

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

3
4 JANICE JOHNSON, TRUSTEE of the
5 HAROLD and HELEN JOHNSON
6 TRUST and HAROLD A. & HELEN C.
7 JOHNSON TRUST,
8 *Petitioners,*

09/06/18 PM 1:10 LUBA

9
10 vs.

11
12 CITY OF PORTLAND,
13 *Respondent.*

14
15 LUBA No. 2018-037

16
17 FINAL OPINION
18 AND ORDER

19
20 Appeal from City of Portland.

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22 Dorothy Cofield, Portland, filed the petition for review and argued on
23 behalf of petitioners. With her on the brief was Cofield Law Office.

24
25 Lisa Gramp, Deputy City Attorney, Portland, filed the response brief and
26 argued on behalf of respondent.

27
28 RYAN, Board Chair; ZAMUDIO, Board Member, participated in the
29 decision.

30
31 BASSHAM, Board Member, did not participate in the decision.

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33 AFFIRMED

09/06/2018

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

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NATURE OF THE DECISION

Petitioners appeal a decision by the hearings officer denying an application to correct a zone map error.

FACTS

Petitioners own a 2.4-acre property that is zoned Residential 7,000 (R7) and located within the city’s Environmental Conservation (EC) overlay zone. It is the location of the EC zone boundary line on the property that is disputed by petitioners.

In 1991, the city inventoried the location of natural resources in the city and conducted an Economic, Social, Environmental and Energy (ESEE) analysis in order to comply with Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces). In 1992, the city adopted the Southwest Hills Resource Protection Plan (SWHRPP) as part of the city’s comprehensive plan.¹ The subject property is included on the SWHRPP inventory map as part of Site 119, a 426-acre area. Site 119 includes Falling Creek, a seasonal creek located approximately 500 feet south of the subject property’s south property line. The 1992 inventory map identified the resources found on all of Site 119 as “[g]roundwater recharge, seasonal creek, wetlands, forest, wildlife habitat, open space and scenic.” Record 58. The

¹ The city moves for us to take official notice of Ordinance 165002, the ordinance that adopted the SWHRPP. The motion is granted.

1 SWHRPP includes an ESEE analysis that determines that the city’s program to
2 achieve the goal is to impose the EC overlay zone “for all but the most highly
3 rated resources which warrant protection. The EC zone allows development
4 after review so long as impacts on resources are controlled and mitigated.”
5 SWHRPP at 138. According to petitioners, citing Record 60, the property “was
6 only identified for approximately 20 percent protection in the southeast corner
7 of the property.” Petition for Review 11.

8 In March 1992, the city adopted the zoning map for the subject property.
9 The mapped boundary of the EC zone on the subject property includes
10 approximately 75 percent of the subject property.

11 In 2012, in connection with updating the city’s comprehensive plan as
12 part of periodic review, the city adopted a Natural Resources Inventory (NRI)
13 that maps natural features throughout the city and maps the topography and
14 existing vegetation on the subject property.²

15 In 2017, petitioners requested a map error correction, pursuant to
16 Portland City Code (PCC) 33.855.070.A.2, which allows a “correction” to the
17 official zoning map for “mapping errors” such as when “[t]here is a

² Petitioners ask LUBA to take official notice of excerpts of Ordinances 187831, 185657, and 188177, and excerpts of the NRI, that are attached to the petition for review. The city asks LUBA to take official notice of the entirety of the Ordinances cited by petitioners and of the findings of fact that were adopted as part of those ordinances, all of which are attached to the Response Brief. Both motions are granted. ORS 40.090(7).

1 discrepancy between maps and on balance there is sufficient evidence of
2 legislative intent for where the line should be located.” The city’s Bureau of
3 Development Services (BDS) applied on behalf of petitioners for a map error
4 correction, and the director of BDS approved the application. The director
5 concluded that a discrepancy existed between the city’s official zoning map
6 and the NRI map that shows the subject property.

7 An appeal of the decision was filed, and the hearings officer held a
8 hearing on the application. Based on petitioners’ and BDS’ arguments, the
9 hearings officer agreed that a discrepancy exists regarding the location of the
10 EC zone boundary between the city’s official zoning map and the NRI map that
11 shows the subject property. However, the hearings officer concluded that BDS
12 had not demonstrated that “on balance there is sufficient evidence of legislative
13 intent for where the line should be located.” PCC 33.855.070.A.2. The hearings
14 officer concluded that petitioners and BDS had failed to provide sufficient
15 evidence that the NRI map evidences the city council’s intent regarding where
16 the EC zone boundary should be located. This appeal followed.

17 **FIRST ASSIGNMENT OF ERROR**

18 As noted, the hearings officer concluded there was insufficient evidence
19 to support BDS’ position that the NRI map represents the city council’s
20 legislative intent regarding where the EC zone boundary should be located on
21 the property. The hearings officer also concluded that none of the statements
22 and evidence presented by BDS or the city’s Bureau of Planning and

1 Sustainability (BPS) during the proceedings before him provided sufficient
2 evidence that the NRI map was intended by the city council to be used for
3 assessing an application for a mapping error correction.

4 Petitioners' first assignment of error is difficult to follow. In a portion of
5 their first assignment of error, petitioners argue that PCC 3.33.030.D delegates
6 to BPS the duty to implement the NRI through updates to the official zoning
7 map.³ Petitioners also argue that 33.855.070.A.2 delegates to BDS the duty to
8 correct an inconsistency between the official zoning map and the NRI map.
9 Petitioners argue that:

10 "[t]he Hearings Officer erred when he failed to recognize that the
11 City Council had delegated authority to BPS and BDS to correct
12 zoning map errors associated with environmental boundaries
13 because BPS has authority both from directives in the PCC and by
14 City Council Resolution and Ordinance to locate environmental
15 boundaries. Therefore, the Hearings Officer's Decision must be
16 reversed or remanded and BDS' approval of the map error
17 correction must be reinstated." Petition for Review 30–31.

³ PCC 3.33.030.D provides:

"[BPS] is responsible for planning, implementing, and managing
complex programs and projects related to sustainability, urban
design, land use, and long range planning.

"[BPS]:

" * * * * *

"D. Maintains, modifies, and updates Title 33, Planning and
Zoning, and the City Zoning Map[.]"

1 The city responds that the argument was not presented to the hearings officer
2 during the proceedings below, and that BPS and BDS did not take the position
3 during the proceedings below that either has been delegated the authority to
4 assess the validity of an application pursuant to PCC 33.855.070.A.2.⁴
5 Response Brief 9.

6 We reject petitioners' argument. Nothing in the cited code provisions
7 evidences an intent by the city to delegate ultimate responsibility for deciding
8 an application under PCC 33.855.070.A.2 to BPS or BDS or makes a BDS
9 decision the city's final decision on the application. Petitioners do not argue
10 that the city erred in applying the procedures for appealing a BDS decision on
11 an application under PCC 33.855.070.A.2 to a hearings officer. The hearings
12 officer had the authority to determine whether PCC 33.833.070.A.2 was met.

13 In a section of their first assignment of error labeled "Background on the
14 City's Adoption of the NRI for Periodic Review," petitioners cite Exhibit C to
15 Ordinance 185657, the ordinance that adopted the NRI, that is attached to the
16 petition for review at Appendix 61–62. *See* n 2. Petitioners argue that Exhibit C
17 is clear evidence of the city council's intent to use the NRI map for its "future
18 environmental zoning [boundaries.]" Petition for Review 28 n 3. We
19 understand petitioners to argue that, based on Exhibit C, the hearings officer's

⁴ We also understand the city to object to petitioners' reliance on documents appended to their petition for review that are not part of the record of the proceedings before the hearings officer. *See* n 2.

1 decision is not “supported by substantial evidence in the whole record.” ORS
2 197.835(9)(a)(D).

3 We reject petitioners’ argument. The applicable standard requires the
4 hearings officer to determine whether there is sufficient evidence before him or
5 her of the legislative intent for where the boundary line should be located.
6 Exhibit C to Ordinance 185657 is not in the record, and petitioners do not
7 argue that it was provided to the hearings officer during the proceedings
8 below.⁵ Accordingly, petitioners have not established that the hearings officer
9 erred in concluding that petitioners and BDS failed to provide him with
10 sufficient evidence of the legislative intent regarding the purpose of the NRI
11 and its maps.

12 Finally, in their first assignment of error, petitioners argue that the
13 hearings officer improperly construed PCC 33.855.070.A.2 in concluding that
14 it requires “BDS to provide substantial evidence in the record, in the form of
15 documentary pronouncements from Council, describing the factors that should
16 be considered in determining ‘where a line should be located.’” Record 11.

⁵ Petitioners characterize the documents that are appended to the petition for review and of which we take official notice as offered to “specifically address the Hearings Officer’s statement that ‘[i]t is entirely possible that there is legislative history or other documentation that exists which would provide evidence of ‘legislative intent’ related to where City Council desired environmental zone boundaries to be located. However, it is not the obligation of the Hearings Officer to independently investigate legislative history.’” Petition for Review 15-16 (citing Record 11).

1 Petitioners argue that “the hearings officer’s interpretation * * * reads into the
2 provision an extremely high standard of the City Council having to
3 ‘pronounce’ its approval for each and every new boundary location from a
4 known conflict in maps. There is no such hurdle in PCC 33.855.070.A.2.”
5 Petition for Review 20. The city responds that the hearings officer’s
6 interpretation of the provision is that statements and pronouncements by
7 *representatives of BDS or BPS* do not constitute evidence of the *city council’s*
8 intent for purposes of PCC 33.855.070.A.2.

9 While we tend to agree with petitioners that “sufficient evidence of
10 legislative intent” for where a boundary line should be located can be made
11 with something less than “documentary pronouncements from” a governing
12 body, petitioners’ argument is not sufficiently developed for our review and for
13 that reason, provides no basis for reversal or remand of the decision. *Deschutes*
14 *Development v. Deschutes Cty.*, 5 Or LUBA 218 (1982).

15 The first assignment of error is denied.

16 **SECOND ASSIGNMENT OF ERROR**

17 The hearings officer also denied the application because he concluded
18 that BDS and BPS failed to justify their position that the NRI establishes the
19 city council’s legislative intent that only trees in a “vegetative patch” (or tree
20 stand) should be included within the EC boundary on the subject property.
21 Record 7-9. In other words, BDS and BPS took the position that the NRI
22 provided both a qualitative assessment of the resources on the subject property

1 and resultant direction for the location of the EC boundary on the subject
2 property. The hearings officer concluded that BDS and petitioners did not
3 adequately explain why other resources originally identified in the SWHRPP
4 for the entirety of the 426-acre Site 119 (groundwater recharge, seasonal creek,
5 wetlands, forest, wildlife habitat, open space, and scenic) were not considered
6 in determining whether the location of the current EC zone boundary was
7 mapped incorrectly. Record 8–9, 11.

8 In their second assignment of error, petitioners argue that the hearings
9 officer improperly construed PCC 33.855.070.A.2. because according to
10 petitioners, the NRI concludes that the only protected EC resources on the
11 property are connected trees that provide vegetation, forest cover, and wildlife
12 habitat, and that trees that are unconnected to the intact tree canopy on the
13 southern portion of the subject property are not worthy of protection within the
14 EC zone boundary.

15 The dispute in this assignment of error again relates to the intended
16 effect, if any, of the city’s adoption of the NRI on the location of the EC zone
17 boundary on the subject property. The hearings officer’s finding is not an
18 independent basis for denying the application. Rather, it is an additional basis
19 for concluding that petitioners and BDS did not satisfy their burden to
20 demonstrate “sufficient evidence of legislative intent for where the [EC
21 boundary] line should be located.” PCC 33.855.070.A.2. The finding derives
22 from the hearings officer’s ultimate conclusion that there was not sufficient

1 evidence provided to him that the city council intended the NRI maps and the
2 NRI's assessment of natural resources to establish the EC zone boundary on the
3 property. For the reasons explained above, we conclude that petitioners failed
4 to establish that the hearings officer's decision that PCC 33.855.070.A.2 was
5 not met, either improperly construed the applicable law or is unsupported by
6 substantial evidence in the record. Accordingly, the second assignment of error
7 provides no basis for reversal or remand of the decision.

8 The city's decision is affirmed.