

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

3
4 SCOTT FERNANDEZ,
5 *Petitioner,*

6
7 and

8
9 JEFFREY E. BOLY and FLOY JONES,
10 *Intervenors-Petitioners,*

11
12 vs.

13
14 CITY OF PORTLAND,
15 *Respondent.*

16
17 LUBA No. 2015-051

18
19 FINAL OPINION
20 AND ORDER

21
22 Appeal from City of Portland.

23
24 Ty K. Wyman, Portland, filed the petition for review and argued on
25 behalf of petitioner. With him on the brief was Dunn Carney Allen Higgins &
26 Tongue LLP and Michael E. Rose and Creighton & Rose PC.

27
28 Kathryn S. Beaumont, Chief Deputy City Attorney, Portland, filed the
29 response brief and argued on behalf of respondent.

30
31 HOLSTUN, Board Member; BASSHAM, Board Chair; RYAN, Board
32 Member, participated in the decision.

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34 AFFIRMED 03/02/2016

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

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NATURE OF THE DECISION

Petitioner appeals a city council (Council) decision granting demolition review approval to remove two historic reservoirs and a related historic building.

FACTS

The historic reservoirs that are the subject of this appeal (Reservoirs 3 and 4) were constructed in the latter part of the nineteenth century, during the “City Beautiful” movement, and became operational in 1896.¹ The reservoirs and a number of other related structures are examples of Romanesque architecture and, when constructed, were readily accessible by the public. The reservoirs are located in Washington Park, located west of downtown Portland between the Kings Hill and Arlington Heights neighborhoods. There is no question that the reservoirs are a significant city historic resource.² The reservoirs and a number of other related buildings were included in the

¹ The related historic building, the Weir Building, was constructed in 1946. The city’s other open reservoirs, Reservoirs 1, 5 and 6, are located at Mt. Tabor and are not at issue in this appeal. A sixth Mt. Tabor reservoir, Reservoir 2, has been removed. Record 2025.

² The challenged decision states “[i]t is without question that the Washington Park Reservoirs are among the City of Portland’s most significant historic resources.” Record 42.

1 Washington Park Reservoirs Historic District, which was listed as a locally
2 significant resource in the National Register of Historic Places in 2004.³

3 When Reservoir 4 was constructed, the toe of an ancient landslide was
4 excavated, activating that landslide. As a result the reservoirs have required
5 continual maintenance and repair from the time they were first constructed. The
6 landslide-related problems, with resulting concerns about dangers to the
7 reservoirs and adjoining downgrade properties, have resulted in the reservoirs
8 being drained or only partially filled in recent years. The reservoirs have been
9 closed to public access for many years “for security, liability and water quality
10 reasons.” Record 452.

11 Once the reservoirs and Weir Building are removed, the city plans to
12 construct a number of improvements in their place. In the area now occupied
13 by Reservoir 3, the city plans to construct a below-ground reservoir, with a
14 tiered reflecting pool on top of the underground reservoir in approximately the
15 same footprint now occupied by Reservoir 3. A reflecting pool and stormwater
16 swale are to be constructed in approximately the same location as Reservoir 4,
17 but with a reduced footprint. Record 433, 455, 999, 1015-17 (reproduced in
18 color in the Amended Respondent’s Brief’s Appendix). We understand the

³ Like the reservoirs, the Weir Building is listed among the contributing historic resources for the Washington Park Reservoirs Historic District. However, the Weir Building is only referred to in passing in the challenged decision and the parties’ briefs. Like the parties, our focus in this decision is on the historic reservoirs.

1 reflecting pools to represent an attempt to preserve some of the aesthetic
2 qualities of the existing reservoirs.

3 The underground reservoir will be located outside the existing landslide
4 footprint, which will allow construction of a number of measures to attempt to
5 stabilize the landslide. As mitigation for the loss of the reservoirs and Weir
6 Building, the city is proposing a number of improvements to the other
7 contributing historical structures in the Washington Park Reservoirs Historic
8 District that are to remain.⁴

⁴ The findings include the following description of the proposed mitigation:

“* * * The proposed restoration activities include the following: rehabilitation of Dam 3, including repair and reconstruction (as needed) of the parapet wall and balustrade, and removal of unnecessary piping and equipment; rehabilitation of Dam 4, including repair and reconstruction (as needed) of the parapet wall and balustrade, and removal of unnecessary piping and equipment; restoration of windows to Pump House 1, affording interior views to ‘Thumper’ (the historic water pump inside); structural upgrade, roof replacement, replacement of non-historic metal doors with more appropriate doors, and removal of unnecessary equipment to Gatehouse 3; replacement of non-historic metal doors with more appropriate doors and removal of unnecessary equipment to Gatehouse 4; cleaning of the Generator Building and all other buildings and structures to remain; plus patching of holes, and crack and spall repair on all contributing buildings and structures to remain. In addition, retention and rehabilitation of the historic fencing along Dams 3 and 4 and along the east and south edges of Reservoir 4, rehabilitation of the historic light post ironwork, renovation of 3 decorative concrete urns, and removal of non-historic incompatible lighting and introduction of new visually unobtrusive lighting is also proposed. While Reservoirs 3 and 4

1 **INTRODUCTION**

2 The city’s Historic Resources Reviews are described at Portland City
3 Code (PCC) 33.846. One of the types of Historic Resources Review is
4 Demolition Review. PCC 33.846.080. The purpose of Demolition Review is
5 set out at PCC 33.846.080(A).⁵ There are two approval criteria for Demolition
6 Review set out at PCC 33.846.080(C)(1) and (2), and an applicant for
7 Demolition Review must comply with one of them. In this case, the city
8 applied the criterion at PCC 33.846.080(C)(2), which is set out below:

9 “Demolition of the resource has been evaluated against and, on
10 balance, has been found supportive of the goals and policies of the
11 Comprehensive Plan, and any relevant area plans. The evaluation
12 may consider factors such as:

13 “a. The merits of demolition;

and the Weir Building are proposed for demolition, the remaining historic resources will be rehabilitated and incorporated into the new design.” Record 42-43.

⁵ PCC 33.846.080(A) provides:

“Purpose. Demolition review protects resources that have been individually listed in the National Register of Historic Places or are identified as contributing to the historic significance of a Historic District or a Conservation District. It also protects Historic Landmarks and Conservation Landmarks that have taken advantage of an incentive for historic preservation and historic resources that have a preservation agreement. Demolition review recognizes that historic resources are irreplaceable assets that preserve our heritage, beautify the city, enhance civic identity, and promote economic vitality.”

- 1 “b. The merits of development that could replace the
2 demolished resource, either as specifically proposed for the
3 site or as allowed under the existing zoning;
- 4 “c. The effect demolition of the resources would have on the
5 area’s desired character;
- 6 “d. The effect that redevelopment on the site would have on the
7 area’s desired character;
- 8 “e. The merits of preserving the resource, taking into
9 consideration the purposes described in Subsection A; and
- 10 “f. Any proposed mitigation for the demolition.”

11 To summarize, under PCC 33.846.080(C)(2), the city must find the
12 proposed demolition is, “on balance,” “supportive of the goals and policies of
13 the Comprehensive Plan, and any relevant area plans.” The six, nonexclusive
14 factors that are listed “may” be considered and essentially call for an
15 assessment of what will be lost by demolition and what will be gained through
16 redevelopment and mitigation. It is worth noting at the outset that, because
17 PCC 33.846.080(C)(2) only requires the city to find that the proposed
18 demolition is supportive of the comprehensive plan goals and policies, “on
19 balance,” and only suggests six factors that “may” be considered, the Council
20 has significant latitude in applying PCC 33.846.080(C)(2). In the challenged
21 decision, the Council noted that in the past it had interpreted PCC
22 33.846.080(C)(2) to give the Council “broad discretion” in deciding whether a

1 proposed demolition of historic structures is on balance supportive of the Plan
2 goals and policies. Record 45.⁶

3 The city identified 12 Plan goals and by our count a total of 24 policies
4 under those goals.⁷ The Council also identified one area plan. In fourteen
5 pages of single-spaced findings, the Council separately addressed all 12 of

⁶ “In [a prior] Demolition Review * * * the City Council * * * found that it has broad discretion in deciding how to balance applicable comprehensive plan goals and policies, and specifically that ‘The Council has the authority to give certain relevant goals and policies more weight’ and others less in deciding whether the proposal, on balance, supports the Comprehensive Plan and other relevant area plans.” Record 45.

⁷ Those Plan goals are listed below:

- “Goal 1 Metropolitan Coordination”
- “Goal 2 Urban Development”
- “Goal 3 Neighborhoods”
- “Goal 4 Housing”
- “Goal 5 Economic Development”
- “Goal 6 Transportation”
- “Goal 7 Energy”
- “Goal 8 Environment”
- “Goal 9 Citizen Involvement”
- “Goal 10 Plan Review and Administration”
- “Goal 11 Public Facilities”
- “Goal 12 Urban Design”

1 those goals. Record 30-44. The city found that three of the goals are
2 inapplicable.⁸ Of the remaining nine goals, the Council found that the proposal
3 meets or supports six goals and the Washington Park Master Plan and “on
4 balance supports” the remaining three goals.⁹ Stated differently, the Council
5 found the proposed demolition satisfies, or on balance satisfies, each of the
6 applicable goals and the only identified area plan.

7 In finding that the proposed demolition and proposed redevelopment and
8 mitigation, on balance, satisfy the goals and policies, the city repeatedly cites
9 two concerns. First, federal drinking water regulations now require that
10 domestic water supply reservoirs be covered or that the water be treated at the
11 point of use.¹⁰ Second, the now active landslide poses a threat to the reservoirs
12 and downgrade properties, particularly when dangers from potential seismic
13 events are factored in. Removing the existing reservoirs and replacing them
14 with the new underground reservoir and improvements designed to stabilize the
15 landslide addresses both of those concerns. While the city recognized that
16 removing the reservoirs and Weir Building will mean the loss of 120-year-old

⁸ The city found goals 4, 5 and 10 to be inapplicable.

⁹ Most of the Council’s findings address goals 11 and 12, which concern public facilities and historic resources.

¹⁰ The Environmental Protection Agency promulgated the Long Term 2 Enhanced Surface Water Treatment Rule (LT2) in 2006. That rule requires that uncovered reservoirs to be covered or replaced or that the water in such reservoirs be treated. In a separate decision the city has ruled out the covering or treating options.

1 reservoirs, which are significant historic resources, the city found the gains to
2 public safety from stabilizing the landslide and the improvement to the safety
3 and reliability of the city's water system that the underground reservoir
4 represents significantly exceed the loss of these aging and landslide and
5 seismically challenged reservoirs. In reaching that conclusion, the Council also
6 took into consideration the proposed reflecting pools that to some degree will
7 preserve a visual attribute of the removed reservoirs, the other planned
8 improvements to the remaining historic structures, and the resulting restoration
9 of public access to this historic area.

10 **ASSIGNMENT OF ERROR**

11 In a single assignment of error, petitioner alleges the city misinterpreted
12 PCC 33.846.080(C)(2) and adopted a decision that is not supported by
13 substantial evidence. That assignment of error is made up of four
14 subassignments of error, which we address separately below.

15 The city argues petitioner waived the issues presented in the first three
16 subassignments of error, by failing to raise them below. We do not agree.
17 Petitioner was not required to anticipate the Council's final decision would
18 adopt the allegedly erroneous interpretations of PCC 33.846.080(C)(2) that are
19 the subject of petitioner's second and third subassignments of error. In
20 addition, petitioner did not waive his first subassignment of error regarding a
21 condition of approval. Assuming the city was legally required to impose the
22 condition of approval identified in the first subassignment of error, we do not

1 believe petitioner was required to anticipate that the city would fail to impose
2 the required condition of approval in its final written decision.

3 **A. Failure to Impose a Condition of Approval to Require**
4 **Construction of the Proposed Redevelopment**

5 Petitioner refers to the proposed new underground reservoir and
6 reflecting pools and the proposed mitigation collectively as the
7 “Redevelopment.” As PCC 33.846.080(C)(2)(b), (d) and (f) specifically allow,
8 the city considered the merits of the Redevelopment in concluding that on
9 balance the proposed demolition of Reservoirs 3 and 4 and the Weir Building is
10 “supportive of the goals and policies of the Comprehensive Plan[.]” Citing
11 *Sellwood-Moreland Improvement League v. City of Portland*, 68 Or LUBA
12 213, 223 (2013), *aff’d* 262 Or App 9, 324 P3d 549 (2014), petitioner contends
13 that because the city relied on the Redevelopment in concluding that the
14 proposal complies with PCC 33.846.080(C)(2), it was required to condition
15 demolition review approval on construction of the Redevelopment. Petitioner
16 contends the city’s failure to impose such a condition of approval requires
17 remand.

18 Petitioner relies on the following statement in *Sellwood-Moreland*:

19 “[W]here an applicant’s representations regarding development
20 must be made binding in order to assure compliance with
21 applicable approval criteria, the local government must impose
22 conditions of approval to embody those representations, and
23 failure to impose such conditions is a basis for remand. *Neste*
24 *Resins Corp. v. City of Eugene*, 23 Or LUBA 55, [66-67] (1992);
25 *Culligan v. Washington County*, 57 Or LUBA 395, 401-02 (2008).
26 * * *” 68 Or LUBA at 223.

1 The principle stated in *Sellwood-Moreland* was not an issue in that case, but
2 *Neste Resins* and *Culligan* do stand for the proposition that where a local
3 government is relying on a particular development or a particular limitation on
4 development to find a relevant approval standard is satisfied, there must be
5 something in place to ensure the relied upon development or limitation will
6 become a reality. That reality might be achieved through a condition of
7 approval or it might be achieved because the desired development or
8 development limitation is part of the approved proposal. *NE Medford*
9 *Neighborhood Coalition v. City of Medford*, 53 Or LUBA 277 (2007);
10 *Culligan*, 57 Or LUBA at 401; *Neste Resins*, 23 Or LUBA at 67.

11 For purposes of this opinion, we assume the particular Redevelopment
12 discussed in the Council's decision was essential to the Council's reasoning in
13 concluding that demolition of the two reservoirs and the Weir Building is, on
14 balance, supportive of the goals and policies of the Comprehensive Plan.
15 However, a condition of approval is not the only way the city can adequately
16 assure that the proposed Redevelopment becomes a reality. As the city points
17 out, before the city granted Demolition Review approval, applications for the
18 additional land use reviews that are required to construct the Redevelopment
19 had been submitted and those reviews were pending before the city. The nature
20 and scope of the proposed Redevelopment was therefore known. And, more
21 importantly, under PCC 33.445.330(A)(2), the city may not issue a demolition
22 permit to carry out the Demolition Review approval until, among other things,

1 the city has issued a permit for the Redevelopment.¹¹ Petitioner makes no
2 attempt to explain why PCC 33.445.330(A)(2) is not sufficient to ensure the
3 Redevelopment becomes a reality.

4 This subassignment of error is denied.

5 **B. Error to Interpret PCC 33.846.080(C)(2) to be Satisfied Where**
6 **the Value of the Redevelopment is Merely Comparable to the**
7 **Value of the Historic Resource that is to be Demolished**

8 The final three paragraphs in the “Conclusions” section of the Council’s
9 decision are set out below:

10 *“In both of the prior Historic Demolition cases * * *, the City*
11 *Council indicated that in order for a Demolition Review to be*
12 *approved, the replacement development must provide a significant*
13 *public benefit in order to make up for the loss of the historic*
14 *resource.*

¹¹ PCC 33.445.330(A)(2) provides:

“Issuance of a demolition permit after demolition review. If the review body for demolition review approves demolition of the resource, a permit for demolition will not be issued until the following are met:

- “a. The decision in the demolition review is final;
- “b. At least 120 days have passed since the date the Director of the Bureau of Development Services determined that the application was complete; and
- “c. A permit for a new building on the site has been issued. The demolition and building permits may be issued simultaneously.”

1 *“In this case, the historic resources are considerable and the*
2 *public benefit must be comparable.* As outlined above, the
3 construction of a new buried reservoir will protect downslope
4 properties from a potentially catastrophic event such as an
5 earthquake, while reinforcement of the slope west of Reservoir 4
6 will help to slow movement of the landslide, thus protecting
7 upland resources such as the International Rose Test Garden.
8 Neither of these aspects of the proposal [is] possible if the existing
9 reservoirs are kept in their current configuration. In addition,
10 decommissioning of the existing reservoirs and construction of a
11 new buried reservoir slightly east of the existing Reservoir 3 will
12 require less maintenance over time as it will not be subject to the
13 persistent force of the landslide compromising its integrity. As
14 mitigation, the City proposes substantial rehabilitation work on the
15 existing historic resources proposed to remain, interpretive
16 programming, and increased accessibility for pedestrians and
17 bicyclists, which will integrate the historic district more fully into
18 Washington Park and allow the public to enjoy this long-closed-
19 off area and its historic resources. These are substantial and
20 significant public benefits.

21 “On balance, City Council finds that the proposal to demolish
22 Reservoirs 3 and 4 and the Weir Building and redevelop the site as
23 proposed in the applicant’s narrative (Exhibits A-1 and A-7), is
24 supportive of the relevant goals and policies of the Comprehensive
25 Plan, and therefore warrants approval.” Record 45-46 (Emphases
26 added).

27 Petitioner focuses exclusively on the two italicized sentences and in
28 particular the Council’s use in the second sentence of the word “comparable.”
29 Petitioner then relies on a dictionary definition of that word, “[a]ccording to
30 Merriam-Webster, ‘comparable’ means ‘similar’ or ‘like.’” Finally, petitioner
31 concludes the Council interpreted PCC 33.846.080(C)(2) to be satisfied even if
32 the value of the Redevelopment is less than the value of the Historic resource
33 that is to be demolished:

1 “Let’s say the Council assigned numeric values to the effect that
2 demolition of an historic resource has on Comp Plan policies.
3 And let’s say that the Council found that the negative effects of
4 demolishing a given resource ranks a six, while the positive effects
5 of such demolition (and/or redevelopment) constitute a five.
6 Under the Council’s interpretation, such a demolition is
7 presumably okay because five is comparable to six.” Amended
8 Petition for Review 12.

9 The city argues that this subassignment of error “invents an
10 interpretation of [PCC 33.846.080(C)(2)] that the Council did not make and
11 then argues this interpretation is wrong.” Amended Respondent’s Brief 21.
12 We agree with the city. Even if the two sentences are only viewed in context
13 with the remainder of the three concluding paragraphs set out above, it is clear
14 that the Council did not adopt the interpretation petitioner attributes to the
15 Council. When those sentences are viewed in context with the many pages of
16 findings that precede them, it is clear that the Council recognized a large
17 number of positive impacts from the proposed Redevelopment, and discussed
18 the significance of those impacts. The Council also recognized the
19 comparatively smaller number of negative impacts from the loss of the historic
20 reservoirs and Weir building, and discussed the significance of those negative
21 impacts (loss of two architecturally significant and historic reservoirs and a
22 much less significant Weir Building). The Council simply found that the
23 positives of removing the damaged reservoirs, addressing the landslide and
24 seismic threats, and making improvements to the remaining historic structures
25 while improving the city’s water system “on balance” outweigh the negatives

1 of demolition. The Council simply did not interpret PCC 33.846.080(C)(2) in
2 the way petitioner argues it did, and the way the Council did interpret and
3 apply PCC 33.846.080(C)(2) is entirely consistent with the text of PCC
4 33.846.080(C)(2). Because the Council’s interpretation of PCC
5 33.846.080(C)(2) is consistent with the text of PCC 33.846.080(C)(2),
6 petitioner has not demonstrated the Council misinterpreted PCC
7 33.846.080(C)(2). *Siporen v. City of Medford*, 349 Or 247, 261, 243 P3d 776
8 (2010).

9 This subassignment of error is denied.

10 **C. Error to Interpret PCC 33.846.080(C)(2) to Allow**
11 **Consideration of Feasibility**

12 Petitioner’s third subassignment of error is based on the findings set out
13 below:

14 “* * * Based on the analysis of ‘project drivers,’ the Portland
15 Water Bureau has no reasonable choice but to demolish Reservoir
16 3, Reservoir 4, and the Weir Building. The alternative is to
17 maintain deteriorating infrastructure that will continue to be
18 vulnerable to damage by an active landslide or seismic events and
19 that would hold the public at risk of losing water supplies and
20 experiencing downstream flooding.” Amended Petition for
21 Review 12.

22 The two quoted findings appear to be a partial quotation of three findings that
23 appear in the third full paragraph at Record 45, with some text omitted.

24 Petitioner argues “this finding allows an applicant to justify demolition
25 based on the infeasibility of undertaking the Redevelopment elsewhere.”
26 Amended Petition for Review 13. Petitioner then argues that under this

1 interpretation “[a] demolition Review applicant could achieve compliance
2 [with PCC 33.846.080(C)(2)] simply by proposing a redevelopment that is
3 feasible only on the demolition site.”

4 Once again the city argues that petitioner is attempting to attribute an
5 interpretation to the Council that it did not make. Once again we agree. In
6 addition, we do not understand petitioner’s argument. To the extent the quoted
7 finding is concerned about “feasibility” at all, it is concerned with the
8 feasibility of retaining the aging reservoirs, for the reasons set out in the quoted
9 findings and earlier in the Council’s decision. The quoted findings have
10 nothing to do with the “feasibility of undertaking the Redevelopment
11 elsewhere.”

12 This subassignment of error is denied.

13 **D. Petitioner’s Evidentiary Challenges.**

14 Under this subassignment of error, petitioner argues four of the
15 Council’s findings are not supported by substantial evidence. We address
16 those evidentiary challenges separately below.

17 **1. Landslide Danger to Reservoirs; Efficacy of the**
18 **Redevelopment to Correct the Danger**

19 Petitioner argues the following findings are not supported by substantial
20 evidence:

21 “The applicant provided site-specific explanations by qualified
22 and licensed geotechnical and civil engineers establishing that
23 although landslide movement has indeed slowed, the landslide
24 remains active and a danger to the existing reservoirs, and that the

1 proposed design will significantly mitigate that danger. The City
2 Council finds the explanation of the engineers to be credible and
3 persuasive, and finds that the landslide hazard is significant and
4 that the design and the new reservoir will address this project
5 driver (also see findings for Policy 11.28 Maintenance[)].”
6 Record 27-28.

7 Petitioner contends the evidentiary record does not support the Council’s
8 finding that the existing reservoirs “constitute a danger,” or that the
9 “Demolition and Redevelopment will mitigate that danger.” Amended Petition
10 for Review 14.

11 **a. Landslide Danger to Reservoir**

12 Petitioner points to a final draft Infrastructure Master Plan (IMP), dated
13 October 2000, and notes that it identifies “[f]our high priority projects,” and
14 that addressing landslide dangers to the reservoirs is not one of the four.
15 Record 2025. Petitioner also points to testimony submitted to the Council that
16 the reservoirs survived the Flood of 1964 and a significant rain event in 1996
17 “without landslide issue.” Amended Petition for Review 15. That testimony
18 cited to two landslide studies. Record 2045.

19 The city responds initially that the Council did not find that the
20 reservoirs themselves constitute a danger. Rather, the city argues, the Council
21 found the landslide poses a danger to the reservoirs. With regard to the final
22 draft IMP, the city points out that while the System Vulnerability Assessment
23 in the IMP does not list the reservoirs as a “high priority” project, it does list
24 “moderate-high, moderate, and ‘quick fix’ priority projects,” which include

1 “projects that address seismic stability of various reservoirs and tanks.” Record
2 2025. The city also points to memoranda and testimony by two Portland Water
3 Bureau engineers, one of them a geotechnical engineer, that the landslide
4 remains active. Those memoranda, and testimony by the engineers before the
5 city council, rebuts other testimony below that the reservoirs will be able to
6 survive the landslide and seismic events in the future. Record 1867-74, 2071-
7 73, 2132-34. The city contends that evidence “is credible, persuasive and
8 substantial evidence to support the Council’s finding that the ongoing landslide
9 hazard is significant.” Amended Respondent’s Brief 32.

10 The standard that LUBA is required to apply when reviewing substantial
11 evidence challenges to critical findings of fact is not a particularly demanding
12 standard. The evidentiary record, viewed as a whole, must support the finding.
13 *Dodd v. Hood River County*, 317 Or 172, 179, 855 P2d 608 (1993); *Younger v.*
14 *City of Portland*, 305 Or 346, 351-52, 752 P2d 262 (1988). In reviewing
15 substantial evidence challenges LUBA does not reweigh the evidence or ask
16 whether it would have adopted the same finding based on all the evidence.
17 *1000 Friends of Oregon v. Marion County*, 116 Or App 584, 587, 842 P2d 441
18 (1992) (citing *Younger*). Rather, LUBA is to ask whether, faced with the
19 evidence that was placed before the decision maker, the decision maker’s
20 finding is “reasonable.” *Id.* Applying that standard here, the Council’s finding
21 is supported by credible expert evidence, which is believable and conflicts with
22 the evidence cited by petitioner. The Council’s finding that the landslide poses

1 a danger to the reservoirs, particularly when viewed in concert with the seismic
2 dangers, is easily supported by substantial evidence.

3 **b. Redevelopment to Mitigate Landslide Danger**

4 Petitioner disputes that the Redevelopment will mitigate the landslide
5 danger, citing testimony that the landslide is continuing to move and evidence
6 that a buried reservoir located elsewhere in the city, at Powell Butte, is leaking.

7 The city responds that the application and the evidence submitted in
8 support of the application clearly support the Council’s findings that the
9 landslide is continuing to move and that the proposed Redevelopment will
10 include a number of measures to mitigate that danger, including the proposals
11 to locate the new underground reservoir outside the landslide footprint and to
12 construct measures to slow and absorb future landslide movement in ways that
13 mitigate the existing landslide danger. Record 378-79, 2071-73, 2133. The
14 city also argues petitioner has not shown that whatever problems may be
15 causing the Powell Butte reservoir to leak have any bearing on whether the
16 proposed underground reservoir for Washington Park will have similar
17 problems. We agree with the city.

18 The city’s findings that the existing landslide poses a danger to the
19 existing reservoirs and that the Redevelopment will mitigate that danger are
20 supported by substantial evidence, and we reject petitioner’s contentions to the
21 contrary.

1 **2. Efforts to Preserve the Reservoirs**

2 Petitioner next contends that the following finding is not supported by
3 substantial evidence:

4 “Herculean efforts were undertaken that have allowed the
5 reservoirs to serve the City for over 100 years; however, the force
6 of gravity persists and compromises the reservoirs’ ability to
7 withstand a more unpredictable event such as a significant
8 earthquake.” Record 45.

9 The first part of the finding, which characterizes the efforts the city has
10 taken over the past 100 years to address problems caused by the land slide as
11 “Herculean,” is an expression of city opinion rather than a finding of fact that is
12 a necessary part of the Council’s decision. As such, it need not be supported by
13 substantial evidence, although we cannot say it is an inaccurate characterization
14 based on the evidence the parties have cited. And we have already concluded
15 that there is substantial evidence to support the city’s findings that the landslide
16 poses a danger to the reservoirs and that seismic dangers magnify the danger
17 posed by the landslide.

18 **3. The Environmental Protection Agency Rule**

19 Petitioner contends the following finding is not supported by substantial
20 evidence:

21 “[T]he Environmental Protection Agency has mandated that
22 drinking water in open reservoirs be either covered or treated at
23 the point of discharge, which ultimately has prompted the City’s
24 proposal to demolish the reservoirs and build a new buried
25 reservoir at this point in time, rather than at some later point in
26 time.” Amended Petition for Review 16.

1 The city responds that while the record includes testimony from persons
2 who object to the LT2 rule’s cover or treat mandate and continue to believe it
3 may change in the future, the above quoted findings accurately describes the
4 LT2 rule’s cover or treat mandate. The city cites to a letter from the Oregon
5 Health Authority that clearly states the LT2 rule’s cover or treat mandate, and
6 contends that is substantial evidence that supports the Council’s finding. We
7 agree with the city.

8 **4. Reservoir Rebar at Ten Feet on Center**

9 Finally, petitioner argues the following finding is not supported by
10 substantial evidence:

11 “* * * The record * * * shows that the [reservoirs] were reinforced
12 with rebar at 10 feet on center, sufficiently [sic] less than would be
13 required today to protect the health and safety of citizens. * * *”
14 Record 27.

15 In support of his evidentiary challenge, petitioner cites poor quality
16 black and white copies of old photographs in the record. Record 1027, 1770.
17 It is not at all clear to us that those photographs show that the reinforcing bars
18 are spaced less than 10 feet apart. The city cites to evidence in the record that
19 the reservoirs’ reinforcing bars were spaced ten feet apart. Record 843
20 (Washington Park Reservoirs No. 3 and No. 4 Exterior Building Assessment
21 “[r]einforcement bars were anchored at ten-foot intervals within the reservoir
22 basin”); 1157 (National Register Narrative Description describing “twisted
23 iron’ square bars placed ten feet on center”); 2132 (testimony by water bureau

1 that “[t]he original design I believe had rebar every 10 feet as opposed to 16
2 inches, which is more normal”).

3 We agree with the city that the Council’s rebar finding is supported by
4 substantial evidence. Certainly the unexplained photographs cited by petitioner
5 are not enough to call the evidence cited by the city into question.

6 Petitioner’s substantial evidence subassignment of error is denied.

7 The city’s decision is affirmed.