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

FAIRMOUNT NEIGHBORHOOD ASSOCIATION, LAUREL HILL VALLEY CITIZENS, and JOINT RESPONSE COMMITTEE OF THE FAIRMOUNT NEIGHBORHOOD ASSOCIATION AND THE LAUREL HILL VALLEY CITIZENS,
Petitioners,

vs.

CITY OF EUGENE,
Respondent,

and

TOM DREYER and CYNTHIA DREYER,
Intervenors-Respondents.

LUBA No. 2019-078

FINAL OPINION
AND ORDER

Appeal from City of Eugene.

Sean T. Malone, Eugene, filed the petition for review and a reply brief and argued on behalf of petitioners.

Lauren A. Sommers, Assistant City Attorney, Eugene, filed a response brief and argued on behalf of respondent.

Bill Kloos, Eugene, filed a response brief and argued on behalf of intervenors-respondents. With him on the brief was the Law Office of Bill Kloos, PC.

ZAMUDIO, Board Chair; RYAN, Board Member; RUDD, Board Member, participated in the decision.

AFFIRMED DATE 12/16/2019

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

Opinion by Zamudio.

NATURE OF THE DECISION

Petitioners appeal a city planning commission decision approving a tentative plan for a 34-lot planned unit development (PUD).

MOTION TO INTERVENE

Tom Dreyer and Cynthia Dreyer (intervenors), the property owners and applicants below, move to intervene on the side of the respondent. No party opposes the motion, and it is granted.

BACKGROUND

This is the second time this tentative PUD dispute has been before LUBA. We previously remanded the city's prior approval of the tentative PUD in *Dreyer v. City of Eugene*, ___ Or LUBA ___ (LUBA Nos 2018-074/080, Nov 20, 2018), *aff'd*, 296 Or App 490, 437 P3d 1236 (2019) (*Dreyer*). We reiterate the facts from that decision:

> "The subject property is a 13-acre area consisting of five tax lots, developed with three single-family dwellings and one multifamily dwelling. The property is planned and zoned for low density residential use (R-1), and included in the city's inventory of buildable lands. The property is located in the South Hills portion of the city, in an area of steep slopes (generally, slopes 20 percent or steeper). The western half of the property is part of the top of a ridgeline that is above 900 feet in elevation, where the existing dwellings are located. Capital Drive borders the western boundary and provides access to the property. The eastern half of the property slopes steeply down the ridgeline to the east, with slopes generally exceeding 20 percent and reaching 40 percent in some portions. East of the property is a heavily forested area that includes a public hiking trail, the Ribbon Trail. The 80-acre Hendricks Park borders the

property to the north." *Id.* at ___ (slip op at 4).

Floral Hill Drive is located east of and downslope from the subject property and provides access to multiple dwellings.

For each type of development application that involves needed housing, the Eugene Code (EC) provides for a "general" approval process that includes some discretionary or unclear or subjective standards, and a "needed housing" approval process that includes only clear and objective standards. EC 9.8325; *see Home Builders Assoc. v. City of Eugene*, 41 Or LUBA 370 (2002) (discussing the city's two-track system). Intervenors applied for PUD approval under the general track at EC 9.8320.

The pertinent tentative PUD approval criterion requires intervenors to establish 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." EC 9.8320(6). In addition, intervenors were required to complete and submit an "adequate review of both on-site and off-site impacts of any development by a qualified engineering geologist" for development on steep slopes pursuant to the South Hills Study (SHS) refinement plan policy that applies to the subject property.[1] EC 9.9630(3)(c).

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[1] As the city explained in the challenged decision, the SHS polices are directly applicable to the tentative PUD application through EC 9.8320(2), which requires the applicant to demonstrate that "[t]he PUD is consistent with applicable adopted refinement plan policies."

In the prior proceeding, intervenors submitted the 2017 geotechnical analyses, which were based in large part on 10 test pits that were clustered within a relatively flat portion of the subject property proposed to be developed with residential lots. *See* Record 10 (describing 2017 geotechnical analyses); Record 404 (map showing location of the nine 2016 test pits). In *Dreyer*, we remanded the city's prior approval of the tentative PUD because we agreed with the petitioners who opposed the PUD approval that the city should not have relied on intervenors' 2017 geotechnical analyses to determine that the PUD will not be a significant risk to public health and safety on-site and off-site. We also concluded that the city's findings did not adequately address off-site impacts and that the 2017 geotechnical analyses "provides at best conclusory statements regarding off-site impacts." *Dreyer*, ___ Or LUBA at ___ (slip op at 39).

The planning commission did not hold a public hearing on remand but accepted written submissions. Intervenors submitted supplemental geotechnical analyses (2019 geotechnical analyses), which include assessment of an additional nine test pits that were more broadly distributed across the subject property. Intervenors also submitted a technical stormwater review (2019 technical stormwater review). Petitioners submitted expert evidence criticizing and contradicting intervenors' analyses and other evidence of on-site slope conditions and off-site conditions along the Ribbon Trail and Floral Hill Drive. The planning commission issued a written decision approving the tentative PUD with conditions. This appeal followed.

ASSIGNMENT OF ERROR

The city found that "the nineteen test pits excavated by the applicant are generally representative of the subsurface conditions on the subject property," and that "the portions of the site that are most susceptible to landslides either include representative test pits or will be protected by a proposed preservation area which does not allow for construction of private improvements." Record 11.

The city noted that the 2019 geotechnical analyses identified areas of previous slide activity but did not identify signs of recent or active landslide activity. The 2019 geotechnical analyses concluded, and the city accepted, that "[n]ew landslide activity is not expected, provided that primary landslide triggers are mitigated during the site development. These triggers are: removing material from the base of a slope or toe, adding surcharge loads to the top of a slope, and increasing water infiltration into existing landslide mass." *Id.*

The city concluded that the proposed development will avoid and mitigate the three identified landslide triggers. The proposal does not include removing materials from the bottom of slopes. The proposal minimizes the amount of fill placed at the top of slopes by selectively positioning development and not leaving fill materials in areas susceptible to slides. The stormwater management system, explained in further detail below, will detain stormwater from impervious surfaces and discharge it in a controlled manner that mimics existing conditions. Record 11–12.

Petitioners argue that the city's finding that the PUD will not create a significant risk to public health and safety is not supported by adequate findings based on substantial evidence. Intervenors respond that petitioners' assignments of error fail to address the evidence and findings related to the three identified landslide triggers. Intervenors argue that their geotechnical analyses and the city's findings adequately address on-site and off-site development impacts. We agree with intervenors and affirm the city's decision for the reasons explained below.[2]

A. Number and Location of Test Pits

Petitioners argue that the 19 test pits are not representative of the site conditions and thus, the 2019 geotechnical analyses, and the city's findings based on the 2019 geotechnical analyses, are unsupported by substantial evidence. Petitioners observe that, of the 19 test pits, only one is placed within an identified area of landslide activity. Petitioners point to their expert's testimony that the number and location of test pits fail to accurately capture potential slope movements. Petitioners argue that the test pits did not capture all of the areas of landslide concern on and off-site, and thus, the conclusions drawn from the test pits do not accurately reflect the presence or absence of slide risk.

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[2] In the sole assignment of error, petitioners raise multiple sub-assignments of error, with some overlapping arguments. We address the substantive arguments instead of the individual sub-assignments of error.

The 2019 geotechnical analyses explained that the test pits were not located in a manner intended to maximize covering a broad swath of the subject property. Instead, the additional test pits were located in accordance with engineering practices and the City of Eugene Standards for Geological and Geotechnical Analysis, as adopted in the city's Administrative Order No. 58-02-25-F, which implements and adopts standards for geological and geotechnical analyses required by EC 9.6710.

Petitioners cite EC 9.6710 to support their argument that the test pits are inadequate. The city expressly found that EC 9.6710 is not an applicable criterion for this PUD, because the subject property is within the city's Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) inventory. The city explained:

> "The Planning Commission recognizes that the standards of Administrative Order No. 58-02-25-F are not directly applicable to this tentative PUD application.[3] Nevertheless, the Planning Commission finds that Administrative Order No. 58-02-25-F provides a useful guide to the requirements for geotechnical evaluations, and specifically the adequacy of test pit locations, and provides helpful context regarding the question of whether the applicant's geotechnical evaluation can be relied upon to determine the application's consistency with EC 9.8320(6) and the applicable geotechnical recommendations from the South Hills Study. City Public Works staff has opined that the placement and quantity of the applicant's test pits (including the nine new test pits) meet the minimum requirements in Administrative Order No. 58-02-25-F for number and spacing of test pits. The Planning Commission therefore finds that the applicant has provided the City with substantial evidence that the location of the test pits adequately identify the geologic features of the site.

> "[3] Administrative Order No. 58-02-25-F sets out specific requirements for geotechnical evaluations subject to compliance with EC 9.6710. Those standards are not directly applicable in the case of Capital Hill PUD due to its inclusion on the City's Goal 5 inventory - see EC 9.6710(3)(f) (activities on land included in the City's acknowledged Goal 5 inventory are exempt from the requirements of EC 9.6710)." Record 10–11.

Petitioners do not assign error to the city's finding that EC 9.6710 does not apply to the tentative PUD application. Instead, petitioners argue that, because intervenors and the city referenced Administrative Order No. 58-02-25-F in concluding that the location and number of test pits were adequate, the city was required to find compliance with EC 9.6710. According to petitioners, the city used the standards of EC 9.6710 "as a proxy for satisfying EC 9.8320(6)." Petition for Review 17 n 5. Petitioners argue that the city misconstrued and misapplied EC 9.6710 and Administrative Order No. 58-02-25-F.

The city's reference to Administrative Order No. 58-02-25-F as support for its determination that number and location of test site pits were adequate to represent the site does not make that guidance applicable criteria. Accordingly, petitioners' arguments regarding EC 9.6710 provide no basis for reversal or remand, and we do not address them further.

The number and location of test pits is not determinative of the adequacy of the city's analysis. Nothing in EC 9.8320(6) prescribes that test pits capture a specific area of the subject property. Instead, the city was free to accept and rely upon the geotechnical analyses, which includes test pits, on-ground observations,

and review of maps, aerial photographs, and review of federal and state agency soil maps, and that information is information upon which a reasonable person would rely to determine that the PUD does not pose a significant risk to public health and safety.

We also conclude that the city's findings are adequate because the findings set out the applicable approval criteria, explain the facts relied upon to reach the conclusion that the applicable criteria are satisfied, and address specific issues raised by petitioners. *See Heiller v. Josephine County*, 23 Or LUBA 551, 556 (1992) (adequate findings set out the applicable approval criteria and explain the facts relied upon to reach the conclusion whether the applicable criteria are satisfied); *Space Age Fuel, Inc. v. Umatilla County*, 72 Or LUBA 92 (2015) (findings must address and respond to specific issues relevant to compliance with applicable approval standards that were raised in the proceedings below). The city was faced with a decision between conflicting expert testimony. LUBA will not second guess a land use decision maker's choice between conflicting expert testimony, so long as it appears to LUBA that a reasonable person could decide as the decision maker did based on all of the evidence in the record. *Willamette Oaks, LLC v. City of Eugene*, 67 Or LUBA 351, *aff'd*, 258 Or App 534, 311 P3d 527 (2013). Viewing the record as whole, we conclude that the city could decide that the PUD will not be a significant risk to public health and safety, despite petitioners' expert's criticism of the number and placement of the test pits.

B. Buildable Areas

The PUD includes buildable areas within identified landslide areas, but only one test pit was located in a landslide area on the buildable portion of a PUD lot. Record 406–07 (maps depicting PUD lots, landslide areas, and test pits). Specifically, it appears that at least seven residential lots include areas of mass movement on the eastern portions of those lots. Further east on those same lots are preservation areas for individual lots, which may not be developed. Record 63 (site plan showing preservation areas). Petitioners argue that a single test pit provides inadequate information for the city to review on-site and off-site impacts. Petitioners argue that areas susceptible to landslides will not be protected through preservation areas because some buildable portions of PUD lots include landslide-susceptible areas.

Intervenors respond that the city found that the landslide areas identified by petitioners are areas of historic land movement, as defined by the Department of Geology and Mineral Industries (DOGAMI) and verified by intervenors' geotechnical analyses. Petitioners argue that DOGAMI's mapping indicates that the landslide areas are "historic and/or active," and that only intervenors' geotechnical analysis alleges the landslides are "ancient." Record 441. We understand that intervenors' expert's assessment is based on test pits, on-ground observations, and review of maps, aerial photographs, and review of federal and state agency soil maps. Other than arguing that more test pits are required,

petitioners have not demonstrated that a reasonable person would not rely on intervenors' expert's analysis that the landslides are historic and not active.

Intervenors' geotechnical analyses concluded that dwellings could be designed and constructed safely on the existing topography, including the lots with historic slide areas within the buildable area. The city accepted that analysis. We conclude that the city's decision adequately addresses petitioners' concerns that certain lots contain buildable areas on identified historic landslides. We also conclude that the city's conclusion that the PUD will not be a significant risk is supported by substantial evidence.

C. Condition 10

Condition 10 provides:

> "A geotechnical analysis from a certified engineer, with specific recommendations for design and construction standards, shall be provided with any applications for Privately Engineered Public Improvement (PEPI) permits, as well as building permits and site development permits for the initial construction of infrastructure and residences on individual lots. The development proposed with each permit shall adhere to the recommended standards for design and construction as contained in applicant's geotechnical analyses dated February 6, 2017 and May 14, 2019." Record 20.

The city found that the PUD complies with EC 9.8320(6) and the SHS recommendations for development without Condition 10, but adopted Condition 10 "as belt and suspenders to ensure that the individual improvements constructed on the site are constructed in a way that is geotechnically sound and that complies with the [intervenors' 2017 and 2019] geotechnical analyses."

Record 18. The city explained that "imposition of Condition of Approval #10 does not defer a finding of compliance with applicable approval criteria to a subsequent building permit approval process that does not provide notice or public participation." *Id.* The city explained:

> "[S]ite-specific geotechnical reports are important to ensure that roads, houses and other improvements will be constructed in a way that is appropriate to the site conditions and will ensure that the improvements continue to function well long-term. For example, a site-specific geotechnical analysis may recommend that a house built on a steeper slope include piers or a deeper foundation." *Id.*

Petitioners argue that Condition 10 is inadequate to ensure compliance with EC 9.8320(6) because intervenors' 2017 and 2019 geotechnical analyses do not include site-specific recommendations. Petitioners further argue that Condition 10 impermissibly defers a determination of compliance with EC 9.8320(6) to a later time without a requisite feasibility finding or opportunity for public participation during the building permit stage. Petition for Review 29–32.

The city concluded that EC 9.8320(6) is satisfied without Condition 10. One major flaw with petitioners' argument challenging Condition 10 is that petitioners do not address or assign error to the city's finding that the PUD satisfies EC 9.8320(6) *without* Condition 10. In this decision, we affirm the city's conclusion that EC 9.8320(6) is satisfied. *See Meyer v. City of Portland*, 67 Or App 274, 678 P2d 741, *rev den*, 297 Or 82 (1984) (public participatory rights in a two-stage PUD process may be limited to the first stage, so long as findings demonstrating compliance with all mandatory, discretionary approval criteria are

adopted as part of the first stage approval and those findings are adequate and supported by substantial evidence). The city did not defer a finding of compliance with EC 9.8320(6) to a later review; thus, the city was not required to find that compliance with EC 9.8320(6) was feasible as conditioned. Because we agree with the city that Condition 10 is not required to establish compliance with EC 9.8320(6), the fact that intervenors' 2017 and 2019 geotechnical analyses do not include site-specific recommendations provides no basis for reversal or remand.

Intervenors' 2017 and 2019 geotechnical analyses suggest that site-specific developments should avoid and mitigate the three basic triggers for slope failure: (1) removing material from the base of a slope, (2) adding surcharge loads to the top of a slope, and (3) increasing water infiltration into existing landslide mass. The 2019 geotechnical analyses concluded, and the city accepted, that "[n]ew landslide activity is not expected, provided that primary landslide triggers are mitigated during the site development." Record 11. Petitioners have not explained, and we see no reason why, site-specific geotechnical analyses following those recommendations are inadequate as additional measures to prevent on-site and off-site risks to public health and safety. *See Dreyer*, ___ Or LUBA at ___ (slip op at 40) ("A condition of approval that requires that additional or confirming information be submitted at the building permit stage could, in other circumstances, represent a permissible 'belt and suspenders' approach to ensuring compliance with an approval criterion, if the local government adopts an adequate finding, supported by substantial evidence, that

the approval criterion is satisfied."). Petitioners' challenge to Condition 10 provides no basis for remand.

D. Stormwater Discharge

The city found that "off-site impacts of the development and the geologic risks to off-site public health and safety result primarily from stormwater run-off from impervious surfaces and potential landslides." Record 13. The proposed development will manage stormwater runoff "by installing several detention systems to restrict the peak flow rate of the post-development conditions to a rate equal to or less than pre-development conditions." Record 11. Stormwater runoff from the detention systems will be piped to two "level spreaders" located downslope and east of the PUD. The city found that the proposed stormwater management system, in conjunction with Conditions 17 and 18, "will mimic the existing conditions on the development site related to stormwater" and would not result in any additional risk to the surrounding area.[3] Record 11–13.

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[3] Conditions 17 and 18 provide:

> "17. The final PUD plans shall show that the stormwater runoff on the north and south ends of the additional Capital Drive road width will be treated through either filtration or mechanical treatment methods in compliance with the Public Improvement Design Standards manual.
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> "18. The final PUD plans shall show that the stormwater runoff on the north and south ends of the proposed private street will be treated through a filtration facility in compliance with the Stormwater Management Manual." Record 21.

Petitioners argue that stormwater discharge will be directed to landslide areas on the eastern edge of the subject property and create a risk of stormwater intrusion, erosion, and landslide to homes off-site and downslope of the PUD on Floral Hill Drive. Petitioners argue that the city's stormwater findings and conclusions are inadequate and not based on substantial evidence.

Petitioners dispute intervenors' 2019 technical stormwater review and argue that the conclusions therein are based on incorrect calculations. Petitioners point to their expert's criticism and analysis of the proposed stormwater management system. Petitioners' expert opined that (1) intervenors' analysis failed to establish the soil conditions at the level spreader discharge point, and (2) based on an estimated maximum volume of water to be discharged at the level spreaders and the existing soil survey, over 99 percent of the stormwater will run as surface water over Ribbon Trail and towards the dwellings downslope from the PUD. Record 422–23.

The 2019 technical stormwater review demonstrates, and the city found, that the system will produce stormwater runoff at the level spreaders that is the same as pre-development runoff. The designed system meets that standard, despite the fact that the system collects water from impervious areas and concentrates the flow to discharge at the level spreaders. As intervenors explain, the system is designed to collect water, detain it, and discharge it at a controlled rate that matches the pre-development discharge across the same section, despite collecting runoff from a larger area. Intervenors' Response Brief 10, 30; Record

358–59. Petitioners do not dispute those components of the stormwater system. Intervenors respond that petitioners' expert criticism of the 2019 technical stormwater review is based on incorrect assumptions and calculations.

Again, the city was faced with a decision between conflicting expert testimony regarding PUD stormwater management and discharge. Petitioners' arguments on appeal reduce to a disagreement with the city's choice between conflicting evidence. Viewing the record as whole, we conclude that the city could decide that the PUD will not be a significant risk to public health and safety, despite petitioners' expert's criticism of the 2019 stormwater review. *Willamette Oaks, LLC*, 67 Or LUBA 351.

E. Soil Creep

Petitioners submitted evidence of recent soil movement on the steep eastern slopes of the subject property. That evidence includes a summary of testimony from people who reside in dwellings east of and downslope from the subject property along Floral Hill Drive. That summary includes statements that homes on Floral Hill Drive have experienced wet conditions under and around dwellings and foundation problems related to soil movement. Record 416. Petitioners also submitted photographs of an old barn on the eastern slope of the subject property that appears to be structurally deformed by down-slope movement. Record 412–15.

Petitioners submitted expert testimony that, while petitioners' expert was unable to determine the age of the barn deformation, that evidence "proves that

the PUD property itself has been affected by slope movement very recently." Record 411 (boldface omitted). In response, intervenors' attorney submitted a letter arguing that there is no evidence that the barn is supported by a properly engineered foundation, and the deformation demonstrates "normal soil creep." Record 345. Intervenors' expert geotechnical engineer had previously defined "soil creep" in a letter dated March 20, 2018:

> "Soil creep is the downhill movement of near surface soil (usually the upper 2- to 3-feet) due to gravity, freeze/thaw, and shrink/swell effects. The soil creep may cause a pistol-butting of tree trunks during their early growth phase until substantial root mass and trunk strength is developed. Creep is common on most hillsides and does not indicate gross landslide movement. Creep movement is generally mitigated by modern foundation systems and control of soil moisture and temperature under and around the residence to where the slow movement is unnoticeable over the typical lifespan of a residence." Record 495.

The city found that "some soil creep is natural in areas of steep slopes and does not indicate significant landslide activity" and accepted intervenors' geotechnical analyses, which indicate that the slopes are "grossly stable in their current condition" despite surface soil creep in some areas. Record 14. The city also noted that "modern foundations are designed to minimize the effects of soil creep." *Id.*

Petitioners argue that the city's findings are inadequate and unsupported by substantial evidence. Petitioners argue that the evidence of the barn deformation demonstrates that, contrary to intervenors' geotechnical analyses, the eastern slopes of the subject property are currently or recently moving and

are not stable. Petitioners argue that their expert testimony was required to be rebutted with expert testimony, and that the city could not rely on intervenors' attorney's testimony regarding soil creep. Petitioners criticize intervenors' expert testimony regarding soil creep because it predates the evidence submitted related to the old barn. Petitioners argue that the evidence related to the old barn compels further expert investigation and expert response.

Intervenors respond, and we agree, that the city's findings differentiate soil creep from mass landslide movement and the city's findings are supported by substantial evidence. The city was not required to accept petitioners' conclusion that the deformed old barn demonstrates present mass movement on the eastern slope of the subject property. Contrary to petitioners' criticism, it does not appear to us that the city relied solely on intervenors' attorney's lay statement to reach that conclusion. Rather, the city accepted intervenors' geotechnical analyses, which indicate that the slopes are "grossly stable in their current condition" despite areas of surface soil creep. We conclude that, looking at the record as a whole, a reasonable person could conclude that surface soil creep is distinct from mass land movement (*i.e.*, landslide), particularly, based upon intervenors' expert geotechnical testimony that evidence of soil creep does not indicate gross landslide movement.

F. Qualified Engineering Geologist

Petitioners argue that the city misconstrued the SHS refinement plan requirement that intervenors submit an "adequate review of both on-site and off-

site impact of any development by a qualified engineering geologist occur" before development is approved on steep slopes. EC 9.9630(3)(c). Petitioners argue that only one of the team members of intervenors' engineering team that produced intervenors' geotechnical analyses is a certified, and thus a "qualified," engineering geologist. Petitioners point to certain on-the-ground on-site and off-site observations that were made by engineers who are not certified engineering geologists. As we understand it, petitioners argue that the city was precluded from relying on geotechnical analyses that are based on data, observations, and opinions produced by engineers who are not certified engineering geologists.

We accept for the sake of this decision petitioners' argument that "qualified engineering geologist" means certified engineering geologist. The record demonstrates that intervenors' certified engineering geologist signed and stamped the geotechnical reports, made on-the-ground observations, and reviewed the other engineers' observations. The SHS requires "adequate *review* of both on-site and off-site impact of any development by a qualified engineering geologist occur." The city reasonably determined that "adequate review" does not require all observations be made first-hand and in-person by a certified engineering geologist. The city did not misconstrue the standard, and the city's finding that the SHS requirements are satisfied is supported by substantial evidence.

Petitioners' assignment of error is denied.

The city's decision is affirmed.