

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

3
4 ORENCO NEIGHBORHOOD ORGANIZATION,)
5 PHILLIP SMITH, SHERRY SMITH,)
6 KATHY PECK, ROBERT PECK, CHARLES B.)
7 HEDRICKS, HARLAN BAUGHMAN,)
8 VIRGINIA BAUGHMAN, JOEL KOOKEN,)
9 BONNIE KOOKEN, SONJA HALL, and)
10 MRS. ARNOLD NUREEN,) LUBA No. 95-010
11)
12 Petitioners,) FINAL OPINION
13) AND ORDER
14 vs.)
15)
16 CITY OF HILLSBORO,)
17)
18 Respondent.)

19
20
21 Appeal from City of Hillsboro.

22
23 Gregory J. Lutje, Portland, represented petitioners.

24
25 Timothy J. Sercombe, Portland, represented respondent.

26
27
28 SHERTON, Chief Referee, participated in the decision.

29
30 DISMISSED 04/19/95

31
32 You are entitled to judicial review of this Order.
33 Judicial review is governed by the provisions of ORS
34 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioners appeal an ordinance amending the City of
4 Hillsboro Zoning Ordinance (HZO).

5 **FACTS**

6 The Portland metropolitan area Westside Light Rail
7 Project includes a Hillsboro Extension segment. The City of
8 Hillsboro (city) agreed to participate in planning for
9 neighborhoods surrounding the light rail stations for the
10 proposed Hillsboro Extension. However, the city anticipated
11 that preparation of Station Area Plans would require
12 approximately 18 months, during which time the city would
13 have no regulations preventing non-transit-supportive
14 development from occurring in these areas. Consequently,
15 the city planning commission initiated legislative
16 amendments to the HZO to establish interim light rail
17 station area protective measures. The planning commission
18 held public hearings on the proposed HZO amendments from
19 December, 1993 through February, 1994, and recommended
20 adoption of the proposed amendments to the city council.

21 On April 5, 1994, the city council adopted Ordinance
22 No. 4223, entitled "ZOA 3-93: Light Rail Station Area
23 Interim Protection Ordinance (SAIPO)." SAIPO amends the
24 text of the HZO, including the addition of a new
25 section 135, entitled "Station Area Interim Protection
26 District" (SAIPD), which is described as:

1 "* * * an overlay zone intended to direct and
2 encourage transit supportive and pedestrian
3 sensitive development within areas in close
4 proximity to planned Westside Project and
5 Hillsboro Extension light rail station sites,
6 pending the development and adoption of specific
7 station area plans." HZO 135(1).

8 HZO 135(2) provides:

9 "The SAIPD shall apply as an overlay zone to those
10 specific properties identified on the [SAIPD]
11 Overlay Map, an attachment to the Official Zoning
12 Map of the City of Hillsboro. The [SAIPD]
13 boundaries and standards are created and can be
14 modified or removed only as provided in [HZO] 135,
15 or through the legislative planning process, and
16 not through a site-specific quasi-judicial
17 planning process." (Emphasis added.)

18 HZO 135(2) also provides that application of the SAIPD to
19 specific properties shown on the SAIPD Overlay Map shall
20 terminate (1) if a Station Area Plan amending the Hillsboro
21 Comprehensive Plan (plan) and HZO with regard to those
22 properties is adopted; (2) if the Tri-Met Transportation
23 District fails to obtain necessary federal approvals to
24 proceed with the Hillsboro Extension segment of the Westside
25 Light Rail Project; or (3) two years after the effective
26 date of SAIPO.

27 **MOTION TO DISMISS**

28 Petitioners filed their notice of intent to appeal
29 SAIPO on January 17, 1995, over nine months after SAIPO was
30 adopted. The city moves to dismiss this appeal on the
31 ground that the notice of intent to appeal was untimely
32 filed.

1 There is no dispute that SAIPO was adopted by the city
2 as a postacknowledgment land use regulation amendment
3 pursuant to ORS 197.610 to 197.625. Under ORS 197.830(8)
4 and OAR 661-10-015(1)(a), a notice of intent to appeal a
5 postacknowledgment land use regulation amendment "shall be
6 filed not later than 21 days after the decision sought to be
7 reviewed is mailed to the parties entitled to notice under
8 ORS 197.615." Under ORS 197.615(2)(a), the parties entitled
9 to notice are persons who:

10 "(A) Participated in the proceedings leading to
11 the adoption of the amendment to the * * *
12 land use regulation * * *; and

13 "(B) Requested of the local government in writing
14 that they be given such notice."

15 The city argues it mailed notice of its decision to all
16 persons entitled to such notice on April 8, 1994.
17 Therefore, the city contends petitioners' notice of intent
18 to appeal should have been filed on or before April 29,
19 1994.

20 Petitioners do not claim the city failed to provide any
21 petitioner with notice of the challenged decision required
22 under ORS 197.615(2)(a). Rather, petitioners contend
23 petitioner Hedricks' notice of intent to appeal was timely
24 filed under ORS 197.830(3), which provides in relevant part:

25 "If a local government makes a land use decision
26 without providing a hearing * * *, a person
27 adversely affected by the decision may appeal the
28 decision to [LUBA] under this section:

29 "* * * * *

1 "(b) Within 21 days of the date a person knew or
2 should have known of the decision where no
3 notice [of the decision] is required."

4 As petitioners point out, in Leonard v. Union County,
5 24 Or LUBA 362, 374-75 (1992), this Board determined that if
6 a local government fails to give a person an individual
7 written notice of hearing to which that person is entitled
8 under state or local law, the local government fails to
9 provide a hearing with regard to that person, within the
10 meaning of ORS 197.830(3). Petitioners argue the city
11 failed to give petitioner Hedricks individual mailed notice
12 of its hearings on the proposed SAIPO to which petitioner
13 Hedricks is entitled under HZO 116(1)(b), because he owns
14 property affected by the SAIPD Overlay Zone. According to
15 petitioners, under ORS 197.830(3)(b), petitioner Hedricks
16 properly filed his notice of intent to appeal within 21 days
17 of when he knew or should have known of the challenged
18 decision.

19 The city contends petitioner Hedricks is not entitled
20 to individual mailed notice of its hearings on the proposed
21 SAIPO under HZO 116.¹ As relevant here, HZO 116 ("Public

¹The city also contends petitioner Hedricks' notice of intent to appeal is not timely filed under ORS 197.830(3)(b) because petitioner Hedricks (1) is not adversely affected by the adoption of SAIPO, and (2) "knew or should have known" of the adoption of SAIPO more than 21 days before his notice of intent to appeal was filed. The city moves for an evidentiary hearing on these issues. However, because we agree with the city that petitioner Hedricks was not entitled to individual mailed notice of the city hearings on SAIPO under HZO 116, this appeal must be dismissed in any case, and we do not consider the city's motion for evidentiary hearing.

1 Hearing on an [HZO] Amendment") provides:

2 "Before taking action on a proposed amendment to
3 [the HZO], the Planning and Zoning Hearings Board
4 or the Planning Commission shall hold a public
5 hearing thereon * * *.

6 "(1) Notice of Hearing. Notice of * * * the
7 public hearing before the Planning Commission
8 or the Planning and Zoning Hearings Board, on
9 a proposed amendment shall be given * * * in
10 the following manner:

11 "a. If an amendment to the text of [the HZO]
12 is proposed, notice shall be by three
13 publications in a newspaper of general
14 circulation in the City * * *.

15 "b. If an amendment to the zoning map is
16 proposed, the notice shall be by one
17 publication of a written notice and
18 vicinity map in a newspaper of general
19 circulation in the city, * * * and by
20 mailing written notice * * * to owners
21 of property within the area enclosed by
22 lines parallel to (and) 500 feet from
23 the exterior boundaries of the property
24 involved * * *.

25 "* * * * *"

26 The city argues SAIPO is a legislative amendment to the
27 text of the HZO, not an amendment to the city's zoning map,
28 and therefore the required notice of hearing is governed by
29 HZO 116(1)(a), not HZO 116(1)(b), as argued by petitioners.
30 The city argues the "zoning map" is established under HZO 6
31 and shows only the "base" zoning districts established in
32 HZO 5. The city points out SAIPO does not purport to amend
33 HZO 5 or 6, but rather establishes the SAIPD as a temporary
34 overlay district in newly created HZO 135, and specifically

1 describes the SAIPD Overlay Map as "an attachment to," not
2 "an amendment of," the city zoning map.² The city further
3 argues that HZO 116(1)(b) applies only to amendments to the
4 zoning map established under HZO 6, which under HZO 112, are
5 heard by the Planning and Zoning Hearings Board.³ According
6 to the city, legislative changes to the text of the HZO are
7 heard by the planning commission, as was SAIPO, and are
8 governed by HZO 116(1)(a).

9 Under ORS 197.829 and Clark v. Jackson County, 313 Or
10 508, 514-15, 836 P2d 710 (1992), we are required to give
11 considerable deference to a local governing body's
12 interpretation of its own enactment. Additionally, in Gage
13 v. City of Portland, 123 Or App 269, 860 P2d 282, on
14 reconsideration 125 Or App 119 (1993), rev'd on other
15 grounds 319 Or 308 (1994), and Weeks v. City of Tillamook,
16 117 Or App 449, 453, 844 P2d 914 (1992), the Court of
17 Appeals has said we are required to review the governing
18 body's interpretation of its own enactment, as expressed in
19 the challenged decision, and may not interpret the local

²The city also points out its other overlay district, the Special Industrial District (SID), is also established under a separate section of the HZO, rather than under HZO 5, and is not shown on the zoning map established under HZO 6.

³HZO 112 provides in relevant part:

"* * * Applications for [zoning] map amendment[s] shall be heard by the Planning and Zoning Hearings Board. Consideration of amendments to the text of [the HZO] shall be by the Planning Commission."

1 enactment ourselves in the first instance.⁴

2 Here, the challenged decision does not explicitly
3 interpret HZO 116 with regard to whether notice of the
4 city's hearings on SAIPO is governed by HZO 116(1)(a) or
5 (b). However, we can infer from the fact that the proposed
6 SAIPO was reviewed by the Planning Commission, and not the
7 Planning and Zoning Hearings Board, and from the facts that
8 SAIPO does not purport to amend the zoning map established
9 under HZO 6, but rather refers to the SAIPD Overlay Map as
10 an "attachment" to that zoning map, that the city believed
11 SAIPO to be an amendment to the text of the HZO governed by
12 HZO 116(1)(a), rather than an amendment to the zoning map
13 governed by HZO 116(1)(b).

14 For the reasons set out below, we would agree with this
15 interpretation regarding the applicability of HZO 116 to the
16 adoption of SAIPO, even without the deference required by
17 ORS 197.829 and Clark. Therefore, no purpose would be
18 served by remanding the challenged decision for the city
19 council to make its interpretation of HZO 116 explicit, and
20 we do not believe a remand is required in this circumstance
21 by Gage, supra, and Weeks, supra.⁵

⁴However, we note that neither Gage nor Weeks involved interpretations of local enactments necessary to determine whether this Board has jurisdiction to review a challenged decision.

⁵In Fraser v. City of Joseph, ___ Or LUBA ___ (LUBA No. 94-067, November 4, 1994), whether a city council decision approving provision of city services outside city limits was a "land use decision," as defined in

1 It is reasonable and correct to interpret HZO 116(1)(b)
2 as applying only to proposed amendments to the city "zoning
3 map" established under HZO 6. In creating a temporary
4 overlay district in new HZO 135, SAIPO amends only the text
5 of the HZO. Under HZO 135(2), the SAIPD Overlay Map is
6 adopted only as a temporary attachment to the zoning map,
7 and the boundaries of the SAIPD can be changed only as
8 provided in HZO 135 or through a legislative planning
9 process, not by a quasi-judicial zoning map amendment.
10 Therefore, SAIPO does not amend the zoning map, and notice
11 of the city hearings concerning the adoption of SAIPO is
12 governed by HZO 116(1)(a). Consequently, petitioner
13 Hedricks was not entitled to individual mailed notice of the
14 city's hearings and is not entitled to appeal SAIPO to this
15 Board under ORS 197.830(3). Petitioners provide no other
16 basis for concluding their notice of intent to appeal was
17 timely filed.

18 The city's motion to dismiss is granted.

19 This appeal is dismissed.

ORS 197.015(10)(a)(A)(ii) and, therefore, whether the decision was subject to our review jurisdiction, depended on whether particular comprehensive plan provisions were approval criteria for the decision. The challenged decision did not interpret these plan provisions, and we decided we were required by Gage and Weeks to remand the decision to the city to adopt such interpretations, before we could determine whether we had jurisdiction. However, in Fraser, we could not infer the city's interpretation of the relevant plan provisions from the decision itself, and the city did not advocate an interpretation of the relevant plan provisions with which we would agree, regardless of whether Clark deference was required.