BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

NORTHGREEN PROPERTY LLC,
Petitioner,

vs.

CITY OF EUGENE,
Respondent,

and

NEW CINGULAR WIRELESS PCS, LLC,
Intervenor-Respondent.

LUBA No. 2011-099

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Micheal M. Reeder, Eugene, filed the petition for review and argued on behalf of petitioner. With him on the brief was Arnold Gallagher Percell Roberts & Potter, PC.

No appearance by City of Eugene.

Richard J. Busch, Issaquah, Washington, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Busch Law Firm PLLC.

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

REMANDED 03/05/2012

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

Opinion by Ryan.

NATURE OF THE DECISION

Petitioner appeals a decision by the city approving tentative planned unit development and conditional use permit applications to site a cellular communications tower and ancillary facilities on property zoned Low Density Residential/Planned Unit Development (R-1/PD).

MOTION TO INTERVENE

New Cingular Wireless PCS, LLC (intervenor), the applicant below, moves to intervene on the side of the city. There is no opposition to the motion and it is granted.

MOTION TO STRIKE

Petitioner moves to strike Appendix I attached to intervenor's response brief. Appendix I is a copy of a 2004 hearings officer's decision on an application for land use review in Deschutes County. Petitioner argues that the document is not a part of the record of this appeal and is not subject to official notice. Intervenor has not cited any legal authority under which we might take official notice of Appendix I.

Petitioner's motion to strike Appendix I is granted. The Board will not consider Appendix 1 or the portion of the Response Brief on page 8 lines 19-27 that quotes a portion of Appendix 1.

FACTS

Intervenor submitted planned unit development and conditional use permit applications to site a 75-foot tall wireless communications tower on the northern part of a 58-acre private golf course, and also submitted a variance application to locate the ancillary facilities that house the equipment for the tower above ground.[1] The subject property is

[1] Eugene Code (EC) 9.5750 contains special siting requirements and procedures for telecommunications facilities. EC 9.5750(8) requires in relevant part that "all ancillary facilities within an R-1, PL, C-1, GO, and PRO zone must be located underground to the maximum extent technology allows, unless a variance is obtained pursuant to the provisions of subsection (9) of this section."

zoned R-1/PD and is designated Parks and Open Space in the Metro Plan and the Willakenzie Area Plan. The Metro Plan is the comprehensive plan that governs the metropolitan area of the city, and the Willakenzie Area Plan is the applicable refinement plan for the area of the city in which the subject property is located. Petitioner's 222-unit apartment building is located to the north of the golf course property, approximately 100 feet from the proposed cell tower. The golf course is surrounded by single family residential development on all sides.

The hearings officer held a hearing on the applications and approved the planned unit development and conditional use permit applications, but denied the variance application to locate the ancillary facilities above ground. Petitioner and intervenor each appealed the hearings officer's decision to the planning commission, which upheld the hearings officer's decisions. This appeal followed.

FIRST ASSIGNMENT OF ERROR

EC 9.8320(1) requires the city to find that "[t]he PUD is consistent with applicable adopted policies of the Metro Plan." EC 9.8090(1) similarly requires the city to find that the conditional use permit application "is consistent with applicable provisions of the Metro Plan and applicable refinement plans." The city concluded that there were no "applicable" Metro Plan policies or provisions that applied to the applications. In its first assignment of error, petitioner argues that Metro Plan Environmental Resources Element Policy C-21 and Environmental Design Element Policy E-4 are applicable Metro Plan policies and that the city erred in failing to determine whether the applications are consistent with those policies. Petitioner also argues that to the extent the planning commission concluded that the applications are consistent with those policies, the planning commission's findings are inadequate to explain the basis for that conclusion.

A. Policy C-21

Metro Plan Policy C-21 provides:

> "When planning for and regulating development, local governments shall consider the need for protection of open spaces, including those characterized by significant vegetation and wildlife. Means of protecting open space include but are not limited to outright acquisition, conservation easements, planned unit development ordinances, streamside protection ordinances, open space tax deferrals, donations to the public, and performance zoning."[2]

The hearings officer found:

> "This policy seems to provide both broad direction to the local government for long-term planning, and direction when regulating development; however, the 'means of protecting open space' include only long-term planning strategies, not anything that is related to a specific development proposal." Record 219.

The planning commission agreed with the hearings officer and adopted additional findings:

> "The Planning Commission concludes that Metro Plan policies C.21, E.4 and E.6 are not independent, mandatory approval criteria in this instance. In regards to Policy E.4, the Hearings Official correctly found the policy to provide broad direction and, as applied to a PUD and CUP, the policy is implemented by numerous criteria, including EC 9.8320(3), (4), (8), (12) (13) and EC 9.8090(2) and (3). The Hearings Official correctly explains the proper use of this and other Metro Plan policies in his decision, also specifically noting that several of the other relevant policies are implemented by other approval criteria for the applications. To the extent the policies are relevant or could be interpreted as part of the approval criteria in this instance, the Planning Commission has considered them and finds that the intent of the policies are met based on the Hearings Official's decision and the additional findings * * * elsewhere in this Final Order." Record 16.

We review the city's interpretation of its comprehensive plan and land use regulations to determine whether it is correct. *Gage v. City of Portland*, 133 Or App 346, 349-50, 891 P2d 1331 (1995). In *Bothman v. City of Eugene*, 51 Or LUBA 426 (2006), we concluded that even where the local code includes a requirement that the comprehensive plan be considered in approving a land use permit application, plan policies that plainly direct the city to undertake planning efforts do not operate as decisional standards that apply on a case-by-case basis when approving individual development proposals. We agree with the city's interpretation of the Metro Plan that Policy C-21 is such a policy. Policy C-21 directs the

[2] We set out the text of Policy E-4 and discuss that policy separately later in this opinion.

city to implement one of several means of protecting open space, including adopting planned unit development ordinances, and does not contain any language that suggests that it is intended to apply on a case-by-case basis to individual applications for planned unit development approval that are processed under the city's adopted planned unit development ordinances.

B. Policy E-4

Policy E-4 of the Metro Plan's Environmental Design Element of the plan provides:

> "Public and private facilities shall be designed and located in a manner that preserves and enhances desirable features of local and neighborhood areas and promotes their sense of identity."

The hearings officer found that Policy E-4 is not an "applicable" approval criterion, but rather provides broad direction to the city and is implemented by approval criteria in the EC's sections providing standards for PUD and CUP applications:

> "In a prior decision * * * the hearings officer concluded '[t]his policy is broad direction to the city. As applied to a PUD, this policy is implemented by numerous criteria, including EC 9.8320(3), (4), (8), (12), and (13). * * * Two CUP criteria also implement this policy: EC 9.8090(2) and (3).
>
> "* * * Even though the hearings official believes this policy provides broad direction to the city, the hearings official notes that this decision addresses the criteria that implement this policy below; it is not necessary to conduct an independent review of the proposed development for consistency with this policy." Record 219.

As noted above, the planning commission agreed with the hearings officer.

Petitioner argues that the text of Policy E-4 demonstrates that it is an "applicable" provision of the Metro Plan and is intended to apply to individual permit decisions on public facilities. Petitioner first points out that Policy E-4 is phrased in mandatory terms with the use of the word "shall" providing direction for designing and locating public facilities. Petitioner also points to context provided in the preamble to the Environmental Design Element that provides in relevant part that "[i]f we are to maintain a livable urban

environment and realize the full potential of our desirable and distinctive qualities, *daily decisions that concern change must be guided by environmental design principles, such as site planning, in combination with other planning policies*." Metro Plan, III-E-1 (Emphasis added.) According to petitioner, the text and context of Policy E-4 support reading Policy E-4 as a separate, mandatory approval criterion that applies to the applications.

Petitioner also challenges the city's conclusion that Policy E-4 is fully implemented by EC 9.8320(3), (4), (8), (12) and (13) and EC 9.8090(2) and (3) or that those sections of EC 9.8320 and 9.8090 make it unnecessary to separately apply Policy E-4. We set out the text of those provisions in Appendix A. According to petitioner, the EC provisions cited by the city do not contain any language that suggests that they are intended to implement the purposes stated in Policy E-4 to "enhance[] desirable features" of the area and "promote[] their sense of identity" but at most the provisions require the public facility to mitigate some of the effects of development on those features. Finally, petitioner argues that to the extent the planning commission adopted alternative findings that Policy E-4 is satisfied, those findings are inadequate to explain the basis for that conclusion.

Intervenor responds by arguing that Policy E-4 is aspirational rather than mandatory, and that it does not provide specific direction for the city in considering a permit application. Intervenor maintains that the city correctly found that the cited EC provisions implement Policy E-4 and argues that petitioner does not point to any evidence in the record that a neighborhood feature or identity is not preserved or enhanced by the telecommunications tower.

We do not think that the city's interpretation of the Metro Plan is correct. *Gage*, 133 Or App at 349-50. We agree with petitioner that Policy E-4 constitutes an "applicable" Metro Plan policy that the city must separately address. The text of Policy E-4 does not generally direct the city to undertake future planning efforts to fufill its purpose, but rather provides fairly specific and mandatory direction that public facilities such as the

telecommunications tower "be designed and located" to "preserve[] and enhance" desirable features of the area. The context provided in the preamble to the Environmental Resources Design element provides additional support in referring to "daily decisions" being guided by "site planning." Additionally, we are not directed to any language in any of the cited provisions of the EC or any other provision of the EC that indicates that the cited provisions were adopted to implement Policy E-4 fully and make independent application of Policy E-4 unnecessary. Absent any citation by the city or intervenor to language in the EC that indicates that the cited provisions governing PUD and CUP applications implement Policy E-4 fully, or citation to any language in the cited provisions that is sufficiently similar to the language in Policy E-4 that requires the city to ensure that public facilities are "designed and located in a manner that preserves and enhances desirable features of local and neighborhood areas and promotes their sense of identity," we disagree with the city that the cited provisions of the EC implement Policy E-4 fully.

Finally, we agree with petitioner that to the extent the planning commission findings quoted above are intended to constitute alternative findings that the applications are consistent with Policy E-4, those findings are inadequate to explain the basis for so concluding.

The first assignment of error is sustained, in part.

SECOND AND FOURTH ASSIGNMENTS OF ERROR

EC 9.8320(3) requires that "the PUD will provide adequate screening from surrounding properties including, but not limited to, anticipated building locations, bulk, and height."[3] EC 9.8320(13) requires that "[t]he proposed development shall be reasonably compatible and harmonious with adjacent and nearby land uses." In its fourth assignment of

[3] EC 9.0500 defines "screening" as "[a] method of visually shielding or obscuring an area through the use of fencing, walls, berms, or densely-planted vegetation."

error, petitioner argues that the city misconstrued EC 9.8320(3) in determining that the proposal "will provide adequate screening from surrounding properties * * *." In its second assignment of error, petitioner argues that the city's findings are inadequate and there is not substantial evidence in the record to support the city's conclusion that EC 9.8320(13) is satisfied. The city's decision addresses EC 9.8320(3) and EC 9.8320(13) together, and we therefore address petitioner's assignments of error challenging those parts of the decision together.

A. EC 9.8320(3)

In determining whether the proposal provided "adequate screening" as required by EC 9.8320(3) the hearings officer first reviewed the EC definition of "screening" quoted above at *n* 3, and reviewed the dictionary definitions of "shield" and "obscure."[4] He concluded that the bottom approximately 50 feet of the tower could be adequately screened through landscaping, that the top approximately 25 feet of the tower could not practically be screened from view with any landscaping, and that even if it could be screened with landscaping the tower would not function in the way that intervenor requires with that screening. He concluded that the use of the word "adequate" in EC 9.8320(3) means that the entire tower is not required to be screened, but rather that the tower must be screened "to a reasonable extent" considering the proposed use. Record 223-226. He imposed a condition of approval that requires intervenor to work with owners of adjoining properties to design screening that meets their needs. The planning commission agreed with the hearings officer's interpretation of the phrase "adequate screening." Record 13.

In its fourth assignment of error, we understand petitioner to argue that the city misconstrued EC 9.8320(3) when it concluded that requiring screening of the bottom two

[4] *Webster's Third New International Dictionary* (Unabridged 1981) defines "shield" as "1.b: to cut off from observation: conceal, hide * * *." *Id*. at 2094. "Obsure" is defined as "1.b: to conceal or hide from view as by or as if by covering wholly or in part: make difficult to discern." *Id*. at 1557.

thirds of the tower without requiring screening of the top one-third of the tower means that the proposal provides "adequate screening." According to petitioner, "adequate screening" means that all sections of the tower will be screened from view.

The hearings officer considered the definition of "screening" found at EC 9.0500 and the dictionary definitions of "shield" and "obsure" and concluded that the definition of "screening" is somewhat ambiguous given that the definitions of "shield" and "obscure" are not synonymous. He also noted that telecommunications towers are a use that is allowed conditionally in the R-1 zone and that they are allowed to a maximum height of 75 feet. Given the inherently subjective nature of a criterion that requires "adequate screening," we cannot say that the city's interpretation of EC 9.8320(3) as requiring screening of the tower to a reasonable extent is incorrect. *Gage*, 133 Or App at 349-50.

B. EC 9.8320(13)

The hearings officer incorporated the findings and conclusions described above that the proposal satisfies EC 9.8320(3) in concluding that the proposal also satisfies EC 9.8320(13). The hearings officer found:

> "Compatibility is a subjective standard. What one person believes is compatible another person might believe is very incompatible. * * *
>
> "The City Council has already determined that telecommunications towers are permissible in the R-1 zone and there is no restriction in other zones against locating a cell tower any distance from the R-1 zone or any other residential uses. The telecommunications standards in EC 9.5750 have standards for height, setbacks, color, lighting, and use of the tower for display of signs. These telecommunications standards were established to provide clear criteria for providers to meet, but also provide a discretionary process to provide for public input on a case-by-case basis. The proposed tower complies with the height, setbacks, color and lighting * * * standards.
>
> "Basically what is left for the hearing official to consider is visual impact of this tower at this location – not towers in general, because as explained in the above paragraph, the City Council has already concluded that towers may be located in close proximity to residences. The findings and conclusions in response to EC 9.8320(3) are incorporated here." Record 254-55.

The planning commission agreed with the hearings official. Record 18.

In its second assignment of error, petitioner argues that the city's findings are inadequate and there is not substantial evidence in the record to support the city's conclusion that EC 9.8320(13) is met, where the top 25 feet of the tower will not be screened. Petitioner argues that the evidence in the record demonstrates that the tower's location in a residential neighborhood and its height are not "reasonably compatible and harmonious" with the neighborhood.

Although the findings quoted above could be clearer, we understand the hearings officer to have concluded that the proposed tower is reasonably compatible and harmonious with the neighborhood where it meets the objective standards set out in the EC for telecommunications towers, and where the tower will be screened from view while still allowing the tower to function as intended. We cannot say that those findings are inadequate or represent an erroneous interpretation and application of EC 9.8320(13). We also do not think that the evidence cited by petitioner in support of its argument that the tower is not compatible with the neighborhood is so overwhelming that a reasonable person could not find that the tower is compatible, particularly given the inherently subjective nature of the criterion. *Olson v. City of Springfield*, 56 Or LUBA 229, 237 (2008).

Finally, petitioner argues that the city failed to address its argument that the fact that the EC allows telecommunications towers as conditional uses in the R-1 zone does not mean that the proposed tower complies with EC 9.8320(13). The findings quoted above as well as the planning commission's findings that agree with the hearings officer respond to that argument.

The second and fourth assignments of error are denied.

THIRD AND FIFTH ASSIGNMENTS OF ERROR

EC 9.5750 imposes special siting requirements and procedures for telecommunications facilities. EC 9.5750(7)(f) provides:

> "In R-1, R-2, R-3, R-4, C-1, and GO and in all other zones when the adjacent property is zoned for residential use or occupied by a dwelling, hospital, school, library, or nursing home, *noise generating equipment shall be sound buffered by means of baffling, barriers or other suitable means to reduce sound level measured at the property line to 45 dba*." (Emphasis added.)

A. Fifth Assignment of Error

The hearings officer concluded that EC 9.5750(7)(f) requires that the noise generating equipment from the proposed telecommunications facilities be sound buffered to reduce the sound level measured at the property line to 45 dBa. The hearings officer rejected petitioner's assertion below that the 45 dBa limit applies to all noise measurable from the subject property at the property line, including noise that is not generated by the telecommunications equipment, and requires the city to deny the application if the measureable noise level of all noise at the property line exceeds 45 dBa. Record 247. The planning commission agreed with the hearings officer and adopted additional findings:

> "The Planning Commission finds that the Hearings Official was correct in his application of 45 dba standard, specific to the noise-generating telecommunications equipment proposed in the application(s). The Planning Commission also finds that the standard does not necessarily preclude noise-generating telecommunications equipment when ambient noise may already exceed 45 dba. * * * [T]his determination is supported by the plain text of EC 9.5750(7)(f). Further, this is supported by the context provided by EC 9.5750(6)(b)(5), which requires the applicant to submit '[d]ocumentation that the *ancillary facilities* will not produce sound levels in excess of those standards specified in subsection (7) of this section, or designs showing how the sound is to effectively be muffled and reduced pursuant to those standards." Record 10 (emphasis in original.)

In its fifth assignment of error, petitioner repeats its assertion made below that in applying the EC 9.5750(7)(f) 45 dBa standard, the city must consider all noise from all sources, and argues that the planning commission misconstrued applicable law in determining that the EC 9.5750(7)(f) noise standard only requires that the noise generated by the noise generating equipment that is part of the proposed telecommunications facilities be considered. Petitioner argues that the "plain language" of EC 9.5750(7)(f) requires measurement of all

sources of noise and that if the noise from all sources would exceed 45 dba at the property line then the city is required to deny the application for the proposed facility. Petition for Review 24.

Intervenor responds that the planning commission's interpretation is correct. We agree with intervenor that the city's interpretation of EC 9.5750(7)(f) as only applying to the "noise generating equipment" related to the telecommunications facility that is the subject of the application is correct. EC 9.5750(7)(f) imposes a special noise standard on telecommunications facilities, and requires that a telecommunications facility's "noise generating equipment" must be "sound buffered" "to reduce sound level measured at the property line to 45 dBa." The mechanism EC 9.5750(7)(f) requires that an applicant employ to achieve the 45 dBa standard is "sound buffering." While sound buffering on the telecommunication facility site could be effective to reduce sound from the telecommunication facility's noise generating equipment measured at the property line, sound buffering to reduce the sound at the property line from off-site sources would have to be located off-site to be effective. We believe the EC 9.5750(7)(f) sound buffering requirement is logically understood to mean sound buffering on the telecommunication facility site, which the applicant likely owns or leases. We do not think EC 9.5750(7)(f) is correctly interpreted to require sound buffering on adjacent sites, which the applicant likely does not own, lease or otherwise have control over. We also conclude it is unlikely that the drafters of EC 9.5750(7)(f) intended that an application for a telecommunication facility must be denied where the sound from the telecommunication facility's noise generating equipment does not exceed 45 dBa at the property line, simply because the sound from unrelated off-site sources, which the applicant likely has little or no ability to sound buffer, makes the composite of all noise at the property line exceed 45 dBA. We also agree with the planning commission that EC 9.5750(6), which is referenced in the planning commission's findings, appears to be directed at the telecommunications facility under review by the city, not on

sounds emitted from other unrelated sources near the property line. EC 9.5750(6) therefore lends some additional contextual support for the city's interpretation of EC 9.5750(7)(f).

The fifth assignment of error is denied.

B. Third Assignment of Error

As explained above, EC 9.5750(8) requires that ancillary facilities be located underground unless a variance is approved. As defined by EC 9.0500, "Telecommunications Ancillary Facilities' include "[t]he buildings, cabinets, vaults, closures, and equipment required for operation of telecommunication systems including but not limited to repeaters, equipment housing, ventilation and other mechanical equipment." Intervenor initially applied for a variance from the requirement to locate its ancillary facilities above ground. Intervenor submitted a noise study to demonstrate that projected noise from the proposed above ground location of the ancillary equipment met the standard set out in EC 9.5750(7)(f). Petitioner and other project opponents submitted evidence and testimony from an acoustical engineer that challenged some of the assumptions, methodology and conclusions in intervenor's noise study. The hearings officer found the petitioner's expert's evidence and testimony to be more credible.[5] The hearings officer then concluded:

> "At this point, the hearing official has two choices. First, the hearing official could deny the application as not in compliance with this criterion. Second, the hearing official could deny the applicant's request for a variance pursuant to EC 9.5750(9)(c) to allow placement of the facilities above ground. Placing the equipment for the tower in the ground will almost certainly resolve the

[5] The hearings officer found:

> "[T]he entirety of the evidence does not demonstrate that the noise level from the tower equipment would comply with EC 9.5750(7)(f). The reports do show raw numbers that would seem to comply with this standard, but they lack some of the analyses that [petitioner's engineer] conducted. As such, [petitioner's engineer's] reports are the only ones in the record to address specific aspects of noise level, * * *. As well, the hearing official is concerned that the applicant's reports do not address several questions and formulae that [petitioner's expert] raised. * * * [W]here the applicant's engineers do not explain their assumptions and calculations after another qualified person has raised questions about them, the hearing official cannot conclude that those reports demonstrate compliance." Record 248.

> noise issue; however, there is nothing in the record that supports this seemingly obvious conclusion. For this reason, the applicant must still demonstrate that a revised proposal must comply with this noise criterion. Thus, it is appropriate to impose a condition of approval requiring the applicant to provide a new noise study. Because this is an application requirement, it will be necessary for the noise study to be reviewed in the same manner as a [PUD] application. The final PUD application process subject to type II process with notice and a comment period is still required, at which time compliance can be confirmed. * * * The hearings official believes that the applicant can comply with this standard." Record 249.

The hearings officer then denied the variance to locate the ancillary equipment above ground. He imposed a condition of approval that requires intervenor to produce, prior to final PUD approval, a new noise study for the underground facilities that demonstrates that the noise from the telecommunications facility does not exceed 45 dBa at the property line.

In a portion of its third assignment of error, petitioner argues that the city's deferral of a determination of compliance with EC 9.5750(7)(f) to the final PUD approval stage was improper. According to petitioner, the city's decision fails to determine that it is feasible to comply with the standard, and in fact concedes that there is no evidence in the record to show that underground ancillary facilities comply with EC 9.5750(7)(f)'s noise standard.

Intervenor responds by arguing that the city's deferral of its determination of compliance with EC 9.5750(7)(f) to the final PUD stage was proper because the final PUD approval process is infused with the same participatory rights as the tentative PUD phase. Further, intervenor argues that the applicant's noise study showing that aboveground ancillary equipment complies with the 45 dba noise standard is substantial evidence that it is "feasible" to install ancillary equipment in compliance with the noise standard. We understand intervenor to argue that even if its noise study was insufficient to establish that above ground ancillary equipment complies with the noise standard, that noise study is nonetheless sufficient evidence to meet the lesser burden of showing that it is "feasible" to meet that standard with additional evidence or measures, such as undergrounding the equipment, and the noise study is therefore sufficient to support deferral.

In order for the city to postpone a determination of compliance with an applicable criterion to a future proceeding, the city must first determine, based on evidence in the record, that "compliance with the approval criterion is possible." *Gould v. Deschutes County*, 227 Or App 601, 612, 206 P3d 1106 (2009).[6] In *Gould*, the Court explained that a finding that compliance is "possible" is necessary in order to justify a local government's decision to approve rather than to deny an application, where additional evidence is necessary to make the required ultimate finding that the criterion is satisfied or will be satisfied by measures that are "likely and reasonably certain to succeed. *Id*. at 610-612 (*quoting Meyer v. City of Portland*, 67 Or App 274, 678 P2d 741, *rev den*, 297 Or 82 (1984). According to the Court, the reason deferral must be justified by a finding that compliance with an approval standard is "possible" is because if compliance is *not* possible there is no point in deferring consideration of that approval standard: the application should instead be denied. In other words, the purpose of finding that compliance is "possible" is not to establish, even partly, that the application in fact complies or will comply with the approval standard. The purpose is simply to rule out whether immediate *denial* of the application is the more appropriate option.

The Court explained that the evidentiary showing that is required in order for the local government to determine that future compliance is "possible" is not the same evidentiary showing that will be required when a local government makes the required ultimate finding that an approval criterion is satisfied or will be satisfied with measures that are "likely and reasonably certain to succeed." *Id*. at 610. However, the Court did not elaborate on what quantum or quality of evidence is necessary to support a mere finding that

[6] For the reasons explained in *Gould* we do not use the word "feasible" in describing either the "possible" finding that is required to defer an ultimate finding concerning an applicable criterion or the ultimate, deferred finding that the criterion is satisfied or will be satisfied by measures that are "likely and reasonably certain to succeed." *Gould* at 610 n 3.

compliance is "possible," in order to justify deferral of a determination whether the application complies with an approval criterion. Presumably, it is the basic substantial evidence standard: evidence that a reasonable person could rely upon, in this case to conclude that compliance with the 45 dba noise standard is "possible."

As explained above, the hearings officer found that intervenor had not met its burden of showing that its proposed above ground facilities meet the EC 9.5750(7)(f) noise standard. Nevertheless, the hearings officer concluded that he believed that placing those facilities underground would "almost certainly resolve the noise issue," and achieve compliance with the 45 dba standard, and that expression of belief is the functional equivalent of a finding that compliance with the noise standard is "possible."

As we understand the hearings officer's findings, he observed that if equipment that is above ground comes reasonably close to meeting the noise standard, placing that equipment in an underground vault will "almost certainly" meet the standard. However, he found that there is no evidence in the record that supports the "seemingly obvious conclusion" that placing equipment for the tower in the ground will "almost certainly resolve the noise issue," *i.e.* establish compliance with the 45 dba standard. The hearings officer apparently presumed that placing the equipment in the ground is likely to reduce noise impacts compared to placing the equipment above ground, and expressed the belief that a noise study of underground equipment would "almost certainly" demonstrate compliance with the 45 dba noise standard. The presumption that placing equipment underground is likely to reduce noise impacts at the property line compared to placing the equipment above ground seems like a common sense presumption. However, no party cites us to any evidence in the record supporting that presumption.

Our resolution of the first assignment of error will require remand in any event. Because that remand will provide the city an opportunity to allow the parties to submit additional evidence regarding the possible validity of the hearings officer's presumption, we

decline to decide here whether the lack of any evidence in the record of this appeal to directly support that presumption provides another basis for remand. We do not reach this portion of the third assignment of error.

In a portion of its third assignment of error, petitioner also argues that the city erred in determining that EC 9.8320(13), which requires the city to determine that "[t]he proposed development [is] reasonably compatible and harmonious with adjacent and nearby land uses," is met, where there is no noise study detailing the noise generated by the underground equipment. We do not understand the hearings officer to have concluded that EC 9.8320(13) requires the city to separately determine whether the noise from the facility is reasonably compatible with the neighboring land uses. Rather, we understand the hearings officer to have concluded that satisfaction of the noise standard set out at EC 9.5750(7)(f) will mean that the telecommunications facility is "reasonably compatible and harmonious" with the adjacent residential uses under EC 9.8320(13), as far as noise is concerned. Record 255. Petitioner does not address that finding or otherwise explain why future satisfaction of EC 9.5750(7)(f) will not also satisfy EC 9.8320(13) with respect to noise from the facility. Accordingly, petitioner's argument regarding EC 9.8320(13) provides no basis for reversal or remand.

Finally, in its third assignment of error, petitioner also argues that without a noise study for the underground equipment, there is not substantial evidence in the record to support the city's determination that EC 9.8320(6), which requires the city to determine that "[t]he PUD will not be a significant risk to public health and safety, including but not limited to soil erosion, slope failure, stormwater or flood hazard, or an impediment to emergency response" is satisfied with respect to the health and safety impacts of noise levels from the underground equipment. Intervenor does not respond to petitioner's argument.

The planning commission found in relevant part:

> "While the hearings official did not more specifically address noise as a health and safety issue under the discretionary PUD approval criteria as the appellant suggests is needed, the decision thoroughly addresses the issue of noise impacts in context with other more specific governing standards and approval criteria for telecommunications facilities, including federal standards.
>
> "With the additional findings and modified conditions of approval addressing noise impacts and requirements for undergrounding ancillary equipment above, and to the extent that noise impacts may also be relevant under EC 9.8320(6), the Planning Commission concludes that [EC 9.8320(6)] is met." Record 16.

We understand the findings quoted above to take the position that noise levels from the telecommunications facility do not pose a risk to public health and safety as long as the noise levels do not exceed the noise standard set out in EC 9.5750(7)(f). We do not think that a noise study is required in order for the city to conclude, as we understand it to have concluded, that noise levels that meet the EC noise standard do not pose a significant risk to public health and safety.

The third assignment of error denied, in part.[7]

The city's decision is remanded.

[7] We deny the third assignment of error in part because, as explained in the text of the opinion, we do not reach part of the third assignment of error

Appendix A

9.8090 Conditional Use Permit Approval Criteria - General. A conditional use permit shall be granted only if the proposal conforms to all of the following criteria:

(1) The proposal is consistent with applicable provisions of the Metro Plan and applicable refinement plans.

(2) The location, size, design, and operating characteristics of the proposal are reasonably compatible with and have minimal impact on the livability or appropriate development of surrounding property, as they relate to the following factors:

(a) The proposed building(s) mass and scale are physically suitable for the type and density of use being proposed.

(b) The proposed structures, parking lots, outdoor use areas or other site improvements which could cause substantial off-site impacts such as noise, glare and odors are oriented away from nearby residential uses and/or are adequately mitigated through other design techniques, such as screening and increased setbacks.

(c) If the proposal involves a residential use, the project is designed, sited and/or adequately buffered to minimize off-site impacts which could adversely affect the future residents of the subject property.

(3) The location, design, and related features of the proposal provides a convenient and functional living, working, shopping or civic environment, and is as attractive as the nature of the use and its location and setting warrant.

9.8320 Tentative Planned Unit Development Approval Criteria- General. The hearings official shall approve, approve with conditions, or deny a tentative PUD application with findings and conclusions. Decisions approving an application, or approving with conditions shall be based on compliance with the following criteria:

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(3) The PUD will provide adequate screening from surrounding properties including, but not limited to, anticipated building locations, bulk, and height.

(4) The PUD is designed and sited to minimize impacts to the natural environment by addressing the following:

(a) Protection of Natural Features.

1. For areas not included on the City's acknowledged Goal 5 inventory, the preservation of significant natural features to the greatest degree attainable or feasible, including:

a. Significant on-site vegetation, including rare plants (those that are proposed for listing or are listed under State or Federal law), and native plant communities.

b. All documented habitat for all rare animal species (those that are proposed for listing or are listed under State or Federal law).

c. Prominent topographic features, such as ridgelines and rock outcrops.

d. Wetlands, intermittent and perennial stream corridors, and riparian areas.

e. Natural resource areas designated in the Metro Plan diagram as "Natural Resource" and areas identified in any city-adopted natural resource inventory.

2. For areas included on the City's acknowledged Goal 5 inventory:

a. The proposed development's general design and character, including but not limited to anticipated building locations, bulk and height, location and distribution of recreation space, parking, roads, access and other uses, will:

(1) Avoid unnecessary disruption or removal of attractive natural features and vegetation, and

(2) Avoid conversion of natural resource areas designated in the Metropolitan Area General Plan to urban uses when alternative locations on the property are suitable for development as otherwise permitted.

b. Proposed buildings, road, and other uses are designed and sited to assure preservation of significant on-site vegetation, topographic features, and other unique and worthwhile natural features, and to prevent soil erosion or flood hazard.

(b) Tree Preservation. The proposed project shall be designed and sited to preserve significant trees to the greatest degree attainable or feasible, with trees having the following characteristics given the highest priority for preservation:

1. Healthy trees that have a reasonable chance of survival considering the base zone or special area zone designation and other applicable approval criteria;

2. Trees located within vegetated corridors and stands rather than individual isolated trees subject to windthrow;

3. Trees that fulfill a screening function, provide relief from glare, or shade expansive areas of pavement;

4. Trees that provide a buffer between potentially incompatible land uses;

5. Trees located along the perimeter of the lot(s) and within building setback areas;

6. Trees and stands of trees located along ridgelines and within view corridors;

7. Trees with significant habitat value;

8. Trees adjacent to public parks, open space and streets;

9. Trees located along a water feature;

10. Heritage trees.

(c) Restoration or Replacement.

1. For areas not included on the city's acknowledged Goal 5 inventory, the proposal mitigates, to the greatest degree attainable or feasible, the loss of significant natural features described in criteria (a) and (b) above, through the restoration or replacement of natural features such as:

a. Planting of replacement trees within common areas; or

b. Re-vegetation of slopes, ridgelines, and stream corridors; or

c. Restoration of fish and wildlife habitat, native plant habitat, wetland areas, and riparian vegetation.

To the extent applicable, restoration or replacement shall be in compliance with the planting and replacement standards of EC 6.320.

2. For areas included on the city's acknowledged Goal 5 inventory, any loss of significant natural features described in criteria (a) and (b) above shall be consistent with the acknowledged level of protection for the features.

(d) Street Trees. If the proposal includes removal of any street tree(s), removal of those street tree(s) has been approved, or approved with conditions according to the process at EC 6.305.

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(8) Residents of the PUD will have sufficient usable recreation area and open space that is convenient and safely accessible.

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(12) The proposed development shall have minimal off-site impacts, including such impacts as traffic, noise, stormwater runoff and environmental quality.

(13) The proposed development shall be reasonably compatible and harmonious with adjacent and nearby land uses.