above and are denied. Based on the foregoing, petitioner's
23 allegation of error B is denied.

24 ASSIGNMENT OF ERROR C

25 Petitioner alleges that "Respondent has improperly
26 construed and applied the law on variances, and has improperly

1 used the variance process either to effectively rezone the
2 parcel, or to legislatively modify the zone." Petitioners
3 arguments seem to be two-fold. First, he argues that the
4 findings and evidence do not reflect hardship or practical
5 difficulties of developing the site under present zoning. This
6 assertion is nothing but a rehash of his prior arguments
7 attacking the findings. As we have previously discussed, we
8 disagree with petitioner's arguments.

9 Second, petitioner seems to be arguing that taking the
10 impact of all the variances into consideration, the city has
11 granted a use variance which amounts to the creation of a zone
12 whose characteristics are different than the granted A1 zone.
13 We disagree with petitioner. The granted A1 zone without
14 variances allows for multi-family housing which is the same
15 utilization applicant proposes for the site.² The findings
16 and the record in support thereof are replete with concerns
17 which relate to traditional grounds for area variances. These
18 include the topography of the site, soil instability, the
19 necessity to provide off-street parking and protection of the
20 views enjoyed from neighboring residences. In addition, a
21 height limitation placed by court order on any structure built
22 on the property affects the site. See Anderson, American Law
23 of Zoning, Section 18, (2d Ed 1977). These factors, when
24 combined, necessitate a unique structural design to enable
25 construction of the multi-family facility permitted in an A1
26 zone on the site. For the above stated reasons, petitioner's

1 assignment of error C denied.

2 ASSIGNMENT OF ERROR D

3 Here, petitioner alleges that the respondent failed to
4 specify, prior to its final decision, the standards and
5 criteria on which the decision is based. His argument is that
6 respondent "makes no conclusion in its findings as to the
7 applicable law or other criteria it is using in evaluating
8 participant's application or the standards applied in approving
9 that application for zone change and variances." We disagree
10 with petitioner's argument. It is clear from the findings and
11 record that petitioner knew throughout the hearings regarding
12 the zone change and variances that the city was basing its
13 decision on its city code and specifically those sections of
14 its code governing zone changes and variances. Those policies
15 and standards were written out and existed at the time of the
16 action being contested.

17 Petitioner further argues that the existing AO zoning on
18 portions of the property was invalid and that as a result
19 respondent could not rely upon the high density nature of the
20 AO zone to urge a lesser density for the site. Petitioner
21 relies heavily on his argument that the AO zoning which
22 appeared in the city records was the result of a scrivener's
23 error rather than the official action of the City of Portland.
24 Petitioner takes the Board through a history of the zoning on
25 the property and the court actions relating thereto. He does
26 not support however, with any evidence in the record, his

1 allegation of scrivner's error. Even if petitioner were
2 correct that the AO zoning was somehow inaccurate, the result
3 would be that a portion of the site was unzoned at the time of
4 the contested action. Petitioner, however, does not present
5 any argument or cite this Board to any authority that would
6 prevent the city from applying the contested A1 zone to the
7 site in the event a portion of it was unzoned. For the above
8 stated reasons, petitioner's allegation of error D is denied.

9 ASSIGNMENT OF ERROR E

10 Petitioner alleges that respondent failed to address the
11 applicable goals and develop adequate findings thereon.
12 Specifically petitioner attacks Respondent City of Portland's
13 decision alleging that it violates statewide goals 1, 2, 7, 10
14 and 12. We will consider each of those goals separately.

15 Goal 1:

16 Petitioner alleges that respondent's failure to respond to
17 petitioner's concerns on goals 2, 7, 10 and 12 constitutes a
18 violation of goal 1, Citizen Participation. Petitioner fails
19 to articulate what portion of goal 1 he is referring to;
20 however, considering the context of his allegation, it can only
21 be assumed his assertion is based on the goal's requirement
22 that "feedback" mechanisms exist. Specifically, component no.
23 5 of goal 1 requires that feedback mechanisms be developed to
24 "assure that citizens will receive a response from
25 policymakers." Component 5 states:
26

1 "Recommendations resulting from the citizen
2 involvement program shall be retained and made
3 available for public assessment. Citizens who have
4 participated in this program shall receive a response
5 from policy makers. The rationale used to reach land
6 use policy decisions shall be available in the form of
7 a written record."

8 The feedback mechanism contemplated under goal 1 is
9 satisfied in a quasi-judicial proceeding by the administrative
10 law requirements of due process protections and detailed
11 findings of fact and conclusions of law. See Sunnyside
12 Neighborhood v. Clackamas Co. Comm., 280 Or 3, 569 P2d 1063
13 (1977). Respondent in this quasi-judicial proceeding explained
14 through findings the basis for its decision. Included in its
15 findings are subject matters which relate to concerns addressed
16 in goals 2, 7, 10 and 12. The fact that petitioner had an
17 opportunity to present evidence, orally argue, and was provided
18 with a copy of the final order addressing areas of his concern
19 achieved the purpose of the feedback mechanism contemplated in
20 Goal 1. Therefore, petitioner's allegation of error regarding
21 goal 1 is denied.

22 Goal 2:

23 Petitioner next alleges that a Goal 2 violation has
24 occurred because "respondent has neither generated data nor
25 made findings on the buildable lands in the affected zones, on
26 the buildable qualities of the site or on the effects of the
27 proposed change on the proposed comprehensive plan." We
28 disagree. The city's obligation under Goal 2 in a
29 quasi-judicial proceeding such as this is to generate

1 sufficient factual data to support findings showing compliance
2 with the applicable goals. This does not require, however, as
3 petitioner seems to suggest, that the city develop a mini
4 comprehensive plan for the area before it can approve a
5 development such as the one which is the subject of this case.

6 What petitioner seems to be asserting here, is that Goal 2
7 somehow imposes a Fasano v. Washington County, 264 Or 574, 507
8 P2d 23 (1973) need and alternative lands tests upon a city.
9 This Board finds no Goal 2 basis for such an assertion as
10 regards a quasi-judicial proceeding.

11 In reference to petitioner's assertion about the buildable
12 qualities of the site, the city's findings and record in
13 support thereof reveal that the purpose of the zone change and
14 the variances is to allow construction on this extremely steep
15 property. The city's findings addressing the site's
16 buildability are quite detailed. See discussion on Goal 7
17 infra. We find no Goal 2 error.

18 We now turn to that portion of this allegation of error
19 which attacks the city's failure to make findings or generate
20 data on the requested zone change's effect on the city's
21 proposed comprehensive plan. Nothing in Goal 2 suggests that a
22 jurisdiction must make specific findings as to the effects of
23 its land use actions on proposed or unadopted comprehensive
24 plans. Because petitioner here did not specify how the city's
25 decision might violate the proposed plan, we do not find a Goal
26 2 violation.³ Therefore, petitioner's allegations regarding

1 goal 2 are dismissed.

2 Goal 7:

3 Goal 7 entitled "Areas Subject to Natural Disasters and
4 Hazards" states:

5 "Developments subject to damage or that could
6 result in loss of life shall not be planned nor
7 located in known areas of natural disasters and
8 hazards without appropriate safeguards. Plans shall
9 be based on an inventory of known areas of natural
10 disaster and hazard."

11 There is no question that the subject property fits within
12 the definition of an area of natural disaster and hazard. The
13 evidence in the record indicates clearly that this property is
14 subject to landslides. Petitioner argues that respondent has a
15 responsibility to make a finding based upon substantial
16 evidence that no physical condition of the subject property
17 would make development of the kind allowed by the zone unsafe.
18 While we agree with petitioner that a city has a duty to
19 determine property can be safely developed, we disagree that
20 Portland failed to make such a determination.

21 The city's findings as a whole, coupled with the fact the
22 city granted the zone change and requested variances, indicate
23 the city found the land to be buildable given the structural
24 safeguards proposed by the developer. The purpose of the
25 requested and granted variances is to enable adequate
26 safeguards to be designed into the structure. Finding no. 10
states in pertinent part:

1 "None of the proposed variances would cause
2 substantial adverse effects upon property values or
3 environmental conditions in the immediate vicinity or
4 in the zone in which the property of the applicant is
5 located, because the proposed building is more
6 compatible with the neighboring uses than that which
7 may be built under existing zoning, and because the
8 variances allow the construction of a building adapted
9 to the topographic conditions of the site." (Emphasis
10 added).

11 Finding No. 12 states:

12 "All of the variances are required in order to modify
13 the impact of the exceptional and extraordinary
14 circumstances and conditions that apply to the subject
15 property and its development."

16 Finding No. 16 states:

17 "The variance relating to the increase in height of
18 wall is required by the topography and in order to
19 enclose the parking area which provides parking at a
20 two to one ratio for the project, thereby keeping the
21 owners' cars off SW Market Street Drive."

22 Finding No. 17 states:

23 "The variance relating to projection into front
24 yard is required by the fact that the location of the
25 projection is at the north end of the project where
26 the slope is at its steepest and juts out more
27 abruptly into the building area."

28 Finding No. 18 states in pertinent part:

29 "* * * Approving these variances in order to authorize
30 a sound architectural and engineering scheme adapted
31 specifically to the difficulties of this site is in the
32 public interest and supports the intent and purpose of
33 Title 33."

34 Finding No. 19 states in pertinent part:

35 "* * * In addition, the ability thus created for the
36 applicant to fit the structure to the site, all as
37 indicated by the testimony before the Council will
38 substantially enhance the environmental conditions
39 that might otherwise occur. It will, given the city's
40 engineering safeguards under Chapter 70 of the Uniform
41

1 Building Code, greatly enhance the safety of the hill
and site."
2

3 As regards petitioner's allegation that the findings that
4 exist are not supported by substantial evidence, we find that
5 allegation to be unfounded. Considering the whole record,
6 there is sufficient evidence contained therein, specifically in
7 the form of testimony by architects and engineers, to enable
8 the city to conclude the structure can be placed on the subject
9 site in a safe manner. Therefore, for the above stated reasons
10 petitioner's allegations regarding statewide goal no. 7 are
11 dismissed.

12 Goal 10.

13 Petitioner asserts that Goal 10 was violated because the
14 Respondent failed to find the property is suitable and
15 necessary for residential use.

16 Goal 10 states:

17 "Buildable lands for residential use shall be
18 inventoried and plans shall encourage the availability
19 of adequate numbers of housing units at price ranges
20 and rent levels which are commensurate with the
financial capabilities of Oregon households and allow
for flexibility of housing location, type and density.

21 "Buildable Lands -- refers to lands in urban and
22 urbanizable areas that are suitable, available and
necessary for residential use."

23 Goal 10's focus is on providing sufficient land to meet the
24 housing needs of Oregonians and to allow flexibility in housing
25 choices. Nothing in that goal prohibits a jurisdiction from
26 approving a residential development without first making a

1 finding that the land on which the development is to take place
2 is "buildable land" within the context of Goal 10.

3 Even if, however, the city were required under Goal 10 to
4 find that the land upon which the development was to be located
5 was "buildable land," the city's findings do show that the land
6 is suitable and necessary for residential development. As the
7 Supreme Court held in Sunnyside Neighborhood, supra, there is
8 no specific form required for findings in a land use case. The
9 findings in this case are replete with evidence of the city
10 council's concern over the site's suitability for development
11 as proposed. (See discussion on Goal 7 supra). This property
12 is within one mile of Portland's City Center and within
13 Portland's urban growth boundary. Those facts, along with
14 findings regarding the site's close proximity to mass transit
15 and city services as well as its prime view location all
16 address suitability and necessity within the context of goal
17 10. The city council decided the project would add to housing
18 alternatives within the City of Portland. Petitioner's
19 allegation regarding goal 10 is denied.

20 Goal 12:

21 Petitioner alleges that respondent has violated statewide
22 goal 12 because its "findings failed to consider peak hour
23 travel patterns as set forth in Goal 12, guideline 4 [sic] and
24 requested for review by petitioner." Petitioner's reliance on
25 a guideline is misplaced. ORS 197.015(9) states in pertinent
26 part:

1 "Guidelines shall be advisory and shall not limit
2 state agencies, cities, counties and special districts
to a single approach."

3 See also Gayken v. Portland, 1 Or LUBA 313, 317 (1980).

4 In addition, petitioner's allegation is inaccurate. In
5 finding no. 6 the city states:

6 "6. SW Market Street Drive is improved for a width of
7 18 feet in front of the property but such width
8 only extends approximately two blocks north to SW
9 Vista Avenue and two blocks south to SW 19th
10 Avenue. SW Market Street Drive substantially
11 widens south of SW 19th Avenue. The volume of
12 traffic (23 cars per hour at peak use and 100
13 average daily trips) is such that the expected
14 increase from this project on SW Market Street
15 Drive would not be an undue increase. Because
16 the main entrance and garage of the project will
17 be on SW Market Street Drive, it is not expected
18 that the proposed driveway on SW Vista Avenue
19 will create a hazard on that street. Any other
20 use of the property adjacent to SW Vista Avenue,
21 specifically including a number of single-family
22 residences along SW Vista Avenue, would create a
23 greater hazard to traffic. Applicant will
24 provide parking at a ratio of two spaces for one
unit which is twice that required by the City
Code and will eliminate the need for residents to
park on SW Market Street." (Emphasis added).

Respondent in findings no. 5 states:

18 "5. The property is located less than one mile from
19 the Portland City Hall. Therefore, it is
20 expected that a substantial portion of its owners
21 will make trips to Downtown Portland by foot or
22 bicycle rather than automobile. In addition,
23 there is a bus line providing mass transit
24 service next to the project on SW Vista Avenue.
The project is in compliance with Statewide
Planning Goal No. 12 relating to transportation,
No. 13 relating to energy conservation, and No.
14 relating to urbanization."

25 Given the size and location of this development,
26 respondent's findings satisfactorily address petitioner's

1 concerns.

2 Based on the foregoing, we find petitioner's allegations
3 regarding statewide goals 1, 2, 7, 10 or 12 to be
4 unsubstantiated. Therefore, all of the allegations regarding
5 those statewide goals are denied.

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FOOTNOTES

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"33.98.005 Purpose. The provisions of Section 33.98.005 through Section 33.98.045 inclusive, shall provide for the variance procedure, including the establishment of the Variance Committee. The purpose of these provisions is to prescribe the procedure for the relaxation of certain provisions of the zoning regulations under specified conditions, so that the public health, safety and welfare is secure and substantial justice done most nearly in accord with the general purpose, intent and spirit of this title and in the public interest."

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We note petitioner does not argue the density allowed by the development's configuration exceeds that permitted by the zoning ordinance. In addition, petitioner doesn't argue that some other zoning on the property would allow this specific development without the necessity of obtaining variances.

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What appears above reflects LCDC determination of March 26. The original proposed opinion submitted to LCDC by this Board contained the following language:

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"Nothing in Goal 2 suggests that a jurisdiction must coordinate its land use actions with proposed or unadopted comprehensive plans. Since there is no requirement in Goal 2 that a jurisdiction determine a land use decision's consistency with a proposed plan, and because petitioner here did not specify how the city's decision might violate the proposed plan even if such consistency were required, we do not find a Goal 2 violation.

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