

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

3  
4 JOHN A. GILSON,                           )  
5    )  
6                    Petitioner,            )  
7    )  
8            vs.                            )  
9    )            LUBA No. 91-093  
10 CITY OF PORTLAND,                        )  
11    )            FINAL OPINION  
12                    Respondent,          )            AND ORDER  
13    )  
14            and                            )  
15    )  
16 GAPO, INC.,                             )  
17    )  
18                    Intervenor-Respondent.                                    )

19  
20  
21            Appeal from City of Portland.

22  
23            Edward J. Sullivan, Portland, filed the petition for  
24 review and argued on behalf of petitioner. With him on the  
25 brief was Preston, Thorgrimson, Shidler, Gates & Ellis.

26  
27            Adrienne Brockman, Portland, filed a response brief and  
28 argued on behalf of respondent.

29  
30            Stephen T. Janik, Portland, filed a response brief and  
31 argued on behalf of intervenor. With him on the brief was  
32 Ball, Janik & Novack.

33  
34            SHERTON, Referee; KELLINGTON, Referee, participated in  
35 the decision.

36  
37                           REMANDED                           11/15/91

38  
39            You are entitled to judicial review of this Order.  
40 Judicial review is governed by the provisions of ORS  
41 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city council order approving a  
4 preliminary development plan, tentative subdivision plan and  
5 major variance for a residential planned unit development  
6 (PUD).<sup>1</sup>

7 **MOTION TO INTERVENE**

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

11 **FACTS**

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

20 Besides Interstate-5 on the west, the subject property  
21 is bounded on the north by a condominium development and a  
22 medical laboratory, on the east by existing residences  
23 fronting on S.W. Corbett Avenue (Corbett), on the southeast

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<sup>1</sup>The order also approves an exemption from the city's solar access requirements for the PUD. However, that approval is not at issue in this appeal.

1 by a neighborhood grocery store and on the south by existing  
2 residences and undeveloped land. The subject property is  
3 zoned Single-Family, High-Density Residential (R5). PUDs  
4 are a conditional use in the R5 zone. The surrounding  
5 property is zoned primarily R5 and Multi-Family Residential  
6 (R2).<sup>2</sup>

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

19 The proposal also includes creation of a two acre  
20 common open space tract comprised of the southern end of the  
21 property and a strip along its western edge. Finally, the  
22 application also requested building height variances (from  
23 35 feet to 40, 50 and 55 feet) for 18 of the proposed lots  
24 on the east side of Viewpoint, and building story variances

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<sup>2</sup>The medical laboratory and neighborhood store properties are zoned General Commercial (C2) and Neighborhood Commercial (C4), respectively.

1 (from 2 1/2 to 3 stories) for eight of the proposed lots on  
2 the west side of Viewpoint.

3 On December 28, 1990, after a public hearing, the city  
4 hearings officer approved intervenor's application, with a  
5 number of conditions. Petitioner and others appealed the  
6 hearings officer's decision to the city council. The city  
7 council conducted public hearings on the appeal on March 6,  
8 13 and 20, 1991. At the March 6, 1991 hearing, intervenor  
9 withdrew its request for the height variances. Record 14.  
10 On March 20, 1991, the city council made a tentative oral  
11 decision to deny the appeal, and to impose a condition  
12 requiring design review of the proposed PUD by the Design  
13 Commission. Record 10.

14 On April 18, 1991, the Design Commission held a public  
15 hearing to "review the proposed final design of the [PUD]  
16 and advise the [City] Council regarding the design  
17 compatibility of the project with the surrounding  
18 neighborhood." Record 150. Although the Design Commission  
19 did not issue a formal decision concerning the proposed PUD,  
20 its recommendation was transmitted to the city council via a  
21 memorandum by a design commission staff member.<sup>3</sup> That  
22 memorandum states that the Design Commission "unanimously  
23 concluded that the project, as delineated on the drawings

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<sup>3</sup>We note the parties dispute whether the staff memorandum accurately conveyed the Design Commission's opinion of the project.

1 dated April 9, 1991 \* \* \*,<sup>[4]</sup> did not meet the test of  
2 compatibility with surrounding residential development."  
3 Record 148. However, the memorandum also states the Design  
4 Commission concluded that certain modifications would make  
5 the project acceptable and advised the city council to  
6 affirm the hearings officer's decision, with certain listed  
7 additional conditions. Id.

8 The city council conducted additional hearings on the  
9 appeal, which included consideration of the Design  
10 Commission's recommendation. On June 25, 1991, the city  
11 council issued an order denying the appeal and approving the  
12 preliminary development plan, tentative subdivision plan and  
13 major variance.

14 This appeal followed.

15 **FIRST ASSIGNMENT OF ERROR**

16 "The respondent improperly construed the  
17 applicable law and made a decision inconsistent  
18 with the applicable provisions of its zoning code  
19 when it granted PUD and subdivision approval after  
20 the withdrawal of the height variance  
21 applications."

22 Petitioner argues that at the time the subject  
23 application was filed the height limitation on structures in  
24 the R5 zone was 35 feet. According to petitioner, under the

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<sup>4</sup>The "drawings" dated April 9, 1991 include a site plan, elevation drawing and east-west site sections for the proposed PUD, submitted to the Design Commission by intervenor. Record 156-58. These documents are not part of the original application submitted to the city. The drawings, plans and diagrams submitted with the application are dated August 9, 1990. Record 637-47.

1 proposed preliminary development plan for the PUD, most of  
2 the townhouse structures on the east (downhill) side of  
3 Viewpoint would exceed the 35 foot limit, with some proposed  
4 to have a height of as much as 55 feet, as building height  
5 is measured under the Portland City Code (PCC).<sup>5</sup> Petitioner  
6 contends this was why intervenor originally applied for  
7 height variances for 18 of the 21 lots proposed to be  
8 created on the east side of Viewpoint. Although intervenor  
9 later withdrew that variance application, petitioner  
10 contends the design of the proposed townhouse structures was  
11 never altered. Petitioner further contends that because the  
12 height of the structures proposed for 18 of the lots exceeds  
13 the limitation of the R5 zone, and no variance was approved,  
14 the city erred in approving the PUD preliminary development  
15 plan and tentative subdivision plan.

16 Petitioner notes the city adopted a revised zoning code  
17 on January 1, 1991,<sup>6</sup> after the hearings officer's decision  
18 in this matter was issued. The revised zoning code imposes  
19 a different height limitation on buildings in the R5 zone  
20 and changes the way building height is calculated.<sup>7</sup>

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<sup>5</sup>Under the PCC, height of a structure on a sloping lot is generally measured from the average grade under the structure. PCC 33.12.150 and 33.12.160. Petitioner also contends the height of some of the proposed structures, as measured from their downhill edge, will be up to 75 feet.

<sup>6</sup>In this opinion, the revised zoning code is cited as "PCC (1991) \_\_\_\_."

<sup>7</sup>The limitation on height of structures in the R5 zone was decreased to 30 feet. PCC (1991) 33.110.215.B. However, under PCC (1991) 33.110.215.D,

1 However, petitioner argues that the standards of the revised  
2 code are not applicable to the subject application.  
3 According to petitioner, under ORS 227.178(3), approval or  
4 denial of the subject application must be based on the  
5 standards applicable when the application was submitted.  
6 See Territorial Neighbors v. Lane County, 16 Or LUBA 641,  
7 645-47 (1988). Finally, petitioner argues in the  
8 alternative that, even if the height limit of the revised  
9 code is applicable, the city's findings are inadequate  
10 because they fail to explain how the proposed PUD satisfies  
11 that height limit.

12 Respondent and intervenor (respondents) contend the  
13 building height limitation of the R5 zone is not a standard  
14 applicable to approval of the proposed preliminary  
15 development plan and tentative subdivision plan.  
16 Respondents state PCC 33.79.070(g)(9) requires submittal of  
17 a proposed site plan including "conceptual site plans and  
18 building elevations of proposed multi-unit structures,"  
19 showing items such as "building height, size, shape, roof  
20 shape and proposed exterior materials," only for proposed  
21 PUDs of four acres or less. Respondents argue that no such  
22 factual information is required for larger PUDs. Therefore,  
23 according to respondents, the PUD "height limit" development

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for lots sloping downhill from a street and having an average slope of 20% or more, the height limitation is 23 feet above the average grade of the street. Petitioner concedes it is possible that the proposed structures comply with the height limitation of the revised code.

1 standard established by PCC 33.79.070(c) is not applicable  
2 to approval of preliminary development plans for PUDs other  
3 than those on four acres or less involving multi-unit  
4 structures.<sup>8</sup>

5 Respondents further contend the height limitation of  
6 the underlying zone will be an applicable standard when  
7 applications for building permits for the structures within  
8 the PUD are submitted, and that the applicable height  
9 limitation will be that in effect when such building permit  
10 applications are filed. According to respondents,  
11 ORS 227.178(3) only gives an applicant a right to have an  
12 application reviewed under the standards applicable to that  
13 application when it was submitted. It does not give an  
14 applicant the right to have all subsequent applications for  
15 separate approvals (e.g., design review or building permits)  
16 reviewed under the standards in effect when the initial  
17 application was submitted.<sup>9</sup>

18 Intervenor also argues, in the alternative, that if the  
19 height limitation of the underlying zone is applicable to

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<sup>8</sup>According to respondents, with the exception of PUDs of four acres or less involving multi-unit buildings, "the PUD process deals with two dimensions, e.g., lot sizes, building setbacks, street locations, widths and utilities, [not] with building design or building heights." Respondent's Brief 5.

<sup>9</sup>Intervenor also argues that both the Court of Appeals and this Board have held that subdivision approval does not create a right to have the standards applicable to the subdivision process apply to subsequent land use reviews. See Columbia Hills v. LCDC, 50 Or App 483, 624 P2d 157, rev den 291 Or 9 (1981); Schoonover v. Klamath County, 16 Or LUBA 846, 848-51 (1988).

1 approval of a PUD, it is the height limitation which is in  
2 effect at the time of final development plan and building  
3 permit approvals which must be satisfied. According to  
4 intervenor, there is evidence in the record which clearly  
5 supports a determination that the building height limitation  
6 of PCC (1991) 33.110.215.D can be met by the proposed PUD.  
7 ORS 197.835(9)(b).

8 We must first determine whether the building height  
9 limitation of the underlying zone is an approval standard  
10 for a PUD preliminary development plan and tentative  
11 subdivision plan. If so, we must also determine what  
12 building height limitation applies; that in effect at the  
13 time the preliminary development plan and tentative  
14 subdivision plan application was first submitted, or that in  
15 effect when the decision to approve the preliminary  
16 development plan and tentative subdivision plan application  
17 is made.

18 **A. Applicability of Building Height Limitation**

19 PCC 33.79.010 (Purpose and Intent) provides in relevant  
20 part:

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

25 "(a) Provide flexibility in architectural design,  
26 placement and clustering of buildings; use of  
27 open space and outdoor living areas;  
28 provision of circulation facilities and  
29 parking; and related site and design  
30 considerations.

1           "\* \* \* \* \*

2           "(e) Promote an attractive and safe living  
3           environment which is compatible with  
4           surrounding residential developments."  
5           (Emphasis added.)

6   The above emphasized purposes include more than simply  
7   providing two-dimensional flexibility in lot sizes, setbacks  
8   and clustering of structures, as respondents contend. A PUD  
9   preliminary development plan can only be approved if it  
10   fulfills the purpose and intent of both PCC 33.79.010 and  
11   33.106.010.<sup>10</sup> PCC 33.79.110(g)(1). These sections require  
12   consideration of issues such as compatibility,  
13   attractiveness and architectural design. The height of  
14   proposed buildings may be relevant to all of these issues.

15       More importantly, PCC 33.79.070 (Development Standards)  
16   establishes standards, including ones for lot sizes,  
17   setbacks, open space, parking, etc., which all PUDs must  
18   meet. PCC 33.79.070(c) establishes the following standard:

19       "Height Limits. The height limit of the  
20       underlying zone shall apply. \* \* \*"

21   Moreover, PCC 33.79.110(g)(3) provides that approval of a  
22   PUD preliminary development plan requires a finding that  
23   "there is reasonable certainty that the development

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<sup>10</sup>Under PCC 33.106.010, in approving a conditional use, the city is required to determine that:

"\* \* \* the use at the particular location is desirable to the public convenience and welfare and not detrimental to the public health, peace or safety, or to the character and value of the surrounding properties. \* \* \*" (Emphasis added.)

1 standards of [PCC] 33.79.070 \* \* \* will be met." These  
2 provisions make compliance with the R5 zone height  
3 limitation an approval standard for the subject PUD  
4 preliminary development plan.

5 The only basis respondents offer for concluding that  
6 the height limitation of the R5 zone is not an approval  
7 standard for the subject preliminary development plan  
8 approval is that the subject site exceeds four acres and PCC  
9 33.79.100(g)(9) does not require the submittal of conceptual  
10 site plans showing building elevations and heights for such  
11 a PUD. However, PCC 33.79.100 simply establishes minimum  
12 requirements for what must be included in a PUD preliminary  
13 development plan application. It does not purport to  
14 establish or modify the approval standards for preliminary  
15 development plans.<sup>11</sup>

16 We conclude that compliance with the building height  
17 limitation of the underlying zone is an approval standard  
18 for a PUD preliminary development plan.<sup>12</sup>

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<sup>11</sup>We also note that PCC 33.79.100(c) requires the preliminary development application to include a "statement of how the purpose and intent of [PCC] 33.79.010 will be achieved by the proposed PUD, including sketches or illustrations of the proposed character of the development \* \* \*."

<sup>12</sup>Petitioners offer no explanation of why the building height limitation of the underlying zone is an approval standard for tentative subdivision plan approval, and we agree with respondents that it is not. However, there is no dispute that in this case the city's tentative subdivision plan approval is dependent upon its PUD preliminary development plan approval. Therefore, if reversal or remand of the PUD preliminary development plan approval is warranted, the tentative subdivision approval must be reversed or remanded as well.

1           **B. Which Building Height Limitation is Applicable**

2           ORS 227.178(3) provides, as relevant here:

3           "[A]pproval or denial of the [permit] application  
4           shall be based upon the standards and criteria  
5           that were applicable at the time the application  
6           was first submitted."

7           We determine above the height limitation of the R5 zone  
8           was a standard applicable to the approval of a PUD  
9           preliminary development plan when the subject application  
10          was first submitted to the city on August 24, 1990.  
11          Further, there is no dispute that the subject application is  
12          a permit application subject to the provisions of ORS  
13          227.178(3). Therefore, under ORS 227.178(3), approval of  
14          the PUD preliminary development plan must be based on  
15          compliance with the building height limitation for the R5  
16          zone in effect on August 24, 1990, as set out in  
17          PCC 33.26.080(a), 33.12.150 and 33.12.160. See Sunburst II  
18          Homeowners v. City of West Linn, 18 Or LUBA 695, 700-01,  
19          aff'd 101 Or App 458, rev den 310 Or 243 (1990).

20          Respondents argue that this interpretation and  
21          application of ORS 227.178(3) creates an incongruity,  
22          because the applications for final development plan approval  
23          and building permits for the proposed PUD will be subject to  
24          compliance with the building height limitations of the R5  
25          zone which exist when those applications are filed. We do  
26          not agree. The city has established a "two-step process"  
27          for approving PUDs:

1           "\* \* \* Preliminary [development plan] approval is  
2           only granted where there is reasonable certainty  
3           that the PUD will fulfill all requirements of this  
4           Chapter and other relevant parts of the [PCC]."  
5           (Emphasis added.) PCC 33.79.040.

6           Approval of the final development plan, the second step of  
7           the process, requires only a finding that the final  
8           development plan "is in substantial conformance with the  
9           approved preliminary development plan and any conditions  
10          [imposed] therein." PCC 33.79.140(c). Thus, the building  
11          height limitation of the underlying zone is not an  
12          independent standard for approval of the final development  
13          plan. The city has in effect created a PUD master plan  
14          approval process which governs all further aspects of the  
15          PUD development process. Compare Tuality Lands Coalition v.  
16          Washington County, \_\_\_ Or LUBA \_\_\_ (LUBA Nos. 91-035 and  
17          91-036, November 12, 1991), slip op 6.

18           **C. Conclusion**

19          The challenged decision does not determine that the PUD  
20          preliminary development plan complies with the R5 zone  
21          building height limitation in effect when the application  
22          was first submitted. Respondents do not contend there is  
23          evidence in the record which clearly supports a  
24          determination that the preliminary development plan complies  
25          with the R5 zone building height limitation in effect when  
26          the subject application was submitted. Therefore, the first  
27          assignment of error is sustained.

1 **FIFTH ASSIGNMENT OF ERROR**

2 "The respondent misconstrued and misapplied its  
3 variance standards and approved eight story  
4 variances with inadequate findings that are not  
5 supported by substantial evidence in the record."

6 The R5 zone height limitations established by  
7 PCC 33.26.080(a) also limit buildings to 2 1/2 stories. The  
8 challenged decision includes the approval of a major  
9 variance for building story variances (from 2 1/2 to 3  
10 stories) for eight of the proposed lots on the west side of  
11 Viewpoint. Petitioner challenges this variance on several  
12 grounds.

13 During the pendency of this appeal proceeding,  
14 intervenor withdrew its application for the building story  
15 variance. Intervenor-Respondent's Brief 46. Intervenor  
16 argues that the withdrawal of its application and the fact  
17 that the revised code adopted effective January 1, 1991,  
18 does not include story limitations in the R5 zone make this  
19 assignment of error moot.

20 For the reasons explained under the first assignment of  
21 error, the building story limitation established by  
22 PCC 33.26.080(a) continues to be applicable to approval of  
23 the subject PUD preliminary development plan. Furthermore,  
24 where it is not clear from the local code that the  
25 applicant's withdrawal of a permit application after the  
26 local government makes a decision approving it has any  
27 effect on that decision, the withdrawal does not necessarily

1 make an appeal of such decision moot. McKay Creek Valley  
2 Assoc. v. Washington County, 16 Or LUBA 1028 (1987).

3       However, here the city's approval of the major variance  
4 is dependent upon its approval of the PUD preliminary  
5 development plan. Our resolution of the first assignment of  
6 error requires that the challenged decision be remanded in  
7 any case. Since the decision must be remanded, and  
8 intervenor has withdrawn the application for the building  
9 story variance, no purpose would be served by reviewing the  
10 adequacy of the city's decision to approve the building  
11 story variance.

12 **SECOND ASSIGNMENT OF ERROR**

13       "The respondent misinterpreted and failed to  
14 comply with applicable provisions of its zoning  
15 code and comprehensive plan relating to its review  
16 of the stability and suitability of the steeply  
17 sloping land for development and failed to adopt  
18 findings supported by substantial evidence  
19 adequately addressing these standards."

20 **THIRD ASSIGNMENT OF ERROR**

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

30       Under these assignments of error, petitioner contends  
31 the city did not adequately determine that the proposed PUD  
32 project is feasible, considering the stability and

1 suitability of the steeply sloping site for the proposed  
2 development. Petitioner also contends there is not  
3 substantial evidence in the record to support a  
4 determination that the proposed development is feasible,  
5 considering these factors. Finally, petitioner contends the  
6 city impermissibly deferred significant factual and legal  
7 determinations necessary to determine feasibility of the  
8 development to the final development plan approval stage,  
9 when no notice or opportunity for public input will be  
10 provided.

11 Under the first assignment of error, we determine the  
12 city's decision must be remanded because the city failed to  
13 determine that the proposed PUD complies with the applicable  
14 (i.e. in effect on August 24, 1990) R5 zone building height  
15 limitation. Further, as explained under the fifth  
16 assignment of error, since intervenor has withdrawn its  
17 application for a building story variance, after remand the  
18 proposed PUD will be required to comply with the applicable  
19 R5 zone building story limitation as well. No party  
20 contends the PUD, as proposed, complies with these  
21 limitations. Therefore, the subject PUD preliminary  
22 development plan application cannot be approved by the city  
23 after remand by this Board without modifications of the plan  
24 to comply with the applicable building height and story  
25 limitations.

26 Accordingly, after remand, the required geologic and

1 engineering analyses concerning site stability and  
2 suitability will necessarily have to address a different  
3 proposed development. Therefore, while we generally agree  
4 with petitioner that the city must determine the feasibility  
5 of a proposed PUD at the preliminary development plan  
6 approval stage, and cannot defer determinations essential to  
7 establishing feasibility to the final development plan  
8 approval stage, no purpose would be served by reviewing the  
9 adequacy of the city's findings and the evidence in the  
10 record to support a determination that the subject PUD is  
11 feasible.

12 **FOURTH ASSIGNMENT OF ERROR**

13 "The respondent misinterpreted and failed to  
14 comply with the provisions of its comprehensive  
15 plan and zoning code relating to the proposed  
16 development's compatibility with the neighborhood.  
17 And, the city failed to adopt findings supported  
18 by substantial evidence adequately addressing  
19 these standards."

20 Under this assignment of error, petitioner challenges  
21 the adequacy of the city's findings to demonstrate  
22 compliance with several Portland Comprehensive Plan (plan)  
23 and PCC provisions which petitioner contends are applicable  
24 approval standards requiring that the proposed PUD be  
25 compatible with, and not detrimental to, the character and  
26 value of the surrounding neighborhood. Petitioner also  
27 challenges the evidentiary support for the findings the city  
28 did adopt on this issue. However, the primary basis for  
29 petitioner's complaints is the height of the proposed

1 buildings. Petition for Review 32.

2 Under the first assignment of error, we determine the  
3 challenged decision must be remanded because the city failed  
4 to demonstrate that the proposed PUD complies with the  
5 applicable R5 zone building height limitation. There is no  
6 contention by the parties that the proposed PUD does comply  
7 with the applicable building height limitation, and  
8 intervenor's application for a variance from that limitation  
9 was withdrawn. Thus, in any case, the subject PUD  
10 preliminary development plan application cannot be approved  
11 after remand by this Board without modifications of the plan  
12 to comply with the applicable height limitation, and  
13 additional hearings on such a modified plan. Therefore, no  
14 purpose would be served by reviewing petitioner's  
15 contentions under this assignment of error.

16 The city's decision is remanded.