

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

JOHN C. BARTELS, BESS I. BARTELS, )  
and JOHN BARTELS, )  
Petitioners, )  
vs. ) LUBA No. 91-178  
CITY OF PORTLAND, ) FINAL OPINION  
Respondent, ) AND ORDER  
and )  
KELLY BRUUN and BARBARA BRUUN, )  
Intervenors-Respondent. )

Appeal from City of Portland.

John Bartels, Portland, filed the petition for review and argued on his own behalf.

Peter Kasting, Portland, filed a response brief and argued on behalf of respondent.

Garry McMurry, Portland, filed a response brief and argued on behalf of intervenors-respondent. With him on the brief was Garry McMurry and Associates.

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

AFFIRMED 04/24/92

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

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioners appeal a city decision granting (1)  
4 preliminary planned unit development (PUD) approval, (2)  
5 tentative subdivision plat approval, (3) exemption from  
6 solar access requirements, and (4) two variances.

7 **MOTION TO INTERVENE**

8 Kelly Bruun and Barbara Bruun, the applicants below,  
9 move to intervene on the side of respondent in this  
10 proceeding. There is no objection to the motion, and it is  
11 allowed.

12 **FACTS**

13 In Bartels v. City of Portland, \_\_\_ Or LUBA \_\_\_ (LUBA  
14 No. 90-111, December 3, 1990)(Bartels I), we remanded a  
15 previous city decision concerning this project. Our remand  
16 was based on our determination that the city failed to  
17 adequately address the requirements of Portland City Code  
18 (PCC) 33.79.100(h) with regard to demonstrating the  
19 feasibility of developing the proposed lots for residential  
20 purposes. Following our decision remanding the city's  
21 initial decision, the city conducted an additional  
22 evidentiary hearing and adopted the decision challenged in  
23 this appeal.

24 **FIRST ASSIGNMENT OF ERROR**

25 Petitioners argue that the affirmative votes of three  
26 of the five members of the city council are required to

1 adopt the challenged decision. Only four of the five  
2 members of the city council participated in the vote  
3 adopting the challenged decision; one member abstained.  
4 Petitioners argue two of those members should not have  
5 participated in the decision.

6 Two of the four city council members who voted to  
7 approve the challenged decision, abstained when the decision  
8 challenged in Bartels I was adopted by the city in 1990.<sup>1</sup>  
9 Petitioners argue the affirmative votes of these two members  
10 are, therefore, invalid. With only two valid votes,  
11 petitioners argue, the request should have been denied.  
12 Petitioners apparently take the position that we may  
13 presume, from these members' prior decisions to abstain,  
14 that they also were not sufficiently familiar with the  
15 record to participate in the decision on remand.

16 The city council's proceedings on remand were limited  
17 to the issues raised in our decision in Bartels I remanding  
18 this matter. While the local record in Bartels I was  
19 included in the local record on remand, additional  
20 evidentiary proceedings following our remand were held  
21 before the city council. There is no basis for this Board  
22 to presume the two city council members who apparently felt  
23 insufficiently familiar with the record to participate in

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<sup>1</sup>The city council members at that time cited their lack of familiarity with the record and their having missed meetings at which the proposal was considered by the city council.

1 the first decision were also insufficiently familiar with  
2 the record to participate in the decision following the  
3 proceedings on remand. See Angel v. City of Portland, \_\_\_  
4 Or LUBA \_\_\_ (LUBA No. 91-192, February 14, 1992), slip op 5-  
5 6; Toth v. Curry County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 91-070,  
6 December 20, 1991), slip op 9-10.

7 The first assignment of error is denied.

8 **SECOND ASSIGNMENT OF ERROR**

9 Under their second assignment of error, petitioners  
10 argue the city committed error by failing to give notice of  
11 the hearing conducted by the city council on remand to a  
12 number of persons who participated in the local proceedings  
13 leading to Bartels I.

14 The error petitioners allege is procedural. Procedural  
15 errors provide no basis for reversal or remand unless  
16 petitioners' substantial rights are prejudiced by the  
17 procedural error. ORS 197.835(7)(a)(B); Murphey v. City of  
18 Ashland, 19 Or LUBA 182, 188-90, aff'd 103 Or App 238  
19 (1990); Slatter v. Wallowa County, 16 Or LUBA 611, 617  
20 (1988). Although other persons entitled to notice of the  
21 local proceedings on remand may not have been given the  
22 legally required notice, petitioners in this appeal do not  
23 claim that they did not receive notice of those proceedings,  
24 nor do they contend they were denied a full opportunity to  
25 participate in the local proceedings on remand. Therefore,  
26 even if petitioners are correct that the city erred by

1 limiting the notice of hearings on remand to the parties in  
2 Bartels I, there was no prejudice to petitioners'  
3 substantial rights.

4 The second assignment of error is denied.

5 **THIRD ASSIGNMENT OF ERROR**

6 Under applicable PCC provisions, the original proposal  
7 was required to be reviewed first by a hearings officer.  
8 Following our remand, the applicants' proposal was revised  
9 to remove a bridge crossing of a ravine. As approved by the  
10 city, the roadway will be constructed on fill placed within  
11 the ravine.<sup>2</sup> Petitioners argue removing the proposed bridge  
12 is a significant change in the proposal following our remand  
13 and requires that the proposal again be reviewed by the city  
14 hearings officer. Petitioners contend the city's failure to  
15 require hearings officer review requires remand.

16 Our remand was to the city council, not to the hearings  
17 officer, and petitioners cite no PCC provisions establishing  
18 how the city council must proceed when a decision is  
19 remanded by this Board. The city council clearly was  
20 entitled to limit its consideration on remand to correcting  
21 the deficiencies that were the basis for our remand. Von  
22 Lubken v. Hood River County, 19 Or LUBA 404, 419, rev'd on  
23 other grounds 104 Or App 683 (1990), adhered to 106 Or App  
24 226, rev den 311 Or 349 (1991). In conducting its

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<sup>2</sup>The proposal was also amended to propose fewer lots and other changes were made to the proposed roadway.

1 proceedings on remand, absent code provisions to the  
2 contrary, a local government is not required to repeat the  
3 entire process it followed in rendering the original  
4 decision. Washington Co. Farm Bureau v. Washington Co., \_\_\_  
5 Or LUBA \_\_\_ (LUBA No. 91-171, January 14, 1992); Lane County  
6 School Dist. 71 v. Lane County, 15 Or LUBA 150, 154 (1986).

7 Even if petitioners' characterization of the changes in  
8 the project following our remand as "significant" is  
9 correct, petitioners cite no provisions requiring that the  
10 hearings officer first review significant changes before  
11 they may be considered by the city council in its remand  
12 proceedings.

13 The third assignment of error is denied.

14 **FOURTH ASSIGNMENT OF ERROR**

15 PCC 33.79.100(h) requires that:

16 "For PUDs containing lands of moderate or severe  
17 landslide potential, [the preliminary development  
18 plan must include] a preliminary assessment by an  
19 engineering geologist or geotechnical engineer  
20 addressing soil conditions, storm water runoff,  
21 and ground water; and a preliminary assessment by  
22 a geotechnical engineer addressing the project's  
23 feasibility and identifying potential problems and  
24 how they might be resolved."

25 In Bartels I, we reviewed in some detail the technical  
26 reports for the property included in the record of this  
27 appeal. We concluded those reports "make it clear that the  
28 subject property, in view of the slopes and landslide  
29 hazards, will be a challenging property to develop in the  
30 manner proposed." Id., slip op at 19. Nevertheless we also

1 concluded the Rittenhouse-Zeman and Assoc., Inc. (R-Z)  
2 report was adequate to comply with PCC 33.79.100(h), with  
3 regard to "potential road and utility construction and fill  
4 problems \* \* \* identified \* \* \*." Id.

5 However, with regard to developing residences on  
6 individual lots, we concluded "neither the R-Z report nor  
7 any of the other reports submitted during the local  
8 proceedings are sufficient to comply with PCC 33.79.100(h)."  
9 Id. The R-Z report acknowledged that engineered foundations  
10 would be required for many of the lots, but failed to  
11 explain why it believed such engineered foundations would be  
12 feasible or whether problems could be expected in  
13 constructing residences in active landslide areas. We  
14 explained our decision to remand as follows:

15 "We do not mean to suggest that the city  
16 necessarily must require the kind of detail in the  
17 preliminary geotechnical assessment that  
18 petitioners suggest. However, in view of the  
19 undisputed development constraints present on the  
20 site, the largely unexplained expressions of  
21 confidence in the R-Z and AW [Geotechnical  
22 Services Inc.] reports that the proposed  
23 residential development is feasible are not  
24 sufficient to comply with PCC 33.79.100(h). The  
25 R-Z report does state that while it defers  
26 detailed recommendations concerning individual  
27 lots until after completion of site grading,  
28 "[t]he soils present on this site are generally  
29 suitable for support of foundations on  
30 conventional spread or continuous footings."  
31 Record [Bartels I] 153. In view of the admittedly

1 limited scope of the R-Z report,<sup>[3]</sup> we do not  
2 believe this statement is sufficient to constitute  
3 substantial evidence that no problems are expected  
4 in developing residential foundations on the site  
5 or that development of such foundations is  
6 feasible." Bartels I, slip op at 21.

7 On remand, R-Z prepared supplemental recommendations  
8 dated February 13, 1991. Portions of those recommendations  
9 are quoted below:

10 "\* \* \* LUBA \* \* \* expresses concern as to whether  
11 or not residences built on the planned lots are  
12 feasible and whether such construction will have a  
13 negative impact on site stability. In addition,  
14 we have been asked to comment further on the  
15 impacts of individual residential construction on  
16 the stability of existing slopes, the existing  
17 landslide hazards present on the property, and on  
18 groundwater and drainage issues.

19 **"RESIDENTIAL FOUNDATIONS**

20 "The classes of residential foundations utilized  
21 will vary across the site, dependent on the soil  
22 conditions encountered on the lot. There are  
23 likely to be some relatively flat, inherently  
24 stable lots on the eastern half of the property  
25 where future owners could utilize conventional  
26 house foundations, designed in accordance with the  
27 building code. This will be the exception more  
28 than the rule. Over most of the remainder of the  
29 site, house foundations will need to be  
30 individually designed based on lot conditions. In  
31 almost all of these cases it will be necessary to  
32 transfer major building loads to underlying  
33 bedrock or silt soils. Such load transfers would  
34 be accomplished through the installation of driven  
35 piling or possibly drilled piers. A principle  
36 advantage of such a foundation system is that they

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<sup>3</sup>The R-Z report in Bartels I was prepared to provide recommendations for roadways, utilities and fills and was not prepared to provide recommendations for constructing residences on individual lots.



1 are designed to enhance rather than decrease  
2 overall slope stability. They typically add  
3 support to upslope portions of the site while  
4 adding no load to potentially unstable near  
5 surface soils. Over the last five years in  
6 Portland, hundreds of such foundations have been  
7 designed and installed with much success.

8 **"STABILITY OF SLOPES**

9 \* \* \* \* \*

10 "The slide mass and toe support issues are  
11 addressed together through careful site grading.  
12 It is possible to maintain or increase the  
13 stability of a slope by not adding or actually  
14 decreasing weight or load to the upper soils and  
15 by adding or at least not removing weight or  
16 support to the lower portions of the slope. We  
17 have recommended that the toe of all cut slopes be  
18 retained by walls. This avoids the overall  
19 steepening of slopes. While the removal of soil  
20 during cutting operations removes toe support, an  
21 appropriately designed retaining wall will provide  
22 more support to the toe than was removed by  
23 cutting. At the same time, we have recommended  
24 against fills placed at the tops of slopes. In  
25 order to develop near the tops of lots, it will be  
26 necessary to build retaining walls which transfer  
27 stresses to the underlying stable deposits, either  
28 through piling or excavation to shallow bedrock  
29 where it exists.

30 **"LANDSLIDING**

31 "There are currently two mechanisms of sliding at  
32 work on the site. These consist of an action  
33 known as surface creep and a large active slide  
34 which has been identified by a number of parties.  
35 Surface creep consists of down slope movement of  
36 weak, often saturated top soil and other near  
37 surface layers. This movement is evident in the  
38 slight humping of soil on the uphill side of trees  
39 and the tilting of brush and saplings. Such  
40 movement does not typically preclude residential  
41 development or even pose a hazard to such. In  
42 areas which are to be regraded, the maximum slope

1 of 2:1 and subsequent landscaping should eliminate  
2 the problem altogether. In areas which will not  
3 be regraded, pile and pier foundations will be  
4 designed to withstand surface creep pressures and  
5 appropriate landscaping will significantly reduce  
6 movement.

7 "Home construction in the area of the existing  
8 landslide will be difficult and will require  
9 specialized techniques. After the road is  
10 constructed and the head of the slide is  
11 essentially removed and buttressed, the slide will  
12 only impact four lots as they are currently laid  
13 out. Solutions to lot construction will depend  
14 heavily on the type of house proposed and the  
15 desires of the lot owner. Deep foundation houses  
16 which allow for movement of surrounding soil are  
17 not uncommon in Portland. While such construction  
18 is expensive, it is certainly not unfeasible. The  
19 economics of the residential market will dictate  
20 when these four lots will be developed. Since the  
21 road will be constructed prior to lot  
22 construction, the weight of slide mass above the  
23 lots will be lessened considerably and overall  
24 stability will be [improved].

25 \* \* \* \* \*

26 **CONCLUSION**

27 "We continue to express the opinion that the  
28 proposed development is feasible. The geologic  
29 setting of this site is not unique. Many sites in  
30 the general area of this site have similar  
31 formations and features. The relative lack of  
32 vacant, undeveloped property in the area of this  
33 site indicates that appropriate solutions, which  
34 have proved acceptable to local building  
35 officials[,] have been previously implemented."  
36 Record 116-18.

37 We find the above quoted portions of the R-Z  
38 supplemental recommendations adequate to supply the  
39 explanation that was missing in the reports we reviewed in

1 Bartels I.<sup>4</sup> We emphasize again, as we did in Bartels I,  
2 that the preliminary determination of feasibility required  
3 by PCC 33.79.100(h) does not require the kind of certainty  
4 or supporting evidence that may ultimately be required for  
5 approval of final construction plans. As we recently  
6 explained in Southwood Homeowners Assoc. v. City of  
7 Philomath, \_\_\_ Or LUBA \_\_\_ (LUBA No. 91-103, June 12, 1991),  
8 slip op 16:

9 "The lack of a requirement for a complete  
10 technical solution at the tentative plan approval  
11 stage will likely not satisfy opponents who  
12 believe a satisfactory technical solution is not  
13 possible. On the other hand, the applicant  
14 frequently will be motivated to keep costs as low  
15 as possible until tentative plan approval is  
16 assured, and may not want to incur the costs of  
17 providing additional information where questions  
18 are raised concerning particular approval  
19 standards or site conditions. The city's  
20 obligation is to require sufficient information at  
21 the tentative plan approval stage to make the  
22 initial determination of feasibility. As long as  
23 the determination of feasibility is adequately  
24 explained and supported by substantial evidence,  
25 i.e. evidence a reasonable person would accept as  
26 adequate to support the decision, the city may  
27 properly defer final engineering review to its  
28 staff."

29 Regarding the ravine in the southwestern portion of the  
30 property that will be partially filled to accommodate the

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<sup>4</sup>In addition to the February 13, 1991 supplemental report, R-Z also submitted an additional report dated August 13, 1991 and the applicants submitted detailed plans for the roadway and the storm and groundwater drainage system, including plans for connection of the storm and sanitary sewer lines to mains located in the Sunset Highway right of way.

1 relocated roadway, petitioners argue the proposed fill will  
2 act as a dam obstructing water flow and creating additional  
3 soil instability. Intervenors cite maps in the record which  
4 they contend demonstrate that the proposed storm drainage  
5 line traveling down the ravine will collect storm water  
6 above the proposed fill, carry it under the fill and  
7 discharge the storm water into the ravine below the fill.  
8 As far as we can tell, intervenors are correct.

9       Petitioners' remaining arguments either provide no  
10 basis for reversal or remand or attack the evidentiary  
11 support for the above quoted R-Z recommendations. Again,  
12 recognizing that the requirement is for a preliminary  
13 determination of feasibility, we conclude the evidence in  
14 the record is sufficient for a reasonable person to  
15 conclude, based on that evidence, that residential  
16 development of the proposed lots is feasible. Following our  
17 remand in Bartels I, the applicants' experts explained in  
18 significant detail why they believe residential development  
19 of the proposed lots is feasible. Although petitioners  
20 contend more detailed on-site testing is necessary to  
21 support the expert's recommendations, we conclude the  
22 experts' recommendations and the evidence supporting those  
23 recommendations constitute evidence the city could  
24 reasonably rely upon to make the required preliminary  
25 determination of feasibility.

26       The fourth assignment of error is denied.

1           The city's decision is affirmed.