

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

3
4 MAUREEN SMITH,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF SALEM,
10 *Respondent,*

11
12 and

13
14 TERRY KELLY and MARY RENTFRO,
15 *Intervenors-Respondents.*

16
17 LUBA No. 2009-093

18
19 FINAL OPINION
20 AND ORDER

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22 Appeal from Salem.

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24 Maureen Smith, Salem, filed the petition for review and argued on her own behalf.

25
26 Daniel B. Atchison, Deputy City Attorney, Salem, filed a joint response brief and
27 argued on behalf of respondent.

28
29 Nathan K. Boderman, Salem, filed a joint response brief and argued on behalf of
30 intervenors-respondents. With him on the brief was Saalfeld Griggs PC.

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

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35 AFFIRMED

04/09/2010

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

NATURE OF THE DECISION

Petitioner appeals a city decision approving a minor comprehensive plan map amendment, neighborhood plan amendment, and zone change to facilitate conversion of a former golf course to mixed use development.

MOTION TO STRIKE

The city and intervenors (respondents) move to strike Appendix F to the petition for review, which includes a flood study that petitioner admits is not part of the local record. Petitioner identifies no basis for LUBA to consider the study in Appendix F under our rules, and the motion to strike is granted. The Board will not consider Appendix F.

FACTS

The subject property is a 44.27-acre tract designated as Parks, Open Space and Outdoor Recreation, and zoned Public Amusement (PA). Until 2007, the property was part of a privately-owned 82-acre golf course, but in that year the course was closed, greens removed, and buildings demolished. Following closure, the owners (intervenors-respondents) filed for comprehensive plan and zoning map changes for the entire 82-acre tract, but later withdrew the application. In 2008, intervenors sold 38 acres of the 82-acre tract to the city for purposes of stormwater detention and flood management, leaving the subject 44.27-acre tract. A small creek, Waln Creek, bisects the property north to south, emptying into other creeks located on the city-owned tract south of the subject 44.27-acre tract.

In 2009, intervenors filed applications to redesignate most of the remaining 44.27-acre tract to Commercial, Multi-Family Residential, and Single-Family Residential comprehensive plan map designations, with corresponding zone changes. Approximately 2.27 acres of the property would remain designated for parks and open space, and continue in PA zoning. The city processed the application as a “minor” or quasi—judicial

1 comprehensive plan amendment. The planning commission conducted a hearing and
2 approved the application, with conditions. The city council called up the planning
3 commission decision for review, and conducted additional hearings. On July 13, 2009, the
4 city council adopted its final decision and affirmed the planning commission decision, with
5 additional conditions. This appeal followed.

6 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

7 Salem Revised Code (SRC) 64.040(g) defines “minor plan change” as a
8 comprehensive plan map amendment “affecting less than five privately and separately owned
9 tax lots.” A “major plan change” is any plan change that does not qualify as a “minor plan
10 change.” SRC 64.040(f).¹ The subject 44.27-acre tract is comprised of eight separate lots, all
11 owned by intervenors. Petitioner argues that the city erred in processing the application as a
12 minor plan change instead of a major plan change, because petitioner argues that the eight
13 lots are “separately owned” in the sense that they are legally separate lots or parcels that can
14 be separately conveyed to different persons.

15 Respondents argue, and we agree, that petitioner has not established that the city
16 erred in processing the application as a minor plan change under SRC 64.040(g). The city
17 council found that the application involves less than five privately and separately owned tax
18 lots, and therefore qualifies as a minor plan change. Record 17. Although the city does not
19 provide an explicit interpretation of SRC 64.040(g), it is clear the city understands the phrase
20 “separately owned tax lots” to refer to lots or parcels that are in separate ownership, *i.e.*,
21 owned by different persons. Petitioner does not explain why that view is inconsistent with
22 the text of SRC 64.040(g), and therefore reversible under ORS 197.829(1). Petitioner’s
23 arguments under the first assignment of error do not provide a basis for reversal and remand,

¹ The criteria that govern a major plan change, at SRC 64.070, appear to be much less rigorous than the criteria at SRC 64.090 that govern a minor plan change.

1 and the first assignment of error is denied. The second assignment of error, in which
2 petitioner argues that the city failed to apply the major plan change criteria, is also denied.

3 **THIRD ASSIGNMENT OF ERROR**

4 SRC 64.090 sets out the criteria for a minor plan change, requiring in relevant part a
5 finding that “[t]he proposed change conforms to all criteria imposed by applicable goals and
6 policies of the comprehensive plan in light of its intent statements[.]” SRC 64.090(5)

7 Petitioner argues that the city failed to identify and address each of the 15 goals and
8 162 policies in the Salem Area Comprehensive Plan (SACP), and instead addressed only
9 those goals and policies it deemed applicable.

10 The city council adopted 25 pages of findings addressing SRC 64.090(5) and the
11 several dozen SACP goals and policies it deemed applicable. Record 42-67. In the petition
12 for review, petitioner does not identify any specific SACP goals and policies that the city
13 failed to address and she believes are applicable. The closest she comes is a reference to
14 Record 1471, which includes a brief argument that the planning commission had failed to
15 address several broad categories of SACP goals and policies. However, the argument at
16 Record 1471 does not identify any specific SACP goal or policy, or explain why the goal or
17 policy is applicable. Petitioner’s arguments under this assignment of error do not provide a
18 basis for reversal or remand.

19 The third assignment of error is denied.

20 **FOURTH ASSIGNMENT OF ERROR**

21 SRC 64.090(3) requires a finding that “[t]he proposed plan change considers and
22 accommodates as much as possible all applicable statewide planning goals[.]” In three
23 subassignments of error, petitioner argues that the city inadequately addressed whether the
24 proposed plan map change is consistent with Statewide Planning Goals 5 (Natural Resources,
25 Scenic and Historic Areas, and Open Spaces), 7 (Areas Subject to Natural Hazards) and 8
26 (Recreational Needs).

1 **A. Goal 5 Open Space**

2 The city found, and there is no dispute, that the subject property is not listed in the
3 city’s Goal 5 inventory of open space or scenic areas. If we understand petitioner correctly,
4 she argues that the subject property deserves inclusion in the city’s open space inventory, or
5 that the city’s Goal 5 inventory is deficient, and the city should correct that deficiency in the
6 course of approving the proposed plan map amendment. Petitioner contends that the city
7 should comply with Goal 5, Guideline 2, which states that “[c]riteria should be developed
8 and utilized to determine what uses are consistent with open space values and to evaluate the
9 effect of converting open space lands to inconsistent uses.”²

10 Respondents argue, and we agree, that petitioner has not established that Goal 5
11 applies to the challenged plan amendments. OAR 660-023-00250(3) sets out the
12 circumstances that require application of Goal 5 when adopting a post-acknowledgment plan
13 amendment, and petitioner does not contend, and it does not appear to be the case, that any of
14 those circumstances are present here. Petitioner has also failed to establish that the city’s
15 Goal 5 open space or scenic area inventory is deficient or, even assuming it is, that the city is
16 obligated to correct any deficiency in the course of approving the proposed plan map change.
17 In any case, the city adopted findings explaining why it believed the proposal considers and
18 accommodates Goal 5 as much as possible, but petitioner does not acknowledge or challenge
19 those findings. Record 22-24. This subassignment of error is denied.

20 **B. Goal 7 Natural Hazards**

21 Petitioner argues that the city’s findings and conditions regarding the possibility of
22 increased downstream flood hazards from development of the subject property are not

² For the reasons that follow, petitioner fails to establish that Goal 5 applies in this case. However, even if Goal 5 did apply, statewide planning goal guidelines are “advisory” rather than “mandatory” approval standards. ORS 197.015(9); *Downtown Community Assoc. v. City of Portland*, 80 Or App 336, 722 P2d 1258 (1986).

1 supported by substantial evidence. Petitioner cites to testimony that flooding of creeks
2 downstream of the subject property has been a problem in the past.³

3 Respondents cite to several pages of findings and conditions addressing Goal 7 that
4 explain that the city’s subdivision and permit application standards are sufficient to ensure
5 that eventual development of the subject property will not increase downstream flood risk.
6 The city imposed a “zero net rise” condition, requiring the applicant to offset any fill placed
7 in the floodplain with off-setting flood storage. Respondents also cite to a memorandum from
8 city public works staff and testimony from the applicant’s engineer supporting the city’s
9 conclusions on that point. We agree with respondents that petitioner has not demonstrated
10 that the city’s findings under Goal 7 with respect to flood hazards are unsupported by
11 substantial evidence.

12 Petitioner also argues that the applicant failed to address several Goal 7 guidelines.
13 However, the guidelines to the goals are not mandatory approval criteria that must be
14 satisfied in order to approve or deny a post-acknowledgement plan amendment. *See* n 2. In
15 any case, the city did adopt findings addressing the Goal 7 guidelines that petitioner cites.
16 Record 26-27. Petitioner does not acknowledge or challenge those findings, and the
17 arguments under this subassignment of error do not provide a basis for reversal or remand.

18 This subassignment of error is denied.

19 **C. Goal 8 Recreational Needs**

20 The city adopted findings explaining that the subject property is not identified in the
21 city’s master park plan or Goal 8 inventory as recreational land, but goes on to consider Goal
22 8 and whether the proposed use of the property is consistent with the city’s recreational
23 needs. Record 29-31. The city’s findings explain why city acquisition of the property and

³ Petitioner’s arguments under this subassignment of error partially rely on the study in Appendix F to the petition for review. We granted respondents’ motion to strike Appendix F, however, so we do not consider the study or petitioner’s arguments based on the study.

1 conversion to a public golf course is not warranted, and concludes that with the proposed
2 2.24 acres of open space to be preserved on the property, along with the 38 acres of city-
3 owned property south of the subject property, public recreational opportunities in the area
4 would be enhanced. The city concludes that the proposal accommodates Goal 8 as much as
5 possible, for purposes of SRC 64.090(3).

6 Petitioner apparently disagrees with that conclusion, but does not explain why.
7 Petitioner faults the city for failing to consider “the recreational golf need” of the city’s
8 citizens. Petition for Review 21. However, petitioner does not explain why Goal 8 requires
9 the city to consider the city’s recreational golf needs when redesignating and rezoning
10 private land that was once a private golf course. In any case, the city explained why
11 acquisition and conversion of the property to a public golf course is not warranted, and
12 petitioner does not challenge those findings. This subassignment of error is denied.

13 The fourth assignment of error is denied.

14 **FIFTH ASSIGNMENT OF ERROR**

15 SACP Open Space, Parks and Recreation Policy 5 states that “[t]he preservation and
16 connection of identified natural open space areas shall be protected through public
17 acquisition and/or land use regulation.” We understand petitioner to argue that the subject
18 property is “identified natural open space” because it is identified in the Liberty-Boone
19 neighborhood plan map as “Parks, Open Space.” Petitioner contends that the city failed to
20 address Policy 5 and explain why development of identified natural open space is consistent
21 with the policy.

22 Respondents argue that Policy 5 does not apply because the subject property is not
23 “identified natural open space” in the SACP or any incorporated element of the SACP, such
24 as the neighborhood plan. While the neighborhood plan may identify the subject property as
25 “Parks, Open Space,” respondents argue, nothing in the SACP or elsewhere identifies the

1 property as “natural” open space. According to respondents, the city addressed this issue,
2 finding:

3 “Testimony was received regarding the loss of open space, as the property has
4 a Comprehensive Plan designation of Parks, Open Space and Outdoor
5 Recreation. The SACP describes the different facilities that make up each
6 designation. It states the different types of parks (neighborhood, community,
7 school, etc.) and open space (historic areas, special use facilities, and natural
8 resource areas) that are to be managed by the City. It divides Open Space into
9 two distinct categories—Designed Open Space (Capitol Mall, Wilson Park,
10 Willamette University, etc.) and Natural Open Space (Pringle Creek, Mill
11 Creek, Willamette River, etc.). It states that golf courses are the primary
12 example of Outdoor Recreation use in the Salem Urban Area.” Record 59.

13 Respondents argue that the city found that the subject property is not among the areas such as
14 Pringle Creek that are identified in the SACP or any neighborhood plan as “natural” open
15 space, and therefore the city did not err in failing to address Policy 5.

16 We agree with respondents that Policy 5 is directed at property that is identified in
17 some plan inventory as “natural open space.” The subject property is not listed in any SACP
18 inventory of parks or open spaces at all. As the above-quoted findings note, SACP
19 II(A)(3)(g) distinguishes between “natural” open space and other types of open space, and
20 does not identify the subject property as a natural open space. The Liberty-Boone
21 neighborhood plan map does identify the property as “Parks, Open Space,” but petitioner
22 does not cite to anything that identifies the subject property as “natural” open space for
23 purposes of Policy 5. Consequently, petitioner’s arguments under this assignment of error do
24 not provide a basis for reversal or remand.

25 The fifth assignment of error is denied.

26 **SIXTH ASSIGNMENT OF ERROR**

27 The city’s decision amends the subject property’s designation on the Liberty-Boone
28 neighborhood plan map from Parks, Open Space to Single-Family, Multi-Family, and
29 Commercial Retail. The city processed the neighborhood plan map amendment in the same

1 manner as the SACP plan map amendments, applying the minor comprehensive plan
2 amendment criteria at SRC 64.090.

3 Petitioner first argues that the city erred in failing to address whether that plan
4 amendment is consistent with the goals and policies in the neighborhood plan, as required by
5 SRC 64.090(b)(5). However, petitioner does not identify any neighborhood plan goals or
6 policies that she believes are applicable and that the city did not consider. The city adopted
7 extensive findings at Record 69-84 addressing neighborhood plan goals and policies it
8 believed were applicable. Petitioner does not acknowledge those findings or explain why
9 they are inadequate.

10 Next, petitioner notes that SRC 64.440(a) provides that the neighborhood plan “shall
11 be the basis for any neighborhood recommendation” to the city council. Petitioner argues
12 that the neighborhood association letter supporting the application failed to discuss the
13 neighborhood plan’s Open Space element or the neighborhood plan map, which designates
14 the property “Parks, Open Space.”

15 Respondents argue, and we agree, that even assuming the neighborhood association
16 failed to comply with SRC 64.440(a) in making its recommendation to the city council, that
17 failure does not provide a basis for reversal or remand. SRC 64.440(a) is not an approval
18 criterion governing this application. The city council adopted no findings addressing SRC
19 64.440(a) or the neighborhood association’s recommendation, and was not required to. The
20 city did adopt extensive findings addressing the applicable neighborhood plan policies and
21 plan map, but as noted above petitioner does not challenge those findings.

22 The sixth assignment of error is denied.

23 The city’s decision is affirmed.