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

OLAVI SALO,)
)
Petitioner,)
)
vs.)
)
CITY OF OREGON CITY,)
)
Respondent,)
)
and)
)
CARLTON LAND & TIMBER COMPANY,)
)
Intervenor-Respondent.)

LUBA No. 98-173
FINAL OPINION
AND ORDER

Appeal from City of Oregon City.

Peggy Hennessy, Portland, filed the petition for review and argued on behalf of petitioner. With her on the brief was Reeves, Kahn & Eder.

Marnie Allen, Portland, Dorothy S. Cofield, Portland, and Richard A. Vial, Portland, filed the response brief. With them on the brief were Edward J. Sullivan, Preston, Gates & Ellis L.L.P. and Vial Fotheringham L.L.P. Marnie Allen argued on behalf of respondent. Richard A. Vial argued on behalf of intervenor-respondent.

BASSHAM, Board Member; HOLSTUN, Board Chair; BRIGGS, Board Member, participated in the decision.

REMANDED 07/14/99

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

1 Opinion by Bassham.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the city's approval of a preliminary development plan for a nine-lot
4 single family residential planned unit development.

5 **MOTION TO INTERVENE**

6 Carlton Land & Timber Company (intervenor), the applicant below, moves to
7 intervene on the side of the city. There is no opposition to the motion, and it is allowed.

8 **FACTS**

9 The subject property is an undeveloped 18-acre parcel zoned Residential Single
10 Family Dwelling (R-10). The property consists mostly of steep slopes, the lower portion of
11 which has been identified as an active landslide area. The entire property is subject to an
12 Unstable Soils and Hillside Constraint Overlay District (US Overlay Zone). Development
13 within the US Overlay Zone must comply with Oregon City Municipal Code (OCMC)
14 Chapter 17.44.

15 Intervenor initially applied for subdivision of the property at the maximum density
16 allowed by the R-10 zone, but withdrew that application after geologic investigation
17 discovered an area of landslide activity on the lower slopes of the property. Intervenor then
18 applied to the city for a lower density nine-lot residential planned unit development (PUD)
19 that placed the area of landslide activity in an open-space tract, and located the buildable
20 portions of the nine lots outside of that area. Intervenor submitted along with its application
21 several preliminary geologic reports, which concluded that residential development on the
22 property contemplated by the preliminary plat was "geotechnically feasible" provided that
23 the recommendations in the reports were implemented during construction. Among those
24 recommendations was that site-specific geologic studies be performed before building
25 permits may be issued for each lot.

26 The planning commission approved the PUD, conditioned on the applicant submitting

1 lot-specific geotechnical studies on each of the nine buildings sites prior to submitting the
2 PUD plan for final approval. If the lot-specific geotechnical studies showed that any
3 particular lot was unbuildable, the planning commission required the applicant to submit a
4 modified plan for review and approval.

5 Petitioner appealed the planning commission's approval to the city commission. On
6 July 1, 1998, the city commission voted to deny the appeal and uphold the planning
7 commission's approval subject to revised conditions and findings. This appeal followed.

8 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

9 In the first assignment of error, petitioner argues that the city erred in deferring (1) a
10 requirement that the applicant submit information demonstrating compliance with mandatory
11 approval criteria; (2) a finding of compliance with approval criteria, by making compliance
12 with those criteria a condition of approval without a current determination of feasibility; and
13 (3) a finding of compliance with approval criteria to a second stage of review that does not
14 provide opportunity for notice or hearing. In addition, petitioner contends that to the extent
15 the city made findings of current compliance with OCMC 17.44.060, those findings are
16 inadequate because the city commission simply made a conclusory statement that the
17 standards at OCMC 17.44.060 are met, without addressing OCMC 17.44.060(A) through (K)
18 individually. In the second assignment of error, petitioner argues that, to the extent the city
19 made findings of current compliance with OCMC 17.44.060(A) through (K), those findings
20 are not supported by substantial evidence in the record.¹

21 OCMC 17.44.050 lists plans and information required for all development proposals
22 within the US Overlay Zone.² Petitioner argues that the applicant's site plan fails to include

¹Petitioner asserts that the city made inadequate findings with respect to each of the standards at OCMC 17.44.060(A) through (K), but the petition for review raises specific challenges only with respect to the city's findings regarding OCMC 17.44.060(A), (B), and (K). We confine our discussion to the three provisions of OCMC 17.44.060 that petitioner specifically challenges.

²In relevant part, OCMC 17.44.050 requires submission of:

1 some of the information required by OCMC 17.44.050(C) through (G). Petitioner contends
2 that the required information is not found elsewhere in the record and is necessary to show
3 compliance with the development criteria at OCMC 17.44.060, in particular with OCMC
4 17.44.060(A), (B), and (K).

5 OCMC 17.44.060(A) requires, in relevant part, that all development in the US
6 Overlay Zone "shall be designed to avoid unnecessary disturbance of natural topography,
7 vegetation and soils."³ OCMC 17.44.060(B) requires that "[d]esigns shall minimize the
8 number and size of cuts and fills." OCMC 17.44.060(K) requires, in part:

"* * * * *

"C. An architectural site plan of the proposed development, showing * * * the location of areas proposed to be stripped of top soil, paved or covered by structures (including impermeable surfaces or embankments).

"D. A cross-section diagram, drawn to scale and indicating depth, extent and approximate volume of all excavation and fills.

"E. A soil erosion control plan * * *

"F. A preliminary hydrology report * * * addressing the effect upon the watershed in which the proposed development is located; the effect upon the immediate area's stormwater drainage pattern of flow, the impact of the proposed development upon downstream areas and upon wetlands and water resources; and the effect upon the groundwater supply.

"G. A preliminary engineering geology report * * * containing a description of geologic formations, bedrock and surficial materials including artificial fill; location of any faults, folds, etc.; * * * cross sections showing subsurface structure * * *.

"* * * * *

"I. The city engineer may waive one or more requirements of subsections E through H of this section if * * * the city engineer determines that site conditions, size or type of development of grading requirements do not warrant such detailed information. If one or more requirements is waived, the city engineer shall, in the staff report or decision, identify the waived provision(s), [and] explain the reasons for the waiver * * *."

³OCMC 17.44.060(A) provides:

"All developments shall be designed to avoid unnecessary disturbance of natural topography, vegetation and soils. To the maximum extent practicable as determined by the review authority, tree and ground cover removal for residential development on individual lots shall

1 "[a determination] whether the proposed methods of rendering a known or
2 potential hazard site safe for construction, including proposed geotechnical
3 remediation methods, are feasible and adequate to prevent landslides or
4 damage to property and safety. * * * The review authority may allow
5 development in a known or potential hazard area as provided in this chapter if
6 specific findings are made that the specific provisions in the design of the
7 proposed development will prevent landslides or damage."

8 With respect to OCMC 17.44.060(A), petitioner argues that without the erosion plan
9 and other plans and information required under OCMC 17.44.050(C), (E), and (G), the city
10 cannot determine whether the proposed development will "avoid unnecessary disturbance of
11 natural topography, vegetation and soils" because it cannot know the extent of the proposed
12 disturbance.

13 Similarly, with respect to OCMC 17.44.060(B), petitioner argues that without the
14 cross-section diagrams required by OCMC 17.44.050(D) and (G), the city cannot determine
15 whether the design will minimize the number and size of cuts and fills. Without some idea
16 of the extent of proposed excavation, petitioner contends, the city has no means to determine
17 whether that excavation has been "minimized."

18 Finally, petitioner argues that without geological reports showing faults and folds,
19 cross-section diagrams for subsurface structures, and a stormwater management system, the
20 record does not provide sufficient information to support a finding of compliance with
21 OCMC 17.44.060(K), which requires a determination whether proposed methods of
22 rendering the site safe for construction will prevent landslides and damage.

23 With respect to the missing information, the city commission's final order states:

24 "The geologic/geotechnical reports submitted by the applicant address the
25 criteria in OCMC 17.44.050(G) and (H), except that: 1) faults and folds, if
26 any, are not located; and 2) cross-sections showing subsurface structures are
27 not presented. The absence of faults and folds shall be confirmed.
28 Representative cross-sections through the site, showing subsurface conditions

be confined to building footprints and driveways, to areas required for utility easements and
for slope easements for road construction, and to areas of geotechnical remediation.
Temporary protective fencing shall be established around all trees and vegetation designed
for protection prior to commencement of grading or other soil disturbance."

1 and the proposed lot boundaries, building area envelopes, and the street shall
2 be submitted. Preliminary criteria for allowable cut and fill thicknesses and
3 slopes shall be specified for each lot * * *. Th[ese] criteria shall be verified or
4 revised during the lot-specific geotechnical investigations.

5 "Allowable stripping areas shall be shown or described relative to
6 construction areas (OCMC 17.44.050(C)). Cross-sections shall be submitted
7 for the roadway along with approximate cut and fill volumes (OCMC
8 17.44.050(D)). * * * The developer shall submit an erosion control plan for
9 City review * * *.

10 "The applicant has prepared preliminary grading and utility plans for the
11 project, but has not specifically responded to the impact of proposed
12 development upon downstream areas, water resources, and the groundwater
13 supply. The potential for adverse impacts on downstream areas for the
14 nondesign storms shall be evaluated, and mitigation alternatives presented, as
15 necessary. The final hydrology report shall discuss these issues * * *.

16 "* * * It is essential to evaluate the project using lot-specific plans with actual
17 building configurations. Geotechnical review shall be completed * * * for
18 each lot, the roadway, and sanitary sewer and storm drainage improvements.
19 The review shall be based on final (post-construction) site grading and
20 building configuration. The review shall address slope stability, drainage,
21 foundations, excavation (maximum cuts and fills), lot grading, and other site
22 concerns. Additional test pits or borings shall be provided for lot-specific
23 final foundation and slope stability recommendations." Record 8-9.

24 The city commission found that, notwithstanding the absence of certain information
25 required by OCMC 17.44.050, "there is enough evidence in the record to demonstrate the
26 approval criteria are met." Record 50. In particular, the city commission's decision adopted
27 the following findings of compliance with OCMC 17.44.060(A) through (K):

28 "The Planning Commission correctly found that [one of the applicant's
29 geologic reports] demonstrates that [OCMC 17.44.060] is met. The Report
30 states that 'the August 1997 Preliminary Site Plan is considered geotechnically
31 feasible,' provided its recommendations are implemented during construction.
32 [Those recommendations include]: grading minimization, fill restrictions
33 above and below the unstable slope line, site drainage and infiltration
34 restrictions, utility location and construction procedures, building exclusion in
35 the unstable slope area, road construction inspection for soil bedding and
36 drainage conditions, cut and fill earthwork requirements, and building plan
37 review and foundation excavation by a soils engineer.

38 "The Planning Commission correctly found that the proposal's low density use
39 and modified street and sidewalk standards [are] already designed to reduce

1 site disturbance. [The geologic report] has provided additional instructions
2 for avoiding disturbance of natural topography, vegetation, and soils, which
3 complies with the development standards in OCMC 17.44.060.

4 "The City Commission affirms the Planning Commission's findings that any
5 areas of concern can be mitigated by attaching conditions of approval
6 regarding further geologic testing on an individual lot basis prior to final plat
7 approval. Additional geotechnical investigations required to locate faults and
8 folds and develop cross sections of subsurface structure for all building
9 envelopes, streets and lot boundaries. Detailed hydrology reports and erosion
10 control plans are also required to be submitted as part of final plat approval
11 which ensures the implementation of this code provision.

12 "The Planning Commission correctly found that the conditions of approval
13 define additional geotechnical review and documentation throughout the
14 construction and permitting process to guard against unexpected site
15 conditions and control lot-specific development. These requirements allow
16 for continued compliance with OCMC 17.44.060 which requires that the
17 development will not cause or be subject to hazard. The City Commission
18 agrees with the Planning Commission's finding that the development
19 standards contained at OCMC 17.44.060 do not require the applicant to
20 complete 'ready for construction drawings' and provide actual building
21 footprints at this stage of the approval process.

22 "The City Commission concludes that the preliminary approval process
23 contained at OCMC 17.44.060 is designed to provide review of concept plans
24 for lotting, access, public improvements, utilities and in some cases
25 landscaping. All requisite items which are not of a detailed design nature,
26 which are typically left to the staff's analysis at the time the building permit is
27 issued, have been addressed." Record 56-57.

28 **A. Deferral**

29 When conducting a multi-stage approval process for discretionary permits, a local
30 government is required to assure that discretionary determinations concerning compliance
31 with approval criteria occur during a stage where the statutory notice and public
32 requirements are observed. Meyer v. City of Portland, 67 Or App 274, 280, 678 P2d 741, rev
33 den 297 Or 82 (1984); Rhyne v. Multnomah County, 23 Or LUBA 442, 447 (1992).

34 In Meyer, the Court of Appeals addressed whether a city's finding of compliance with
35 local criteria requiring safe development was supported by substantial evidence, where the
36 city had conditioned its approval on future geotechnical reports verifying that proposed

1 roads, drainageways and building sites could be safely developed. The court found that the
2 city's finding of current compliance was supported by substantial evidence, based on
3 evidence that it was feasible to safely develop the proposed roads, drainageways, and
4 buildings. 67 Or App at 281-82; see also Corbett/Terwilliger Neigh. Assoc. v. City of
5 Portland, 25 Or LUBA 601, 613-14 (1993) (finding of compliance with criteria based on
6 finding that solutions to landslide, drainage and similar problems are possible, likely, and
7 reasonably certain to succeed, is supported by substantial evidence).

8 In Rhyne we elaborated on Meyer's holding:

9 "Assuming a local government finds compliance, or feasibility of compliance,
10 with all approval criteria during a first stage (where statutory notice and
11 public hearing requirements are observed), it is entirely appropriate to impose
12 conditions of approval to assure those criteria are met and defer responsibility
13 for assuring compliance with those conditions to planning and engineering
14 staff as part of a second stage. * * *

15 "Where the evidence presented during the first stage approval proceedings
16 raises questions concerning whether a particular approval criterion is satisfied,
17 a local government essentially has three options potentially available. First, it
18 may find that although the evidence is conflicting, the evidence nevertheless
19 is sufficient to support a finding that the standard is satisfied or that feasible
20 solutions to identified problems exist, and impose conditions if necessary.
21 Second, if the local government determines there is insufficient evidence to
22 determine the feasibility of compliance with the standard, it could on that
23 basis deny the application. Third, * * * instead of finding that the standard is
24 not met, it may defer a determination concerning compliance with the
25 standard to the second stage. In selecting this third option, the local
26 government is not finding all applicable approval standards are complied
27 with, or that it is feasible to do so, as part of the first stage approval (as it does
28 under the first option described above). Therefore, the local government must
29 assure that the second stage approval process to which the decision making is
30 deferred provides the statutorily required notice and hearing * * *." 23 Or
31 LUBA at 447-48 (footnotes omitted).

32 In Rhyne we applied the foregoing analysis to the county's findings, and determined
33 that the county had neither made findings of compliance with a standard requiring that
34 development be free of hazards, nor adopted findings that compliance with the standard was
35 feasible. Id. at 448-49. We concluded that the county had improperly deferred a finding of

1 compliance with that standard by requiring that site-specific tests be submitted and reviewed
2 at a second stage of review that did not offer the statutorily required notice and hearing. Id.
3 at 449; see also Tenly Properties Corp. v. Washington County, ___ Or LUBA ___ (LUBA
4 No. 97-110, April 15, 1998), slip op 4-12 (holding that the county impermissibly deferred a
5 determination that a proposed dead-end street has an adequate turnaround, where the
6 applicant did not submit and the county did not review a turnaround design, but merely
7 required the applicant to submit the design for final plat approval).

8 In the present case, petitioner argues that city's action in finding compliance with
9 OCMC 17.44.060, while at the same time deferring submission of information necessary to
10 support a finding of compliance with that provision, is inconsistent with Meyer, Rhyne, and
11 Tenly Properties Corp. because the city's action essentially defers a finding of compliance
12 with OCMC 17.44.060 to a second stage of review that does not provide the requisite notice
13 or hearing. Respondents argue, and we agree, that because the city found compliance with
14 OCMC 17.44.060, the appropriate inquiry is whether that finding is adequate and supported
15 by substantial evidence, not whether the city impermissibly deferred a finding of compliance
16 to a second stage of review. In other words, the present case is similar to Meyer and
17 Corbett/Terwilliger Neigh. Assoc., and dissimilar to Rhyne and Tenly Properties Corp., with
18 respect to the fundamental issue of whether the city exercised the first or the third option
19 described in Rhyne. Because the city in the present case exercised the first option, a finding
20 of compliance or feasibility of compliance with applicable criteria, the deferral issues raised
21 under these assignments of error are more appropriately framed as an inquiry into whether
22 the city's finding is adequate and supported by substantial evidence.

23 Respondents also argue that the city commission expressly interpreted OCMC
24 17.44.060 as not requiring that the applicant submit "ready for construction drawings," or
25 "detailed design" information, such as that "typically left to the staff's analysis at the time
26 that the building permit is issued[.]" Record 56-57. Respondents argue that the city

1 commission's interpretation of OCMC 17.44.060 is not "clearly wrong," and thus that LUBA
2 must affirm it. ORS 197.829(1); Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992);
3 Goose Hollow Foothills League v. City of Portland, 117 Or App 211, 217, 843 P2d 992
4 (1992). Pursuant to that interpretation, respondents contend that the plans and other
5 information that the applicant failed to submit are of a "detailed design nature," and thus are
6 not necessary to a finding of compliance with OCMC 17.44.060(A) through (K) at the
7 preliminary plat approval stage.

8 We might agree with respondents that the city's interpretation, to the effect that
9 OCMC 17.44.060 does not require "construction-ready" drawings or "detailed design"
10 information, is adequate for review and not clearly wrong or inconsistent with the text,
11 purpose or policy of that provision. ORS 197.829(1). However, our agreement with
12 respondents on this point would do little to resolve these assignments of error. The city's
13 interpretation does not state, as respondents suggest, that the information required by OCMC
14 17.44.050 is the type of "detailed design" information, such as that "typically left to the
15 staff's analysis at the time that the building permit issued," that need not be addressed in
16 order to find compliance with the development standards at OCMC 17.44.060. The cited
17 interpretation does not mention OCMC 17.44.050, nor does OCMC 17.44.050 require
18 construction-ready drawings or "detailed design" information of the type described in the
19 city's interpretation.

20 In any case, even if the city's interpretation extends as far as respondents suggest, that
21 interpretation would also fail to resolve these assignments of error. If certain information
22 otherwise required by OCMC 17.44.050 is not absolutely required until the second stage of
23 review, the city's findings of current compliance with OCMC 17.44.060 or that compliance
24 with that provision is feasible must be adequate and must be supported by substantial
25 evidence in the existing record. Meyer, 67 Or App at 280. Accordingly, we must still

1 resolve petitioner's adequacy and evidentiary challenges to the city's findings regarding
2 OCMC 17.44.060(A), (B), and (K).

3 **B. The city's findings regarding OCMC 17.44.060**

4 Petitioner argues, under the first assignment of error, that the city's findings regarding
5 OCMC 17.44.060 are inadequate, because the challenged decision does not address the
6 standards at OCMC 17.44.060(A), (B), or (K) individually, but instead makes a global,
7 conclusory statement that "the development standards contained at [OCMC] 17.44.060 are
8 met." Record 66. Petitioner contends that the city's findings regarding OCMC 17.44.060 are
9 inadequate because they fail to identify the applicable approval criteria, set out the facts
10 relied upon, and explain how those facts lead to the conclusion that the standards are met. Le
11 Roux v. Malheur County, 30 Or LUBA 268, 271 (1995); Lathrop v. Wallowa County, 25 Or
12 LUBA 693, 694 (1993). In the second assignment of error, petitioner argues that the city's
13 findings regarding OCMC 17.44.060(A), (B), and (K) are not supported by substantial
14 evidence, particularly given the absence of the information required by OCMC 17.44.050.

15 **1. OCMC 17.44.060(A)**

16 OCMC 17.44.060(A) requires that "developments shall be designed to avoid
17 unnecessary disturbance of natural topography, vegetation and soils." Although the
18 challenged decision does not specifically identify this standard, it makes findings obviously
19 directed at OCMC 17.44.060(A):

20 "The Planning Commission correctly found that the proposal's low density use
21 and modified street and sidewalk standards [are] already designed to reduce
22 site disturbance. [The geologic report] has provided additional instructions
23 for avoiding disturbance of natural topography, vegetation, and soils, which
24 complies with the development standards in OCMC 17.44.060." Record 56.

25 We understand petitioner to argue that this finding is inadequate because it fails to describe
26 the extent to which the proposed development will disturb topography, vegetation, and soils,
27 and fails to explain why that disturbance is no more than necessary or, in the terms of the
28 standard, why the proposed development avoids unnecessary disturbance. Similarly,

1 petitioner argues that because the record contains no indication of the extent that the
2 proposed development will disturb topography, vegetation, and soils, the city has no
3 evidentiary basis for concluding that the proposed development avoids unnecessary
4 disturbance.

5 We agree with petitioner that OCMC 17.44.060(A) requires a finding that proposed
6 development is designed to avoid unnecessary disturbance of topography, vegetation, and
7 soils. Such a finding in turn requires (1) evaluation of the extent to which the proposed
8 development, as conditioned, will disturb those three elements, and (2) determination of
9 whether that disturbance is no more than necessary. The challenged finding concludes,
10 essentially, that compliance with OCMC 17.44.060(A) is shown by design features or
11 measures that reduce site disturbance. However, a finding that the design of a proposed
12 development reduces site disturbance is not equivalent to the finding that OCMC
13 17.44.060(A) requires: that the design of the proposed development avoids unnecessary
14 disturbance. Accordingly, we agree with petitioner that the city's finding of compliance with
15 OCMC 17.44.060(A) fails to explain why the city believes that the facts relied upon
16 demonstrate that the proposed development avoids unnecessary disturbance.

17 Because the city's finding of compliance with OCMC 17.44.060(A) is inadequate, we
18 need not reach or resolve petitioner's evidentiary challenge to that finding. Forster v. Polk
19 County, 22 Or LUBA 380, 388 (1991) (no purpose is served by determining whether
20 inadequate findings are supported by substantial evidence in the record).

21 **2. OCMC 17.44.060(B)**

22 OCMC 17.44.060(B) requires that "[d]esigns shall minimize the number and size of
23 cuts and fills." The city made no findings specifically directed at OCMC 17.44.060(B) or at
24 whether the design of the proposed development minimizes the number and size of cuts and
25 fills. Petitioner argues that the city's conclusory finding of compliance with OCMC
26 17.44.060 is thus inadequate. Further, petitioner argues, because the record does not contain

1 the cross-sections required by OCMC 17.44.050 or any other information depicting proposed
2 cuts and fills, there is no evidentiary basis for the city to conclude that the proposed design
3 "minimizes" the number and size of cuts and fills.

4 Respondents do not identify any findings in the challenged decision directed at
5 OCMC 17.44.060(B), but point to evidence in the record that, they contend, "clearly
6 demonstrates that the number and size of cuts and fills will be minimized." Respondents'
7 Brief 19. The evidence cited to consists of the preliminary grading plan, the road profile
8 map, and the site plan. It is not clear whether respondents intend to invoke ORS
9 197.835(11)(b), which allows LUBA to affirm a decision notwithstanding absent or defective
10 findings, where "the parties identify relevant evidence in the record which clearly supports
11 the decision or a part of the decision[.]" LUBA has narrowly interpreted the term "clearly
12 supports" in ORS 197.835(11)(b) to mean "makes obvious" or "makes inevitable." Marcott
13 Holdings, Inc. v. City of Tigard, 30 Or LUBA 101, 122 (1995). ORS 197.835(11)(b)
14 authorizes LUBA to remedy minor oversights and imperfections in local government land
15 use decisions, but does not allow LUBA to assume the responsibilities assigned to local
16 governments, such as the weighing of evidence. Id. In the present case, to the extent
17 respondents invoke ORS 197.835(11)(b), we cannot say that it is "obvious" from the grading
18 plan, the road profile map and the site plan that the proposed design minimizes the number
19 and size of cuts and fills.

20 Because the city made no findings addressing OCMC 17.44.060(B), and its general
21 finding of compliance with OCMC 17.44.060 does not address the subject matter of OCMC
22 17.44.060(B), we conclude that the city's findings regarding OCMC 17.44.060 are
23 inadequate. Accordingly, we do not address petitioner's evidentiary challenge. Forster, 22
24 Or LUBA at 388.

1 **3. OCMC 17.44.060(K)**

2 OCMC 17.44.060(K) requires, in relevant part, that "the proposed methods of
3 rendering a known or potential hazard site safe for construction, including proposed
4 geotechnical remediation methods, are feasible and adequate to prevent landslides or damage
5 to property and safety." Petitioner argues that the city failed to adopt adequate findings of
6 compliance with OCMC 17.44.060(K) and, particularly given the absence of site-specific
7 geotechnical studies and the cross-sections required by OCMC 17.44.050, there is not
8 substantial evidence in the record to support a finding of compliance with that provision.

9 Respondents do not identify findings in the challenged decision that address OCMC
10 17.44.060(K), or that draw any conclusions regarding whether proposed methods of
11 rendering the site safe for construction are "feasible and adequate" to prevent landslides or
12 damage. Respondents describe the remediation measures proposed in this case as including
13 (1) preserving trees outside building envelopes; (2) delineating the lower portion of the site
14 unbuildable; (3) having lot-specific geological studies to address final foundation and slope
15 stability; (4) requiring that, if any lots prove unbuildable, the applicant must return to the
16 planning commission for modifications; and (5) requiring that all disturbed areas be
17 revegetated. Respondents' Brief 21-22. Further, at oral argument, intervenor emphasized
18 that the primary method of rendering the site safe for construction is requiring that all
19 development occur on the upper portion of the property found, subject to site-specific
20 geologic studies, to be "suitable" and "geotechnically feasible" for development, outside the
21 delineated area of landslide activity. Respondents argue that "[t]he geotechnical reports in
22 the record clearly support a finding that proposed geotechnical remediation measures are
23 adequate to prevent landslides or damage to property or safety." Respondents' Brief 22.

24 Again, assuming that respondents intend to invoke ORS 197.835(11)(b), we cannot
25 conclude that the record "clearly supports" a finding that the proposed methods of rendering
26 the site safe for construction are "feasible and adequate" to prevent landslides or damage to

1 property or safety. Marcott Holdings, Inc., 30 Or LUBA at 122. Because the city failed to
2 address OCMC 17.44.060(K) or otherwise explain why it believes the facts demonstrate
3 compliance with that provision, the city's general finding of compliance with OCMC
4 17.44.060 is inadequate. Again, we decline to address petitioner's evidentiary challenge.
5 Forster, 22 Or LUBA at 388.

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

7 The second assignment of error is denied.

8 **THIRD ASSIGNMENT OF ERROR**

9 Petitioner argues that the city's findings are inadequate, because the city failed to
10 address whether the proposed development was consistent with applicable policies of the
11 city's comprehensive plan, as required by OCMC 17.64.120(A). OCMC 17.64.120 provides
12 in part:

13 "The decision maker shall approve an application for preliminary PUD plan
14 [approval] if the following criteria are found to be met:

15 "A. The proposed preliminary PUD plan is consistent with the purposes of
16 this chapter set forth in [OCMC] 17.64.010 and any applicable goals
17 or policies of the Oregon City comprehensive plan."

18 Petitioner argues that language at sections F-29 and F-33 (Natural Resources) of the city's
19 comprehensive plan contains policies applicable to the proposed development, and that the
20 city failed to address whether the proposed development is consistent with those policies, as
21 OCMC 17.64.120(A) requires.⁴

⁴Oregon City Comprehensive Plan (OCCP) F-29 provides in relevant part:

"Oregon City's location along major waterways, the existence of slopes, areas of unstable soils and areas of potential landslides and flooding result in sections of the City being susceptible to natural disasters and hazards. In order to protect life and property, developments subject to damage or that could result in loss of life should not be planned or located in known areas of natural disasters and hazards without appropriate safeguards."

OCCP F-33 provides in relevant part:

1 Respondents argue that the city expressly interpreted OCMC 17.64.120(A) as
2 allowing consistency with comprehensive plan policies to be demonstrated by compliance
3 with OCMC provisions that implement those policies:

4 "The City Commission interprets its code that the goals and policies in the
5 comprehensive plan that apply to this development are implemented in the
6 OCMC. Therefore, consistency with the comprehensive plan is demonstrated
7 when the applicable approval standards in the OCMC are met. The natural
8 resource, water resource and hazard comprehensive plan policies are found in
9 the overlay districts. * * * The Planning Commission correctly found that the
10 unstable slopes overlay district approval criteria has been met as explained
11 below. The City Commission finds that the Planning Commission properly
12 found that the applicant has demonstrated consistency with the comprehensive
13 plan policies as implemented through the OCMC." Record 52-53.

14 Petitioner does not challenge the city commission's interpretation, other than to argue
15 that that interpretation renders OCMC 17.64.120(A) meaningless. However, petitioner does
16 not explain why the city's interpretation has that effect. It is not apparent why an
17 interpretation that the plan policies and goals that are relevant in this case and fully
18 implemented by the city's development code renders OCMC 17.64.120(A) meaningless.
19 Respondents argue, and we agree, that the city's interpretation is not inconsistent with the
20 text, purpose, or policy of OCMC 17.64.120(A), or clearly wrong. ORS 197.829(1); Goose
21 Hollow Foothills League. Accordingly, we affirm it. It follows that petitioner's arguments
22 under this assignment of error, that the city erred in failing to separately address the cited
23 comprehensive plan language, do not provide a basis for reversal or remand.

24 The third assignment of error is denied.

25 **FOURTH ASSIGNMENT OF ERROR**

26 OCMC 17.64.120(B) requires a finding that

"Landslide-prone areas should be evaluated on a site specific basis and should be protected from excavations and/or major vegetation clearing activity that would result in increased slide activity."

1 "The proposed preliminary PUD plan meets the applicable requirements of the
2 underlying zoning district, any applicable overlay zone (e.g. [OCMC] 17.44
3 and 17.49) * * * unless an adjustment from any of these requirements is
4 specifically allowed pursuant to this chapter."

5 Petitioner argues that because the city erred in finding that the applicant had
6 established compliance with the US Overlay Zone criteria at OCMC 17.44.160, as discussed
7 in the first and second assignments of error, the city perforce erred in finding compliance
8 with OCMC 17.64.120(B).

9 Petitioner's argument under this assignment of error is wholly derivative of his
10 arguments, some of which we sustained, in the first and second assignments of error.
11 Accordingly, petitioner's argument under this assignment of error presents no independent
12 basis to reverse or remand the challenged decision.

13 The fourth assignment of error is denied.

14 The city's decision is remanded.