

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 HAERTL DEVELOPMENT COMPANY,
5 and COLWOOD PARTNERSHIP,

6 *Petitioners,*

7
8 vs.

9
10 CITY OF PORTLAND,

11 *Respondent.*

12
13 LUBA No. 2008-200

14
15 FINAL OPINION
16 AND ORDER

17
18 Appeal from City of Portland.

19
20 Thor G. Tingey, Portland, filed the petition for review and Jack L. Orchard argued on
21 behalf of petitioners. With them on the brief was Ball Janik LLP.

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23 Linly F. Rees, Deputy City Attorney, Portland, filed the response brief and argued on
24 behalf of respondent.

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

28
29 AFFIRMED

05/21/2009

30
31 You are entitled to judicial review of this Order. Judicial review is governed by the
32 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal a city council decision denying their application for a comprehensive plan amendment and zone change from open space to general industrial, on property that is the site of an existing golf course.

FACTS

The subject property is a 138-acre tract that is developed as a privately-owned, public- play golf course, the Colwood National Golf Club (Colwood). The property carries a comprehensive plan designation of Open Space, and is zoned Open Space (OS). An environmental conservation overlay zone encompasses two sloughs running east to west across the property. The golf course originally opened in 1923, and presently consists of an 18-hole course and accessory club house with restaurant, lounge, pro-shop and various outbuildings. The Portland International Airport borders the property to the north, and Columbia Boulevard to the south. In 2000, the Port of Portland, which operates the airport, amended its master plan to include Colwood’s northern 48 acres as an acquisition target. The Port has negotiated with petitioners to acquire the northern 48 acres, conditioned on petitioners obtaining a plan redesignation from Open Space to Industrial Sanctuary.

Petitioners applied to the city for a comprehensive plan redesignation from Open Space to Industrial Sanctuary, and a zone change from OS to General Industrial 2 (IG-2) for approximately 115 acres of the property on both sides of the two sloughs and an area between the sloughs. Petitioners proposed retaining the OS zone and conservation overlay for the remaining 22.5 acres around the two sloughs. Petitioners contemplate that following the rezone and the Port’s acquisition of the northern 48 acres, the remainder of the golf course will be re-developed into an unspecified industrial use.

City planning staff recommended approval, with conditions. A city hearings officer recommended denial, concluding that under Portland City Code (PCC) 33.180.050.A.1

1 petitioners failed to demonstrate that the proposed comprehensive plan designation is on
2 balance “equally or more supportive of the Comprehensive Plan as a whole than the old
3 designation.”¹ The city council conducted a hearing on the application and voted to deny
4 the proposed amendments. This appeal followed.

5 **FIRST ASSIGNMENT OF ERROR**

6 The city council’s 80-page decision begins by explaining that the applicant has the
7 burden of proof to show that a comprehensive plan amendment is warranted under PCC
8 33.810.050.A.1.² According to the city, the applicant must submit evidence sufficient to

¹ PCC 33.810.050 A provides, in relevant part:

“Amendments to the Comprehensive Plan Map that are quasi-judicial will be approved if the review body finds that the applicant has shown that all of the following criteria are met:

- “1. The requested designation for the site has been evaluated against relevant Comprehensive Plan policies and on balance has been found to be equally or more supportive of the Comprehensive Plan as a whole than the old designation[.]”

² The city council’s decision states, in relevant part:

“**Burden of Proof.** The applicant, in a request for a comprehensive plan amendment, has the burden of proof and persuasion. It is applicant’s responsibility to provide evidence, in the record, that [PCC 33.810.050.A.1] is satisfied.

“**Application of PCC 33.810.050.A.1.** First, the above-stated approval criterion requires a comparison of each relevant Comprehensive Plan policy: does the ‘new’ map designation (Industrial) equally or better meet each relevant Comprehensive Plan policy than the ‘old’ designation (Open Space). The approval criterion is not satisfied by simply demonstrating that the ‘new’ Comprehensive Plan map designation (Industrial) meets or is consistent with each Comprehensive Plan policy. * * *

“Second, after making the comparison described above, the Council must determine whether, on balance, the new designation is equally or more supportive of the Comprehensive plan as a whole than the current designation. *Waker v. Clackamas County*, 111 Or App 189, 826 P2d 20 (1992) provides insight into the ‘balancing’ process that the courts expect a local jurisdiction to conduct. The court in *Waker* expressly authorized a local jurisdiction to balance its goals and/or policies. The court stated ‘we think some balancing or weighing is both permissible and necessary...’ *Id.* at 193. * * *

“[LUBA] has relied on the *Waker* balancing analysis in evaluating the Council’s past application of 33.810.050.A.1. In *Welch v. City of Portland*, 28 OR LUBA 439 (1994), LUBA held: ‘under *Waker*, so long as the record reflects that plan policies were considered and balanced, this is all that is required.’ *Id.* at 447. * * *. Finally, in *St. Johns Neighborhood Assn. v. City of Portland*, 34 Or LUBA 46, 52-53 (1998), LUBA stated that

1 demonstrate that, considering the relevant comprehensive plan policies, on balance the
2 proposed plan map designation is equally or better supportive of the comprehensive plan
3 compared to the existing plan map designation. Further, the city council explains that, in
4 applying the PCC 33.810.050.A.1 balancing test, the city is authorized to give greater weight
5 to some plan policies over others, particularly policies with a strong topical or geographic
6 connection to the proposal. In the body of its decision, the city council identifies a number
7 of relevant comprehensive plan policies and evaluates whether or not the proposed industrial
8 sanctuary plan designation equally or better met the policies compared to the existing plan
9 map designation. The city council concludes that the proposed amendment equally or better
10 supports some comprehensive plan policies, particularly those related to industrial lands, but
11 does not equally or better support other comprehensive plan policies, particularly those
12 directed at open space and environmental protection. The city council chose to give more
13 weight to the open space/environmental plan policies, and ultimately concluded that
14 petitioners had not met their burden of proving that, on balance, the proposed plan
15 amendment is equally or more supportive of the comprehensive plan, compared to the
16 existing Open Space plan designation.³

the City of Portland was permitted to balanced competing plan policies under 33.810.050.A.1.

“Based on these cases, the Council has broad discretion in establishing how to balance the relevant goals given the particular proposal and location. There is nothing in the City’s code or policies that requires that all Comprehensive Plan policies be given equal weight in the balancing process. The Council has the authority to give some relevant Comprehensive Plan policies more weight and other relevant policies less weight in reaching its final decision as to whether the ‘new’ (Industrial) proposed designation, equally or better, satisfies the policies than the ‘old’ (Open Space) designation for this particular property.” Record 26.

³ The city council’s conclusion states, in relevant part:

“The Council finds that the most important Comprehensive Plan policy subject areas, as they relate to this particular proposal, are open space, environmental and economic development and gives these subject areas the greatest weight in the balancing process required by 33.810.050 A.1. The Council further finds that open space/environmental policies, in this case, can and should be given greater weight than the economic development policies. The Council does not ignore the fact that the applicant’s proposal does provide for retention of

1 Petitioners do not challenge the general approach described in the above-quoted
2 findings, but instead argue that the city misapplied the balancing test in PCC 33.810.050.A.1
3 in three particulars.

4 **A. Evaluation of All Uses Allowed under the OS Plan Designation and Zone**

5 Petitioners argue first that in conducting the comparison required by PCC
6 33.810.050.A.1 the city erred in comparing only the Colwood property’s current use as a golf
7 course against the proposed industrial use. According to petitioners, the correct analysis
8 under PCC 33.810.050.A.1 requires (1) a comparison of all the permitted and conditional
9 uses allowed in the OS zone (agriculture, mining, utilities, community services, schools,
10 parks, golf courses) with the permitted and conditional uses allowed in the IG2 zone, (2) an
11 evaluation of the impacts and benefits of rezoning the property to IG2, and (3) a
12 determination whether, on balance, rezoning the property to IG2 would equally or better
13 serve applicable comprehensive plan policies. Petitioners argue that the city failed to
14 conduct this analysis, but instead improperly assumed that the existing golf course would
15 continue and that the perceived benefits and impacts of that golf course use are the proper
16 bases for comparison. Petitioners argue that the city’s comparison and balancing would have
17 been very different if the subject property were in fact used as a livestock operation or
18 chicken farm, both uses permitted outright in the OS zone, but uses that offer very different
19 open space values compared to a golf course.

limited open space and provides funds towards development/maintenance of the retained open space. The Council acknowledges that testimony is in the record establishing a need for additional parcels of industrial land within the City of Portland. Consistent with our findings in previous cases, we find that the open space and environmental policies, although given greater weight, do not prohibit a change from the open space designation. Rather, the Council finds that the economic development benefits of a proposal that retains only 16% of the site in open space do not outweigh the negative impacts on the open space policies. The Council concludes that this application does not meet the burden of proving that, on balance, the current proposal is equally or more supportive of the Comprehensive Plan as a whole than the current Open Space designation. As a result, the application is not approved.” Record 86.

1 The city responds, initially, that petitioners did not take the position below, either in
2 their application or during the proceedings before the city, that the city is required to evaluate
3 and compare all uses allowed in the OS plan designation and zone against the uses allowed in
4 the IG2 zone, and therefore that issue is waived, under ORS 197.763(1) and 197.835(3).
5 According to the city, in their application narrative petitioners never discussed any possible
6 use of the subject property under the OS plan designation or OS zone, other than a golf
7 course. In fact, the city argues, petitioners appeared to take the position that there is no
8 feasible use for the subject property under the OS plan and zoning designations other than a
9 golf course. The city contends that petitioners now challenge before LUBA, for the first
10 time, the same viewpoint that they proposed and relied upon below, that the current use
11 effectively serves as a relevant proxy for the Open Space plan designation, for purposes of
12 comparison and evaluation under PCC 33.810.050.A.1.

13 Petitioners do not cite to any place in the record where any party below took the
14 position that PCC 33.810.050.A.1. requires the city to evaluate all uses allowed under the OS
15 designation and OS zone against uses allowed in the Industrial designation and IG2 zone. As
16 the city notes, the hearings officer's recommendation did not attempt to evaluate or compare
17 the different uses allowed under the OS designation and zone, but appeared to treat the
18 existing golf course use as an appropriate basis for comparison under PCC 33.810.050.A.1.
19 The city council decision follows the same approach. If petitioners believed that approach
20 was error, petitioners identify no reason why that issue could not have been raised during the
21 city council hearings, if not before. Accordingly, we agree with the city that the issue of
22 whether PCC 33.810.050.A.1 requires a comparison of all uses allowed in the OS plan and
23 zone against uses allowed in the Industrial plan and IG2 zone was not raised below, and is
24 therefore waived.

25 Even if the issue were not waived, we would likely agree with the city on the merits
26 that petitioners have not established that PCC 33.810.050.A.1 necessarily requires a

1 comparison of all uses allowed in the OS plan and zone against uses allowed in the Industrial
2 plan and IG2 zone, or that the city erred in considering the fact that the property is currently
3 developed with a golf course, in conducting the balancing required by PCC 33.810.050.A.1.
4 It is important to note that PCC 33.810.050.A.1 concerns comprehensive plan amendments,
5 not zone changes, so the specific uses allowed in the OS and IG2 zones are not the
6 immediate points of comparison. The immediate and ultimate question under PCC
7 33.810.050.A.1 is whether the proposed Industrial Sanctuary plan designation equally or
8 better supports the comprehensive plan and any relevant comprehensive plan policies,
9 compared to the existing Open Space plan designation. In answering that question, we do
10 not see why it is error to take into account the fact that the subject property is currently
11 developed with a use allowed by the OS zone that implements the Open Space plan
12 designation, particularly where there is no suggestion in the record that the applicant is likely
13 to redevelop the property into a different use allowed in the OS zone. We see nothing in PCC
14 33.810.050.A.1 or elsewhere that would compel the city to assume that the subject property
15 will be redeveloped into other uses allowed in the OS zone and evaluate the benefits and
16 impacts of those hypothetical uses. Similarly, on the other side of the comparison, we see no
17 reason why the city could not focus on the likely industrial development that petitioners
18 intend for the subject property, rather than conduct a more extensive and hypothetical
19 evaluation of all the various uses allowed in the IG2 zone. In either case, the existing golf
20 course use and the industrial uses that petitioners seek to develop act as reasonable proxies
21 for the range of uses allowed under the respective zones and plan designations, unless some
22 reason is offered to expand the comparison.

23 **B. Open Space Values**

24 As a sub-theme to the above arguments, petitioners also contend that the city erred in
25 viewing the existing golf course as fostering or supporting Open Space values. Petitioners
26 note that the OS zone serves various functions, including providing opportunities for outdoor

1 recreation, providing contrasts to the built environment, preserving scenic qualities,
2 protecting sensitive environmental areas, and preserving the capacity and water quality of the
3 stormwater drainage system. PCC 33.100.010 (Purpose of the OS zone). According to
4 petitioners, the existing golf course use serves few of these functions, and then only as part of
5 a privately-owned, for-profit business that can be altered for any reason. For example,
6 petitioners argue that except for the slough areas on the property that would remain planned
7 and zoned for open space, there are no sensitive environmental areas or even areas of natural
8 native vegetation on the property, which generally consists of manicured golf greens and
9 tree-lined fairways that Colwood can alter or remove as its business needs require. Similarly,
10 petitioners argue that Colwood allows no public recreational access to the property, other
11 than members of the public who pay to play golf, and that limited access could be eliminated
12 entirely.

13 The city responds that privately owned open space such as the Colwood property can
14 nonetheless support the Open Space values and functions listed in PCC 33.100.010. The city
15 cites to testimony and findings that no matter how it is owned or operated the Colwood
16 property provides visual relief from the surrounding built environment and the upland
17 portion developed as a golf course filters stormwater and otherwise protects the sensitive
18 slough areas and helps preserve the stormwater drainage function of those areas. We agree
19 with the city that petitioners have not established that the city erred in concluding that the
20 existing use of the Colwood property serves or supports one or more of the Open Space
21 values listed in PCC 33.100.010.

22 **C. The Northern 48 Acres**

23 Finally, petitioners argue that the city erred in failing to consider the benefits and
24 impacts of redesignating and rezoning only the northern 48 acres to industrial use, in order to
25 facilitate the Port of Portland's planned acquisition and expansion. Petitioners argue that the

1 Port’s contemplated use of the northern 48 acres is a beneficial public use that the city should
2 have considered, in comparing and balancing under PCC 33.810.050.A.1.

3 The city responds that petitioners did not propose redesignating and rezoning only the
4 northern 48 acres, and that was not the proposal before the city. The city also argues that it is
5 irrelevant under PCC 33.810.050.A.1 who owns the northern 48 acres. According to the city,
6 what PCC 33.810.050.A.1 requires is a comparison of the old and new plan designations
7 with respect to applicable comprehensive plan policies. Whether the Port or some other
8 entity is the industrial user of the northern 48 acres makes no difference under PCC
9 33.810.050.A.1, the city argues. We agree with both responses.

10 The first assignment of error is denied.

11 **SECOND ASSIGNMENT OF ERROR**

12 Petitioners argue that the city failed to provide or apply the correct “standards or
13 criteria” in making the determination that Colwood should be retained as Open Space.
14 Petition for Review 19. According to petitioners, in applying PCC 33.810.050.A.1 the city
15 impermissibly considered a number of values—such as wildlife habitat protection,
16 recreation, need for parkland, water quality preservation, noise and air pollution, and tree
17 preservation—that are not grounded in any pre-existing inventories or assessments of the
18 natural resource or open space values on the property, or required by any city regulation.

19 Petitioners contend, for example, that the city treated the entire Colwood property as
20 having some value for protecting wildlife habitat, notwithstanding that only the slough areas
21 protected by the environmental conservation overlay are documented in the city’s natural
22 resource inventories or Metro regional inventories to have significant value as wildlife
23 habitat. With respect to preserving water quality, petitioners argue that the city considered
24 the upland areas to act as a buffer to filter and protect the slough areas, notwithstanding that
25 the city’s wetland protection regulations do not require a buffer area. Petitioners argue that
26 the city has regulations that protect water quality by applying conservation overlay zones and

1 by requiring that development outside those zones comply with various stormwater
2 management standards. Petitioners contend that the city should have evaluated the Colwood
3 proposal against these code standards, rather than against city staff's generalized statements
4 regarding the stormwater management function of open space.

5 PCC 33.810.050.A.1 requires the city to evaluate whether the proposed Industrial
6 plan designation equally or better supports the comprehensive plan, compared to the existing
7 Open Space plan designation. The city found, and petitioners do not dispute, that that
8 balancing and comparison requires consideration of topically or geographically relevant
9 comprehensive plan policies, which address various policy matters including the need for
10 additional industrial land, protection of wildlife habitat and water quality, etc. Nothing cited
11 to us in the PCC or elsewhere suggests that the city's evaluation of comprehensive plan
12 policies concerned with wildlife habitat, for example, is limited to the specific geographic
13 areas that are found on city inventories of wildlife habitat, and that the city is therefore
14 prohibited from considering evidence that the existing Open Space designation over the
15 entire property acts to buffer and protect those inventoried habitat areas on the subject
16 property. The city argues that petitioners' view, taken to an extreme, would prohibit the city
17 from considering evidence regarding the need for additional industrial land, because the
18 subject property is not on the city's inventory of industrial lands.

19 We agree with the city that petitioners have not established that the city erred in
20 considering evidence regarding wildlife habitat protection, recreation, need for parkland,
21 water quality preservation, noise and air pollution, and tree preservation with respect to the
22 entire subject property, under PCC 33.810.050.A.1 and the relevant comprehensive plan
23 policies. That consideration is not limited to inventoried habitat or riparian areas, such as the
24 sloughs on the subject property, and is not limited by the fact that city regulations may exist
25 that govern related matters such as stormwater management when evaluating permit

1 applications. Petitioners' arguments under this assignment of error do not provide a basis for
2 reversal or remand.

3 The second assignment of error is denied.

4 The city's decision is affirmed.