

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 BEVERLY MACKENZIE and
5 HILARY MACKENZIE,
6 *Petitioners,*
7

8 vs.
9

10 CITY OF PORTLAND,
11 *Respondent,*
12

13 and
14

15 BERNARD NNOLI and AMY NNOLI,
16 *Intervenors-Respondents.*
17

18 LUBA No. 2010-096
19

20 FINAL OPINION
21 AND ORDER
22

23 Appeal from City of Portland.
24

25 Daniel Kearns, Portland, filed the petition for review and argued on behalf of
26 petitioners. With him on the brief was Reeve Kearns, PC.
27

28 Kathryn S Beaumont, Chief Deputy City Attorney, Portland, filed a response brief
29 and argued on behalf of the city.
30

31 Jennifer Bragar, Portland, filed a response brief and argued on behalf of intervenors-
32 respondents. With her on the brief were John M. Junkin and Garvey Schubert Barer.
33

34 RYAN, Board Member; HOLSTUN, Board Chair; BASSHAM, Board Member,
35 participated in the decision.
36

37 AFFIRMED

03/11/2011

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

NATURE OF THE DECISION

Petitioners appeal a city decision approving an application to improve a city right of way that is located in the city’s Environmental Conservation (EC) overlay zone.

FACTS

Intervenors-respondents (intervenors) are the owners of an approximately one-acre residentially-zoned lot that is located adjacent on its northern boundary to NW Hampson Avenue, a 40-foot wide unimproved city right of way, and on its southern boundary to Hillhurst Avenue, an unimproved county right of way. Intervenors’ lot lies entirely within the jurisdiction of unincorporated Multnomah County while NW Hampson Avenue lies entirely within the jurisdiction of the city. In 2007, intervenors obtained county approval to build a residence at the north end of their lot. That approval was conditioned on intervenors using NW Hampson Avenue for access to the approved home site. Intervenors then applied for city approval to apply a gravel base to approximately 4,200 square feet of the undeveloped portion of NW Hampson Avenue within the city and to pave approximately 700 square feet.

Approximately 290 linear feet of NW Hampson Avenue lies within the city’s EC zone, and the proposed access along NW Hampson Avenue cuts across a forested ravine and crosses a culverted creek before ending at intervenors’ lot. Because the proposed access crosses a culverted stream and has a disturbance area of greater than 3,300 square feet within the EC zone, intervenors were required to submit an environmental review that analyzed potential alternatives to developing EC-zoned property. As part of that environmental review, intervenors submitted an alternatives analysis that evaluated six potential alternative routes for providing access to intervenors’ proposed residence. The city approved intervenors’ application, and petitioners appealed the decision to the hearings officer. During the proceedings before the hearings officer, petitioners presented two alternative access

1 routes to access intervenors' lot that do not require improving the portion of NW Hampson
2 Avenue located in the EC zone but do require improving Hillhurst Avenue, the unimproved
3 county right of way to the south of intervenors' lot. The hearings officer upheld the city's
4 decision and this appeal followed.

5 **FIRST ASSIGNMENT OF ERROR**

6 Portland City Code (PCC) 33.430.250(A)(1)(a) requires an application for
7 development of a right of way in the EC zone to demonstrate in relevant part that:

8 "Proposed development locations, designs, and construction methods have the
9 least significant detrimental impact to identified resources and functional
10 values *of other practicable and significantly different alternatives including*
11 *alternatives outside the resource area of the environmental zone[.]*"
12 (Emphasis added.)

13 PCC 33.910.030 defines "practicable" to mean "[c]apable of being done after taking into
14 consideration cost, existing technology, and logistics *in light of overall project purposes.*"
15 (Emphasis added.)

16 Intervenor provided an alternatives analysis that evaluated six potential routes of
17 access to their approved home site. Record 77. The access that was subsequently approved
18 by the hearings officer is referred to as Alternative 3. One of the six alternatives, Alternative
19 4, evaluated taking access via an easement across petitioners' property, which petitioners
20 have agreed to grant only if intervenors change the location of their proposed dwelling to the
21 southern portion of their lot.

22 Another of the six alternatives, Alternative 1, evaluated providing access to the
23 approved home site on the northern boundary of the property via a connection from Hillhurst
24 Avenue, the undeveloped county right of way that is adjacent to the property's southern
25 boundary. That access would require construction of a lengthy driveway, through the
26 southern and eastern portion of the subject property. The access provided under Alternative
27 1 would be located entirely outside of the city's EC zone but portions would be located in a

1 county environmental overlay zone. Record 11. Intervenors estimated that the cost to
2 construct access to the approved proposed home site on the north end of the property under
3 Alternative 1 was approximately \$130,000 higher than the cost to improve NW Hampson
4 Road under Alternative 3.

5 During the proceedings before the hearings officer, petitioners proposed two
6 alternatives to intervenors' Alternative 1 accessing the property via Hillhurst Avenue
7 (Alternatives 1A and 1B) that differed in one important respect from intervenors' proposed
8 Alternative 1: Alternatives 1A and 1B assumed building sites for intervenors' residence that
9 are located adjacent or close to the property's southern boundary, instead of near the northern
10 boundary as intervenors propose. Record 541.

11 The hearings officer rejected petitioners' Alternatives 1A and 1B, and Alternative 4
12 that granted an easement only if the dwelling location was moved to the southern end of the
13 subject property, in part because those alternatives only provided access to a southern home
14 site. The hearings officer interpreted PCC 33.430.250(A)(1) not to require intervenors to
15 consider alternatives that required a different home site than the approved home site, based in
16 part on language in the introductory paragraph of PCC 33.430.250 that provides:

17 "When environmental review is required because a proposal does not meet
18 one or more of the development standards of Section 33.430.140 through
19 .190, then *the approval criteria will only be applied to the aspect of the*
20 *proposal that does not meet the development standard or standards.*"
21 (Emphasis added.)

22 Because nothing in the city's code dictated a particular location for the dwelling, the hearings
23 officer concluded based on the above-emphasized language that the requirement to evaluate
24 alternatives applied only to evaluation of alternatives to the proposal for access along NW
25 Hampson Avenue (*i.e.*, the aspect of the proposal that does not meet the development
26 standard or standards), and did not require an alternative home site evaluation.

1 The hearings officer also concluded that under the definition of “practicable,” the
2 “overall project purpose” is the purpose that is identified by an applicant:

3 “The hearings officer finds that the Applicants, under PCC
4 33.430.250(A)(1)(a) are **not** required to consider alternative home sites. * * *

5 “First, PCC 33.430.250 (opening paragraph) imposes the PCC
6 33.430.250(A)(1)(a) approval criteria only on the aspect of the proposal that
7 does not meet development standards. * * * Second, the applicant has the
8 right to define the project purpose. In this case the project purpose is to
9 construct a single family residence at a location of its choice (so long as the
10 location is consistent with the relevant planning documents.)

11 “* * * * *

12 “The hearings officer finds that PCC 33.430.250(A)(1)(a) requires
13 consideration of alternatives in the context of ‘practicable.’ The hearings
14 officer finds that ‘practicable’ is to be considered in the context of the ‘project
15 purposes.’ The hearings officer finds that the Applicants, in this case, defined
16 the project purposes as siting a residence in the northerly portion of the
17 Subject Property in close proximity to NW Hampson Avenue. * * *

18 “[Petitioners suggest] that the hearings officer * * * must consider an
19 alternative location for the residence in the southern portion of the Subject
20 Property. The hearings officer finds that a southern residence location does
21 not satisfy the ‘project purposes’ as set forth by the Applicants. The hearings
22 officer finds that a southern location for a residence cannot meet the definition
23 of ‘practicable.’” Record 20-21 (emphasis in original).

24 In their first assignment of error, petitioners argue that the hearings officer
25 misconstrued applicable provisions of the PCC by rejecting the petitioners’ proffered
26 alternatives on the basis that they were not practicable because they would not provide access
27 to intervenors’ approved home site. Petitioners allege that the hearings officer erred in his
28 interpretation of PCC 33.430.250 and of the defined term “practicable” by too narrowly
29 defining the term to allow an applicant to define the “overall project purpose.” Petitioners
30 assert that their proffered alternatives are “practicable” precisely because they allow
31 intervenors to build a residence on their lot while posing the least detrimental impact to the
32 resources protected by the imposition of the EC zone on a portion of NW Hampson Avenue.

1 According to petitioners, an applicant’s stated preference for a particular building site should
2 not be a sufficient basis to ignore the purposes of the EC zone set forth in PCC 33.430.017,
3 conserving important resources while allowing environmentally sensitive urban
4 development.¹

5 In support of their argument, petitioners cite *Sprint PCS v. Washington County*, 186
6 Or App 470, 63 P3d 1261 (2003). In *Sprint*, the Court of Appeals considered ORS
7 215.283(1)(d), which allows as a permitted use on Exclusive Farm Use (EFU) zoned land
8 “[u]tility facilities necessary for public service.” In that case, the utility’s defined project
9 purpose was inconsistent with placing a cell tower on a non-EFU site, but the Court of
10 Appeals held that the local government is not required to defer to that defined purpose and
11 allow the tower to be placed on EFU-zoned land. *Sprint* is inapposite in the present appeal,
12 where no development on EFU-zoned land is involved.

13 Intervenors and the city (respondents) respond that the hearings officer was correct in
14 defining the overall project purpose as locating a residence on the north end of the subject
15 property, and therefore the hearings officer correctly rejected petitioners’ alternatives that
16 required a home site in a different location. According to respondents, the term “practicable”
17 in PCC 33.430.250 refers to practicable alternatives that serve the “project purpose” as
18 defined by the applicant.

19 We review the hearings officer’s interpretation of PCC 33.430.250(1)(A)(a) and the
20 defined term “practicable” to determine whether it is correct. *McCoy v. Linn County*, 90 Or
21 App 271, 275, 752 P2d 323 (1988). As a preliminary matter, we disagree with the hearings
22 officer’s general conclusion that “the applicant has the right to define the project purpose” in

¹ PCC 33.430.017 provides:

“The Environmental Conservation zone conserves important resources and functional values in areas where the resources and functional values can be protected while allowing environmentally sensitive urban development.”

1 all cases. Such a broad allowance to an applicant could certainly run afoul of the purpose of
2 the city's EC zone, which, as noted above, allows environmentally sensitive development
3 and protects identified natural resources. However, in this case, intervenors have received
4 approval from the local government that has jurisdiction over their property, the county, to
5 build a residence in a specific location on their property.² Further, that county approval is
6 conditioned on intervenors' securing city approval to access that home site from NW
7 Hampson Road. The city has no jurisdiction or control over the location of intervenors'
8 residence because intervenors' property is not located in the city. We conclude that in such
9 circumstances, it was not error for the Hearings Officer to define the "project purpose" for
10 purposes of the alternatives analysis to be limited to providing access to the location of the
11 county-approved home site on the subject property, and to reject alternatives that provided
12 access to potential home sites in different locations on intervenors property, that have not
13 received county approval.

14 The first assignment of error is denied.

15 **SECOND ASSIGNMENT OF ERROR**

16 In their second assignment of error, although their arguments are not particularly
17 clear, we understand petitioners to argue that (1) the hearings officer misconstrued the
18 definition of "practicable" in rejecting a project opponent's (Dowd's) proposed methodology
19 for considering costs and improperly placing the burden of proof on project opponents to
20 offer evidence demonstrating that intervenors could afford the additional cost to construct
21 Alternative 1, and (2) the hearings officer's conclusion that Alternative 1 is not practicable
22 due to cost is not supported by substantial evidence in the record. During the proceedings
23 before the hearings officer, Dowd argued that the hearings officer should consider "cost" in
24 light of the total combined cost of the dwelling and access to the dwelling. Using that

² The subject property appears to have some steep slopes, streams, and ravines. Record 11.

1 methodology, Dowd argued that improvement of access to the dwelling via Alternative 1
2 would add only 6% to 8% to his estimate of the combined cost of the dwelling and access to
3 the dwelling. Record 553-54.

4 However, as we discuss later, the hearings officer rejected that approach. The
5 hearings officer concluded that intervenors' Alternative 1 was not practicable in part because
6 the cost of Alternative 1 was approximately \$230,000, more than double the cost of
7 constructing preferred Alternative 3, which was estimated to cost approximately \$100,000.
8 The hearings officer based that conclusion in part on a statement by intervenors'
9 representative that "the estimate for construction of [Alternative 3] is \$100,650. This
10 estimate of cost is a practicable amount and in the range anticipated by [intervenors]."
11 Record 24 (quoting Record 197). The hearings officer also concluded that Alternative 1 was
12 not practicable due to other factors, including that constructing Alternative 1 presented
13 greater logistical challenges due to the necessity to construct a roadway on steeper slopes (up
14 to 24%) and the location of that alternative within a county environmental zone that requires
15 100 foot stream buffers. Record 24.

16 Respondents point out first that the hearings officer based his conclusion that
17 Alternative 1 was not practicable on several factors, including logistical problems with
18 constructing that access, and that petitioners fail to challenge the hearings officer's
19 conclusion that Alternative 1 is not practicable based on those logistical factors.
20 Respondents also respond that the hearings officer did not err in rejecting Dowd's proposed
21 method of calculating costs of the project based on his estimated total of all proposed
22 construction on the property, and that substantial evidence in the record supports the hearings
23 officer's decision.

24 As noted above, PCC 33.910.030 defines "practicable" to mean:

25 "Capable of being done after taking into consideration cost, existing
26 technology, and logistics in light of overall project purposes."

1 We agree with respondents that the hearings officer did not err in determining, based on the
2 evidence in the record, that Alternative 1 is not practicable due in part to the increased cost of
3 that alternative over the costs that intervenors anticipated for construction of access.
4 Although Dowd offered an alternative method for approaching the analysis of whether the
5 cost of an alternative is practicable, we understand the hearings officer to have rejected that
6 suggested method of analyzing cost.³ Petitioners do not explain why Dowd’s approach is the
7 only correct method for determining practicability under PCC 33.910.030 and PCC
8 33.430.250. The hearings officer determined, based on intervenors’ evidence and testimony,
9 that Alternative 1 costs more than double the amount that was anticipated and budgeted by
10 intervenors when seeking the subject permit to improve NW Hampson Avenue and
11 concluded that such an increased cost renders the alternative impracticable. That conclusion
12 is supported by evidence in the record, and petitioners do not cite to any evidence in the
13 record that calls that evidence into question. Further, we agree with respondents that the
14 hearings officer did not reverse the burden of proof in relying on that evidence, but rather
15 relied on the evidence submitted by intervenors that indicated that an alternative that more
16 than doubled the cost that they anticipated for the project is not practicable.

17 The second assignment of error is denied.

³ The hearings officer found:

“The Hearings Officer, in past cases, has found a statement by an applicant that project costs, above a certain limit, made the project financially not feasible, was adequate. If the Hearings Officer were to adopt opponent Dowd’s suggested approach, then the Hearings Officer would, in this case for example, enter a finding that [intervenors] were financially capable of spending an additional \$130,000 on the project (even though as a percentage increase in cost was only 6% to 8%.) the Hearings Officer is extremely uncomfortable to enter into such subjective findings, Further, in this case there is no evidence in the record to indicate that [intervenors] are financially capable of expending an additional \$130,000 * * *. The Hearings Officer finds making such finding in this case, would not be supported by substantial evidence, and is speculative and presumptuous. The Hearings Officer, therefore, finds that an appropriate method of determining if an alternative is financially feasible is a representation by an applicant that one or more alternative(s) is/are not economically feasible (‘too expensive’); preferably, but not required, would be an economic analysis supporting an applicant’s not feasible representation.” Record 23.

1 The city's decision is affirmed.