

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

3
4 ROBERT H. GRAVATT,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF PORTLAND,
10 *Respondent,*

11 and

12
13 JOHN WELSH,
14 *Intervenor-Respondent.*

15
16 LUBA No. 2010-087

17
18 FINAL OPINION
19 AND ORDER

20
21
22 Appeal from City of Portland.

23
24 Robert H. Gravatt, Bethesda, Maryland, filed the petition for review and argued on
25 his own behalf.

26
27 Linly F. Rees, Deputy City Attorney, Portland, filed the response brief and argued on
28 behalf of respondent.

29
30 John L. Welsh, Portland, represented himself.

31
32 HOLSTUN, Board Chair; BASSHAM, Board Member; RYAN, Board Member,
33 participated in the decision.

34
35 AFFIRMED

01/10/2011

36
37 You are entitled to judicial review of this Order. Judicial review is governed by the
38 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioner appeals a city decision that approves a request to divide an existing lot into two parcels.

MOTION TO INTERVENE

John L. Welch (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

PETITIONER’S MOTION TO FILE REPLY BRIEF

The petition for review was filed on November 12, 2010. LUBA scheduled oral argument for December 16, 2010. Under LUBA’s rules, the deadline for the city to file its response brief and for intervenor-respondent to file its response brief was December 6, 2010. The city filed its response brief on November 23, 2010, well before the filing deadline expired. Intervenor-respondent did not file a response brief.

On December 13, 2010, petitioner filed his Motion to File Reply Brief and, as required by LUBA’s rules, attached a copy of the proposed reply brief. LUBA received the motion and the reply brief on December 14, 2010, two days before oral argument.

Under OAR 661-010-0039, “[a] request to file a reply brief shall be filed * * * within seven days of the date the respondent’s brief is filed.” Further, OAR 661-010-0039 provides that “[a] reply brief shall be confined solely to new matters raised in the respondent’s brief * * *.” The city objects to petitioner’s motion and the reply brief, arguing that petitioner’s request to file his reply brief was not timely filed and that the reply brief is not limited to new matters in the respondent’s brief.

Petitioner’s motion to file a reply brief is denied. Petitioner’s only explanation for why he failed to file his request to file a reply brief within seven days after the city filed its brief is that he needed to wait until the deadline for intervenor-respondent to file his response brief expired to file the reply brief request. We reject that explanation. If there are new

1 matters in the city's brief that warrant a reply brief, petitioner could have identified those
2 new matters as soon as he received the city's brief. It is the date the city's response brief was
3 filed that triggered the OAR 661-010-0039 seven-day deadline, not the deadline for filing the
4 city's and intervenor's response briefs. Petitioner offers no good reason for delaying until
5 three days before oral argument to request permission to file a reply brief that replies to the
6 city's response brief, which was filed three weeks earlier. We also agree with the city that
7 petitioner's reply brief is not limited to new matters in the city's response brief.

8 Petitioner's motion to file a reply brief is denied.

9 **PETITIONER'S MOTION TO TAKE EXHIBITS AS EVIDENCE**

10 On December 13, 2010, petitioner moved to add three maps to the record in this
11 appeal. The city objects that the deadline for objecting to the record in this appeal expired
12 long ago and that petitioner's request to supplement the record three days before oral
13 argument should be denied. We agree with the city. To the extent petitioner's December 13,
14 2010 motion could be viewed as a request to consider extra-record evidence under OAR 661-
15 010-0045, the city points out that petitioner makes no attempt to show that any of the
16 grounds for considering extra-record evidence under OAR 661-010-0045(1) are present here.
17 Again, we agree with the city.

18 Petitioner's December 13, 2010 motion to add three maps to the record in this appeal
19 is denied.¹

20 **FACTS**

21 The subject 21,233 square-foot lot is zoned Single Dwelling Residential 7,000 (R7).
22 The minimum lot size in the R7 zone is 7,000 square feet. The subject property is developed
23 with an existing residence, as are the two adjoining lots. The subject property also shares a

¹ On December 13, 2010, petitioner also supplied enlarged or color copies of several documents that already appear at record pages 67, 93, 134, 317, 322, 323. We do not understand the city to object to our consideration of those enlarged or color copies of pages in the record, and we have considered those enlarged and color copies.

1 property line with Reed College. Intervenor proposes to divide the subject property into a
2 9,774-square-foot parcel (Parcel 1) and an 11,459-square-foot parcel (Parcel 2). The existing
3 residence would remain on Parcel 1. A new dwelling would be constructed on Parcel 2. The
4 central issue in this appeal is whether the city correctly interpreted and applied its Landslide
5 Hazard Area Approval Criterion in approving the requested land division.

6 **INTRODUCTION**

7 Pursuant to Portland City Code (PCC) 33.632.020, the Landslide Hazard Area
8 Approval Criterion set out at PCC 33.632.100 “applies to all proposals for land divisions
9 where any portion of the site is within a potential landslide hazard area.” A small portion of
10 the site, along its southern boundary with Reed College, is designated as a potential land
11 slide area. Record 323. The PCC 33.632.100 Landslide Hazard Area Approval Criterion is
12 set out below:

13 “The following approval criterion must be met: *Locate the lots, buildings,*
14 *services and utilities on the safest part of the site* so that the risk of a landslide
15 affecting the site, adjacent sites, and sites directly across a street or alley from
16 the site, is reasonably limited.

17 “Determination of whether the proposed layout and design reasonably limits
18 the risk of a landslide will include evaluation of the Landslide Hazard Study
19 and will take into consideration accepted industry standards for factor of
20 safety. Alternative development options including alternative housing types
21 and reduced density may be required in order to limit the risk to a reasonable
22 level.” (Emphasis added.)

23 Petitioner contends the city erroneously interpreted the words “[l]ocate the lots, buildings,
24 services and utilities on the safest part of the site,” and failed to require that the site be
25 divided so that the new dwelling will be located “on the safest part of the site.”

26 **FIRST ASSIGNMENT OF ERROR**

27 It appears that the northern approximately 60 percent of the site is flat, at an elevation
28 of 134 feet. Record 93. The existing dwelling is constructed approximately in the middle of
29 this flat portion of the site. *Id.* The rear approximately 40 percent of the site slopes down
30 toward Reed College from an elevation of 134 feet to an elevation of 114 feet, over a

1 distance of approximately 100 feet. The slopes on the rear portion of the site are not uniform
2 and appear to generally range between 10 percent and 35 percent, with the steeper slopes in
3 the southeastern portion of the rear of the property. *Id.* The proposed new dwelling would
4 not be located on the flat front part of the site. The proposed dwelling also would not be
5 located on any of the steeper slopes in the southeastern rear portion of the site. The proposed
6 dwelling would be located in the southwestern part of the site, on what appear to be
7 approximately ten to 15 percent slopes. Record 411. Petitioner argues that the above
8 italicized language of PCC 33.632.100 plainly requires that lots and building be located on
9 the “safest part of the site.” Petitioner contends the “safest part of the site” is the flat part of
10 the site, and the city’s failure to require that the approved lot include a building site on that
11 flat part of the site violates the PCC 33.632.100 Landslide Hazard Area Approval Criterion.

12 In rejecting petitioner’s understanding of the italicized language of PCC 33.632.100,
13 the hearings officer adopted the following findings:

14 “[Petitioner] appears, to the Hearings Officer, to interpret PCC 33.632.100 as
15 requiring the location of proposed parcels in a partition application to be
16 located in the absolute ‘safest part of the site.’ * * *

17 “The Hearings Officer agrees with [petitioner] that if the language ‘safest part
18 of the site’ is considered in isolation an applicant facing a site with a Potential
19 Landslide Hazard designation would be required to locate lots, buildings, etc.
20 in the *absolute* safest part of the site. However, the Hearings Officer finds
21 that the phrase ‘safest part of the site’ must be considered in the context of
22 PCC 33.632.100 as a whole and also in the context of all provisions of PCC
23 33.632.

24 “The first paragraph of PCC 33.632.100 states that lots, buildings, etc. are to
25 be located on the ‘safest part of the site’ so that the risk of landslide affecting
26 the Site, adjacent sites and sites across the street from the Site ‘is reasonably
27 limited.’ The Hearings Officer considers the ‘reasonably limited’ phrase to
28 negate any interpretation of the ‘safest part of the site’ as being an *absolute*
29 requirement; rather, the phrase ‘safest part of the site’ is to be applied to allow
30 lots, buildings, etc. to be located in locations that are not the absolute ‘safest.’

31 “The second paragraph of PCC 33.632.100 provides additional assistance in
32 interpreting the phrase ‘safest part of the site.’ The first sentence of the
33 second paragraph of PCC 33.632.100 states ‘Determination of whether the

1 proposed layout and design reasonably limits the risk of a landslide will
2 include evaluation of the Landslide Hazard Study and will take into
3 consideration accepted industry standards for factor of safety.’ The Hearings
4 Officer finds that the first sentence of the second paragraph of PCC
5 33.632.100 negates an interpretation of the ‘safest part of the site’ as being an
6 *absolute* requirement. The Hearings Officer finds that the first sentence of the
7 second paragraph of PCC 33.632.100 anticipates reliance on a Professional
8 Geotechnical Engineer, such as provided in this case * * *, to evaluate the
9 land use application and assure the application reasonably limits the risks of a
10 landslide.

11 “The Hearings Officer disagrees with an interpretation that considers the
12 phrase ‘safest part of the site’ as requiring proposed lots, buildings, etc. to be
13 in the *absolute* safest location. Rather, the Hearings Officer interprets PCC
14 33.632.100 to require substantial evidence in the record showing that the
15 proposed location of lots, buildings, etc. reasonably limit risks associated with
16 Potential Landslide Hazard area[s]. * * *” Record 18-19 (emphases in
17 original).

18 The hearings officer’s interpretation of PCC 33.632.100 arguably gives no effect to
19 the main clause, “[l]ocate the lots, buildings, services and utilities on the safest part of the
20 site” and only gives effect to the subordinate clause by simply requiring that the lots and
21 dwellings be located so that the “risk of landslide” is “reasonably limited.” If that is what the
22 hearings officer has done, the hearings officer’s interpretation arguably runs afoul of the
23 interpretative principle embodied in ORS 174.010, which prohibits interpreting statutes in a
24 way that omits statutory language that has been included.² However, a more generous
25 reading of the hearings officer’s reasoning gives some effect to the PCC 33.632.100
26 requirement to locate lots and buildings on “the safest part of the site,” without giving that
27 language the overwhelming effect that petitioner would give it. As we explain below, if that
28 language is given the overwhelming effect petitioner would give it, PCC 33.632.100

² ORS 174.010 provides:

“In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars such construction is, if possible, to be adopted as will give effect to all.”

1 becomes unworkable and would likely run afoul of the ORS 227.173(1) requirement that
2 permit decisions be governed by “standards and criteria.”³

3 The real problem with the PCC 33.632.100 requirement to locate lots and buildings
4 on “the safest part of the site” is that those words, read in isolation, provide no guidance on
5 how site safety is to be analyzed, and impose no limit on how small the “safest part of the
6 site” may be. As the city correctly points out in its brief, without such guidance and limits, a
7 search for “the safest part of the site” could require an applicant to identify the safest square
8 yard, square foot or square inch of the site. In that circumstance, no new lot meeting
9 minimum lot area requirements would be possible and the “safest part of the site” likely
10 would be too small to accommodate a building. If the authors of PCC 33.632.100 intended
11 petitioner’s understanding of PCC 33.632.100 and expected that applicants on a case-by-case
12 basis would find a way to make PCC 33.632.100 workable, PCC 33.632.100 likely runs afoul
13 of ORS 227.173(1). *See State ex rel West Main Townhomes v. City of Medford*, 234 Or App
14 343, 346, 228 P3d 607 (2010) (land use regulation too vague to comply with the ORS
15 227.173(1) requirement for “standards and criteria”); *Lee v. City of Portland*, 57 Or App 798,
16 802, 646 P2d 662 (1982) (ORS 227.173(1) requires “standards that are clear enough for an
17 applicant to know what he must show during the application process”).

18 In effect, the hearings officer’s interpretation avoids the problem of having the “safest
19 part of the site” language render PCC 33.632.100 unworkable or an illusory standard. The
20 hearings officer effectively does so by addressing the requirements of PCC 33.632.100 in
21 reverse order. The hearings officer first focuses on the PCC 33.632.100 requirements for
22 establishing that “risk of landslide affecting the site” be “reasonably limited.” Once the “part
23 of the site” where the “risk of landslide affecting the site” is “reasonably limited” is

³ ORS 227.173(1) requires in part:

“Approval or denial of a discretionary permit application shall be based on standards and
criteria, which shall be set forth in the development ordinance * * *.”

1 identified, the part of the site where the “risk of landslide” is either unknown or cannot be
2 reasonably limited will also be known. After this step is complete, it is a relatively simple
3 matter to comply with the PCC 33.632.100 requirement to locate lots and buildings on “the
4 safest part of the site,” by requiring that the lots and buildings be located on the part of the
5 site where risk of landslide is shown to be reasonably limited, rather than on the part of the
6 site where landslide risks have not been shown to be reasonably limited.

7 The hearings officer went on and explained that the applicant submitted a
8 geotechnical evaluation of the site. That geotechnical evaluation was based in part on four
9 test pits in parcel 2 in the area where the new dwelling would be located. It is somewhat
10 unclear to us whether the geotechnical evaluation provides evidence that would allow the
11 hearings officer to determine that the “risk of landslide affecting the site” is “reasonably
12 limited” for the entire site.⁴ Even if the geotechnical evaluation provides such evidence, it is
13 not at all clear to us that the hearings officer actually found that the risk of landslide is
14 reasonably limited for the entire site. However, while it is a relatively close question, we
15 believe the gist of the applicant’s geotechnical evaluation is that the “risk of landslide
16 affecting the site” is “reasonably limited” for the flat portion of the site that is already
17 developed and will be included in Parcel 1 and for the sloped portion of Parcel 2 that is to be
18 developed with a dwelling and dry well for storm drainage. The extreme southeastern and
19 southern part of Parcel 2 that are more steeply sloped and potentially subject to landslide
20 hazard are not proposed for development. Petitioner does not argue that all of Parcel 2 must
21 be located in the “safest part of the site.” Petitioner argues that the area of Parcel 2 that is
22 developed with the new dwelling and dry well must be located on the “safest part of the site.”

⁴ While petitioner does not challenge the adequacy of the applicant’s geotechnical report in his petition for review, he does advance such a challenge in his reply brief. However, we do not allow the reply brief because it was not timely filed and is not limited to challenging new matters in the city’s response brief.

1 For the reasons explained above, as the hearings officer and we interpret PCC 33.632.100,
2 the dwelling and dry well on Parcel 2 will be located on the safest part of the site.

3 For the reasons explained above, we agree with the hearings officer that PCC
4 33.632.100 does not require an unqualified search for “the safest part of the site,” wholly
5 apart from the other PCC 33.632.100 requirement that an applicant demonstrate that lots and
6 buildings be located where the “risk of landslide affecting the site” is “reasonably limited.”

7 The first assignment of error is denied.⁵

8 **SECOND ASSIGNMENT OF ERROR**

9 Under his second assignment of error, petitioner argues the site could be partitioned
10 to create two parcels, each with a building site on the 11,418-square foot flat portion of the
11 site. Petitioner attaches to his petition for review an appendix that shows how such a
12 division might be accomplished. The city objects to LUBA’s consideration of a hypothetical
13 division proposal that was not provided to the hearings officer.

14 Petitioner’s second assignment of error is predicated on his position that the PCC
15 33.632.100 requirement that lots and buildings be located on the “safest part of the site”
16 requires that both parcels have building sites that are located entirely on the 11,418-square
17 foot flat portion of the site. The hearings officer rejected that argument, and in resolving the
18 first assignment of error we have rejected that argument as well. It follows that the second
19 assignment of error provides no basis for reversal or remand.

20 The second assignment of error is denied.

⁵ Although we deny the first assignment of error, the hearings officer’s and our struggle to give PCC 33.632.100 the meaning that was likely intended makes it clear that the city needs to amend PCC 33.632.100 to more clearly state what PCC 33.632.100 requires and how the city expects applicants to go about applying and complying with PCC 33.632.100. In addition to the ambiguity that we discuss in resolving the first assignment of error, the requirement that “lots” be located on the safest part of the site is potentially problematic. Petitioner appears to read that requirement to mean that all lots must include a building site that is on the safest part of the site, and argues that the city’s error was in approving Parcel 2 with a building site that is not on the flat part of the site. We need not consider whether PCC 33.632.100 requires that any parts of the site for which the “risk of landslide” has not been shown to be “reasonably limited” must be excluded from any lots. But the way PCC 33.632.100 is currently written, that interpretation is certainly possible, although we doubt that interpretation was intended.

1 **THIRD ASSIGNMENT OF ERROR**

2 Petitioner’s third assignment of error is set out below:

3 “Risk of a Landslide on the Adjacent Site to the South has not been
4 Reasonably Limited.” Petition for Review 5.

5 Once again, petitioner’s argument is founded on his interpretation of PCC 33.632.100
6 and his position that the flat part of the site is the safest part of the site:

7 “If the lots, building, etc. have been located on the safest part of the subject
8 site and the risk of landslide has been reasonably limited in absolute terms on
9 the subject site and there are no observable special circumstances, then it is
10 fair to say the risk of landslide on the adjacent site has been reasonably
11 limited. Here, this is not the case because one of the two building sites
12 (Proposed Lot 2) is on the inferior (least safe) portion of the entire 21,000 sq.
13 ft. site. * * *” Petition for Review 6.

14 We have already rejected petitioner’s contention that PCC 33.632.100 must be interpreted to
15 require that the flat front portion of the subject property constitutes the safest part of the site.

16 To the extent the second assignment of error can be viewed as a substantial evidence
17 challenge, it is inadequately developed for review. The geotechnical report that the hearings
18 officer relied on acknowledged that there is always some risk in developing on slopes in
19 areas where there is a landslide risk: “it should be understood by the builder that some
20 assumption of slope instability risk is unavoidable when building on or around steep slopes.”
21 Record 79. However, the geotechnical report goes on to take the position that the site can be
22 divided and developed as proposed:

23 “It is our opinion that the proposed backyard flag lot and infiltration system
24 can be developed as proposed. In our opinion, detailed slope stability
25 analyses [are] unwarranted for this site as the grades on the site are gently to
26 moderately sloping and appear currently stable, and native soils consist of stiff
27 silt and fine-grained sand alluvium not considered highly susceptible to slope
28 instability. The site is considered to have a low relative slope stability
29 hazard.”

30 “* * * * *

31 “Slope conditions on and adjacent to the site do not vary significantly. In
32 accordance with the Landslide Hazard Study requirements, we conclude that

1 the landslide hazard risk over the site is relatively uniform, and no
2 recommendation is made to alter the proposed development in order to locate
3 improvements on the safest part of the property.” *Id.*

4 Although the geotechnical report is not written in the precise words of PCC
5 33.632.100, we understand the above-quoted portion of the geotechnical report to take the
6 position that, in the words of PCC 33.632.100, the “proposed layout and design reasonably
7 limits the risk of a landslide.” We conclude that a reasonable person could have relied on the
8 geotechnical report to find that the proposal satisfies PCC 33.632.100, and petitioner’s
9 arguments under the third assignments of error does not alter our conclusion.

10 The third assignment of error is denied.

11 **FOURTH ASSIGNMENT OF ERROR**

12 We set out below petitioner’s entire argument under the fourth assignment error:

13 “The Portland Hearings Officer claims * * * that: ‘In this case, the Hearings
14 Officer, finds it important to emphasize that the portion of the Site within the
15 Potential Landslide Hazard area is relatively small and located to the extreme
16 south portion of the Site.’ This finding is completely arbitrary and capricious.
17 It is impossible to say what exactly comprises ‘small’ either in area or in
18 percentage of the site. For example, is 5% of the site or 1000 sq. ft. really
19 small? Further, it is simply * * * not the case that land simply goes from good
20 to bad without degrees of worsening involved. Here the approval criterion
21 applies no matter what as under PCC 33.632.020 * * * the size of the
22 landslide designated area is irrelevant.”

23 We are not sure we understand petitioner’s argument. Under any reasonable
24 understanding of the word “small” the area or percentage of the site that falls within the
25 Potential Landslide Area is small. Petitioner’s Oversized (Enlarged) & Reprinted Exhibit D.
26 And while petitioner is certainly correct that PCC 33.632.020 triggers application of the PCC
27 33.632.100 Landslide Hazard Area Approval Criterion without regard to the size of the area
28 designated as a Potential Landslide Hazard Area, the hearings officer did not find that the

1 33.632.100 Landslide Hazard Area Approval Criterion does not apply in this case.⁶ The
2 hearings officer's finding simply points out, accurately, that the area that is designated as a
3 Potential Landslide Hazard Area is quite small. That accurate finding provides no basis for
4 remand.

5 The fourth assignment of error is denied.

6 The city's decision is affirmed.

⁶ As we explained earlier, under PCC 33.632.020, the Landslide Hazard Area Approval Criterion set out at PCC 33.632.100 "applies to all proposals for land divisions where any portion of the site is within a potential landslide hazard area."