

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

3 PATTI HUDSON and BAKER)
4 CITIZENS FOR CLEAN INDUSTRY,)
)
5 Petitioners,) LUBA No. 87-031
)
6 vs.) ORDER DENYING
)
7 CITY OF BAKER,) MOTION TO DISMISS
)
8 Respondent.)

9 This matter is before the Board on Respondent City of
10 Baker's motion to dismiss for lack of jurisdiction. The
11 respondent contends its decision was not a land use decision
12 subject to our review as that term is defined in ORS
13 197.015(10). ORS 197.825. ORS 197.015(10) provides as follows:

14 "(10) 'Land use decision':

15 "(a) Includes:

16 "(A) A final decision or determination made by a local
17 government or special district that concerns the
 adoption, amendment or application of:

18 * * *

19 "(iii) A land use regulation;

20 * * *

21 "(b) Does not include a ministerial decision of a
22 local government made under clear and objective
23 standards contained in an acknowledged comprehensive
24 plan or land use regulation and for which no right to
 a hearing is provided by the local government under
 ORS 215.402 to 215.438 or 227.160 to 227.185."

25 As explained below, we conclude the city's decision
26 concerns the application of a land use regulation (the zoning

1 ordinance), and the exclusion provided in ORS 197.015(10)(b)
2 for ministerial decisions does not apply. The city's decision,
3 therefore, was a land use decision and is subject to our review.

4 THE CITY'S DECISION

5 The city's decision in this case came in response to a
6 request for a land use compatibility statement required by the
7 Department of Environmental Quality (DEQ). State agencies are
8 required to "take actions that are authorized by law with
9 respect to programs affecting land use...in a manner compatible
10 with...(acknowledged) (c)omprehensive plans and land use
11 regulations...." ORS 197.180(1); See Federation of Seafood
12 Harvesters v. Fish and Wildlife Commission, 291 Or 452,
13 632 P2d 777 (1980); Eugenians for a Liveable Future v. Oregon
14 Department of Transportation, 12 Or LUBA 142 (1984). In
15 addition, state agencies are required to assure that their
16 permits affecting land use are "compatible with acknowledged
17 comprehensive plans and land use regulations." ORS
18 197.180(7). The Land Conservation and Development Commission
19 (LCDC) has promulgated administrative rules to implement this
20 requirement. OAR 660-31-015 et seq. Under ORS 197.180(7) and
21 OAR 661-31-035(2), DEQ is authorized to rely on the city's
22 determination of compatibility with the comprehensive plan and
23 land use regulations in certain circumstances.

24 On April 16, 1987 the City of Baker executed a land use
25 compatibility statement in which the city determined that the
26 proposed use was a use "allowed outright by the plan." This

1 appeal followed.

2 DISCUSSION

3 In order to be subject to review by this Board, the city's
4 decision must be both a "final" decision and a "land use"
5 decision. ORS 197.825. Before considering whether the city's
6 decision was a land use decision, we first consider whether it
7 is a final decision within the meaning of ORS 197.830(7).

8 Sometime prior to April 14, 1987, the Baker city manager
9 received a request that he complete a DEQ land use
10 compatibility statement on behalf of Idaho Scrap Dealer for a
11 proposed insulation incinerator to be located in the City of
12 Baker's industrial zone. The land use compatibility statement
13 is a one page form on which the applicant, property and zoning
14 designation are identified. The form provides seven boxes
15 which may be checked to describe how the proposed use is
16 addressed in the comprehensive plan. The city checked the box
17 which indicated the use "is allowed outright by the plan."

18 When the requested land use compatibility statement was
19 received, the city manager consulted DEQ to obtain more
20 information regarding the nature of the proposed use and the
21 regulatory requirements DEQ would impose on such a use. The
22 city manager then concluded that the use was a use permitted
23 outright in the city's industrial zone. Following the city
24 manager's decision, the issue was discussed at the April 14,
25 1987 city council meeting under a citizen participation item on
26 the agenda. The city council apparently took no formal action

1 with respect to the land use compatibility statement. It did
2 pass two motions to request that DEQ hold a hearing in the City
3 of Baker and to indicate that the city council would attend
4 such a hearing.¹

5 Following the city council meeting, the land use
6 compatibility statement was signed by the city attorney on
7 April 16, 1987. The City of Baker and the petitioners have
8 stipulated that while the decision was signed by the city
9 attorney, the decision actually was rendered by the city
10 manager. For lack of a more plausible alternative, we conclude
11 that the decision was made by the city manager sometime before
12 April 14, 1987. That decision was reviewed by the city council
13 on April 14, 1987 who elected to allow the city manager's
14 decision to stand. The city manager's decision became final on
15 April 16, 1987 when it was signed by the city attorney. OAR
16 661-10-010(3).²

17 ORS 197.180(7) expressly provides that, as prescribed by
18 LCDC rules, state agencies "may rely upon a determination of
19 compatibility issued by a city." This statutory authority
20 would be of negligible value if the state agency could
21 nevertheless be required to demonstrate in any subsequent
22 challenge of the agency's permitting action that the use
23 permitted was compatible with the comprehensive plan. We
24 believe ORS 197.180(7) and OAR 660-31-035(2) allow the
25 comprehensive plan compatibility determination to be a decision
26 made by the local government.³ Thus, while the city has

1 issued no building permit or conditional use permit it has
2 rendered a final decision regarding compatibility of the
3 proposed use with the city's land use regulations. See
4 Schreiner's Garden v. DEQ, 71 Or App 381, 386-388, 692 P2d 660
5 (1984).

6 The compatibility determination ruling required the City of
7 Baker to apply its zoning ordinance. Therefore, the decision
8 is a land use decision unless the exemption provided in ORS
9 197.015(10)(b) applies. For the reasons discussed below, we
10 conclude the exemption does not apply.

11 ORS 197.015(10)(b) excludes from the definition of land use
12 decision

13 "a ministerial decision of a local government made
14 under clear and objective standards contained in an
15 acknowledged comprehensive plan or land use regulation
16 and for which no right to a hearing is provided by the
17 local government under ORS 215.402 to 215.438 or
18 227.160 to 227.185."

19 Baker County's comprehensive plan and land use regulations
20 have been acknowledged. The city contends that its decision was
21 ministerial. The relevant issues, therefore, are: (1) whether
22 the applicable zoning ordinance standards are clear and
23 objective, and (2) whether there is a right to a hearing on the
24 matter.

25 The city zoning ordinance provides, in pertinent part, for
26 permitted and conditional uses in the industrial zone as
follows:

"Permitted Uses. In the I zone the following uses and
their accessory uses are permitted:

1
2 "(1) Manufacturing, compounding, fabricating
3 processing, repairing, packing and storage of goods
4 and products.* * * Section 12.020.

4 "Conditional Uses. In the I zone the following uses
5 and their accessory uses are permitted when authorized
6 in accordance with Article 16.

6 * * *

7 "(7) Any use which may create a nuisance because of
8 dust, noise, smoke, odor, gas, or other adverse
9 effect.* * * " Section 12.030.

9 The city contends that the proposed use falls within
10 Section 12.020(1) and that the city manager therefore rendered
11 a ministerial decision under clear and objective standards.
12 Citing Bell v. Klamath County, 77 Or App 131, 711 P2d 209
13 (1985) and Doughton v. Douglas County, 82 Or App 444, ___
14 P2d ___ (1986), the city contends that this is the type of
15 ministerial decision that the legislature did not intend to be
16 reviewed as a land use decision. The city further contends
17 there is no provision for a hearing on the city manager's
18 decision in this matter.⁴

19 All of the parties recognize the significance of the recent
20 Court of Appeals' decision in Doughton v. Douglas County,
21 supra, in resolving the issues presented in this case. In
22 Doughton, this Board had concluded that because a single family
23 dwelling provided in conjunction with farm use (farm dwelling)
24 was a use permitted outright under the county's zoning
25 ordinance and all developmental standards were clear and
26 objective, the building permit fell within the exemption

1 provided by ORS 197.015(10)(b). Citing the Board's decisions
2 in Matteo v. Polk County, 11 Or LUBA 259 (1984), and 14 Or LUBA
3 67 (1985), the court concluded that the question of whether a
4 proposed dwelling was a farm dwelling was "inherently not
5 susceptible to a clear and objective ministerial resolution."
6 82 Or App at 449. The court also expressly rejected the
7 Board's reasoning that the determination of whether the
8 proposed dwelling was a farm dwelling was merely a preliminary
9 classification which does not entail the application of
10 standards under ORS 197.015(10)(b). Id at 448.

11 Petitioners and intervenors contend that Section 12.030(7)
12 applies and it is not a clear and objective standard. Section
13 12.030(7) provides that a conditional use permit is required
14 for "any use which may create a nuisance because of dust,
15 noise, smoke, odor, gas or other adverse effect." Although it
16 is not entirely clear, Section 12.030(7) apparently has the
17 effect of converting the permitted uses in Section 12.020 to
18 conditional uses, subject to the hearing requirements and
19 approval standards in Article 16, if the permitted use may
20 create a nuisance.

21 We agree with petitioners and intervenors that while the
22 land use compatibility statement does not expressly consider
23 12.030(7), ~~the~~ decision has the effect of declaring that
24 subsection does not apply.⁵ We also agree with petitioners
25 and intervenors that Section 12.030(7) is not a clear and
26 objective standard within the meaning of ORS 197.015(10)(b).

1 The application of this standard requires significant
2 discretion.⁶

3 The exemption provided by ORS 197.015(10)(b) is imprecise.
4 Petitioners and intervenors argue for an extremely exacting
5 construction of the requirement for clear and objective
6 standards. They seem to say that if the zoning ordinance must
7 be interpreted at all the decision is a land use decision. The
8 city effectively argues for a very inclusive interpretation of
9 the clear and objective standards requirement.

10 In our view an interpretation somewhere between these two
11 extremes is suggested by the court of appeals' decision in
12 Doughton.

13 "The purpose of ORS 197.015(10)(b) is to make certain
14 local government actions unreviewable as land use
15 decision, because they are really nondiscretionary or
16 minimally discretionary applications of established
17 criteria rather than decisions over which any
18 significant factual legal judgment may be exercised."
19 82 Or App at 449.

17 Our decision in this case is that the city's land use
18 compatibility decision does not involve a "nondiscretionary or
19 minimally discretionary application of established criteria."
20 The application of Section 12.030(7) calls for the exercise of
21 significant discretion. The requirement for discretion is due
22 both to the very subjective nature of what constitutes a
23 nuisance and the very open ended nature of the factors that are
24 to be considered, i.e. "dust, noise, smoke, odor, gas, or other
25 adverse effect." The exemption provided by ORS 197.015(10)(b)
26 does not apply to the city's decision. The city's decision is

1 a land use decision subject to our review.

2 The motion to dismiss is denied.

3 Dated this 12th day of August, 1987.

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Michael A. Holstun
Referee

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1 FOOTNOTES

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4 The parties have advised the Board that DEQ has held
5 hearings on its proposed permit. DEQ's proceedings are
6 separate from the city proceedings and decision at issue in
7 this appeal.

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9 2

10 We have been unable to identify any provision of the zoning
11 ordinance controlling when the land use compatibility statement
12 became final. Because no one has argued that the city attorney
13 was not authorized to sign the statement on behalf of the
14 governing body, we will assume he has such authority.

15
16 3

17 The decision rendered by the City of Baker in this case is
18 similar to the decision the court of appeals found to be a land
19 use decision in Medford Assembly of God v. City of Medford, 297
20 Or 138, 681 P2d 790 (1984). In Medford Assembly of God the
21 county's zoning ordinance provided a procedure under which the
22 planning commission could issue a decision interpreting
23 ambiguous code provisions. The City of Baker contends the city
24 manager has authority to declare what the zoning ordinance
25 requires of DEQ's permit applicant. Section 19.020 of the
26 Baker Zoning provides as follows:

16 "The city manager or his designee shall have the power
17 and duty to enforce this ordinance. An appeal from a
18 ruling by him may be made only to the city council."

19 While the Baker County Zoning Ordinance does contain at Section
20 2.060(a) a provision somewhat similar to the provisions at
21 issue in Medford Assembly of God for the planning commission to
22 interpret the zoning ordinance, the City of Baker did not
23 utilize that provision.

24 Section 19.020 does not expressly empower the city manager
25 to issue land use compatibility statements. However, we
26 believe Section 19.020, liberally interpreted and read in
conjunction with ORS 197.180(7) and OAR 661-31-035(2), is
sufficient to authorize decisions that are substantially the
same as the decision addressed by the court of appeals in
Medford Assembly of God. Intervenors argue that the
interpretation should have been rendered by the planning
commission under Section 2.060 rather than by the city manager
under 19.020. That is an issue more properly raised in the

1 petition for review and we do not address it here. For
2 purposes of this order we assume Section 19.020 gives the city
3 manager such authority.

4

4 Petitioners correctly note that the court of appeals in
5 Bell did not hold that all building permits are ministerial
6 decisions. The decision in Bell is of limited assistance in
7 resolving this case. The court merely noted that a building
8 permit could be a land use decision unless it fell within the
9 exemption provided under ORS 197.015(10)(b). The court did not
10 decide whether the zoning ordinance contained clear and
11 objective standards. In Bell the circuit court had granted a
12 motion to dismiss, concluding that the challenged building
13 permit denial was a land use decision over which it had no
14 jurisdiction. The court of appeals reversed and remanded to
15 the circuit court because the motion to dismiss was not
16 supported by affidavits or other evidence showing that any of
17 the land use planning standards stated in ORS 197.015(10) had
18 formed the basis for denial of the building permit. The court
19 of appeals concluded that if the building permit had been
20 denied for reasons unrelated to the standards in ORS
21 197.015(10), as the plaintiff claimed, it was not a land use
22 decision and the circuit court had jurisdiction. The court of
23 appeals in Bell did note in passing,

14 "considering ORS 197.015(11) together with ORS
15 197.015(10)(b), we think the legislature intended that
16 a routine building permit decision not be considered a
17 'land use decision' within LUBA's jurisdiction." 77
18 Or App at 135.

18

18 The applicability of Section 12.030(7) was discussed
19 during the consideration of this matter by the city
20 council.

21

21 We express no opinion on the correctness of the city's
22 determination that Section 12.030(7) does not apply --
23 only that it is not a clear and objective standard as
24 provided in ORS 197.015(10)(6).