



1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a city decision determining that  
4 general retail shopping centers (hereafter shopping centers)  
5 may be allowed in the Commercial Tourist (CT) zoning  
6 district.

7 **FACTS**

8 The acknowledged City of Cottage Grove Zoning Ordinance  
9 (CGZO) does not specifically list shopping centers as a  
10 permitted or conditional use in any zoning district.  
11 However, two shopping centers presently exist in the  
12 Community Commercial District (C-2P) and a shopping center  
13 was approved as part of Middlefield Village Recreational PUD  
14 Master Plan for a site located in the Limited Commercial  
15 Tourist (CT/L) zoning district.<sup>1</sup>

16 Because the CGZO makes no explicit provision for  
17 shopping centers in any of its zoning districts, the city  
18 concluded the CGZO "is vague or ambiguous and an ordinance  
19 interpretation must be made with respect to the  
20 appropriateness of particular commercial zone(s) to accept

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<sup>1</sup>The C-2P zone allows a variety of commercial uses, including "retail stores, sales and display rooms," "business and professional offices," "eating establishments," and "commercial services." CGZO 18.26.020. The CT/L zone "is intended to provide only those facilities primarily designed to serve [certain] tourists and visitors \* \* \*." CGZO 18.29.010. Although shopping centers and general commercial uses are not listed as permitted or conditional uses in the CT/L zone, "[a]ccessory buildings and uses normal and incidental to a golf course or recreational vehicle park" may be allowed as part of a master site plan. CGZO 18.29.040.

1 shopping centers as a permitted activity." Record 139. The  
2 challenged decision describes the action adopted by the city  
3 as follows:

4 "[S]hopping centers shall henceforth be treated as  
5 uses conditionally permitted in the CT Commercial  
6 Tourist zone district of the City of Cottage  
7 Grove." Record 1.<sup>2</sup>

8 **FIRST AND SECOND ASSIGNMENTS OF ERROR**

9 CGZO 18.02.040 and 18.02.050 specifically grant the  
10 planning commission authority to interpret the CGZO. CGZO  
11 Chapter 18.58 is entitled "Procedures." CGZO 18.58.020  
12 establishes the manner in which requests for various types  
13 of land use actions may be initiated.<sup>3</sup> CGZO 18.58.020(E)  
14 provides as follows:

15 "Determination of Other Permitted Buildings and  
16 Uses. The determination as to whether a building  
17 or use not specified as a permitted use is  
18 considered to be permitted, may be initiated by  
19 application made by any interested person on forms  
20 provided by the planning commission for this  
21 purpose, duly signed and verified by such person  
22 and filed with the planning commission. There is  
23 no public hearing needed for this determination."<sup>4</sup>

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<sup>2</sup>The written decision is in the form of a letter to petitioner and others, informing them of the city council's action.

<sup>3</sup>Separate subsections of CGZO 18.58.020 set out the procedures for initiating zoning ordinance amendments (A), issuance of variances (B), revocation or modification of variances or conditional use permits (C), planned unit developments (D), and determination of other permitted buildings and uses (E).

<sup>4</sup>While a public hearing specifically is not required under CGZO 18.58.020(E), public hearings were held in conjunction with the decision at issue in this appeal.

1           **A. Interpretive Findings Included in the Decision**

2           The city explained its interpretation of the above  
3 referenced CGZO provisions as follows:

4           "[T]he above ordinance provisions allow/permit the  
5 Planning Commission to interpret ambiguous,  
6 conflicting, implied and/or vague ordinance  
7 provisions as well as permits [sic] them to 'list'  
8 unlisted buildings and uses as being either  
9 permitted by right or conditionally permitted in  
10 zones under consideration. These 'listings' are  
11 not ordinance amendments, but rather  
12 interpretations as to whether or not a particular  
13 unlisted use is 'similar' to those listed in the  
14 particular zone district under consideration.  
15 When such interpretation(s) are made by the  
16 [Planning] Commission, staff simply catalogs them  
17 in the appropriate planning file entitled,  
18 'Planning Commission Listing of Similar Uses' for  
19 future reference." (Emphasis in original.)  
20 Record 89.

21           There are at least two ways to read the above quoted  
22 interpretive findings. First, the findings can be read as  
23 stating the planning commission is empowered to make  
24 "similar use" determinations, but only where the applicable  
25 zoning district includes a provision specifically allowing  
26 uses that are "similar" to those uses which are specifically  
27 listed as outright or conditional uses (first  
28 interpretation).<sup>5</sup> Second, the above findings may interpret  
29 CGZO 18.58.020(E), and the other cited CGZO provisions as

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<sup>5</sup>For example the city's Residential, Professional District lists 35 permitted uses and then specifically provides for "[s]imilar uses to those listed above." CGZO 18.18.020(P). Petitioner refers to such "similar use" listings as "basket clauses." Such "similar use" provisions are relatively common in zoning ordinances. See e.g. Citizens Concerned v. City of Sherwood, 20 Or LUBA 550, 551 (1991).

1 providing general authority to make case-by-case  
2 determinations of whether a particular proposed building or  
3 use is allowable in a zoning district because it is similar  
4 to buildings or uses that are specifically listed (second  
5 interpretation). Under this broader construction of  
6 CGZO 18.58.020(E), the city would not be limited in its  
7 "similar use" determinations to zoning districts that  
8 specifically allow such similar uses, presumably because  
9 CGZO 18.58.020(E) itself provides such authority.

10 **B. Interpretation Presented in Respondent's Brief**

11 Another interpretation of CGZO 18.58.020(E) (third  
12 interpretation), not reflected in the above quoted findings  
13 or included elsewhere in the challenged decision, is  
14 advanced by respondent in its brief. It is as follows:

15       \*\* \* \* Nothing in the terms or context of  
16 [CGZO 18.58.020(E)] restricts its application to  
17 use lists ending with [similar use] clauses.  
18 Nothing in the terms or context of  
19 [CGZO 18.58.020(E)] restricts its application to  
20 use lists that are ambiguous. Nothing in  
21 [CGZO 18.58.020(E)] restricts the authority of the  
22 Planning Commission to decide whether a use should  
23 be considered to be permitted outright or  
24 conditionally. And finally, nothing in the terms  
25 or context of [CGZO 18.58.020(E)] limits the  
26 determination of what is permitted to uses which  
27 are subsets or direct analogues [sic] of listed  
28 uses.

29 "[CGZO 18.58.020(E)] allows the Planning  
30 Commission to make its determinations in the  
31 context of the comprehensive plan that the  
32 district implements[,] as well as in the context  
33 of the purpose clause of the zone that the  
34 district implements." Respondent's Brief 1-2.

1 Under the third interpretation of CGZO 18.58.020(E), the  
2 city would not only be free to allow uses that are not  
3 listed in particular zoning districts, it could do so  
4 without determining whether such uses are similar to uses  
5 that are listed in the zoning district.

6 **C. Conclusion**

7 The second interpretation has the problem of making  
8 CGZO 18.58.020(E) a generally applicable "similar use"  
9 provision, which renders the specific "similar use"  
10 provisions included in some zoning districts unnecessary.  
11 This violates the general rule of statutory construction  
12 that, where possible, legislation should be construed to  
13 give effect to all its parts. 2A Singer, Sutherland  
14 Statutory Construction, §46.05 (5th ed 1992); Foster v. City  
15 of Astoria, 16 Or LUBA 879, 885 (1988); Forest Highlands v.  
16 City of Lake Oswego, 11 Or LUBA 189, 193 (1984). The first  
17 interpretation avoids that problem by treating CGZO  
18 18.58.020(E) as a procedural rather than a substantive  
19 provision. Such a construction of CGZO 18.58.020(E) is  
20 generally consistent with the placement of CGZO 18.58.020(E)  
21 in a procedural chapter of the CGZO and in a section of that  
22 chapter concerning procedures for initiating requests for  
23 various land use decisions.

24 The first interpretation is likely one to which this  
25 Board would be required to defer under Clark v. Jackson  
26 County, 313 Or 508, 836 P2d 710 (1992). Although we have

1 some question whether we would similarly be required to  
2 defer to the second interpretation, we need not decide the  
3 propriety of either interpretation, because it is clear from  
4 the findings following the above quoted interpretive  
5 findings that the city did not actually apply either of the  
6 first two interpretations of CGZO 18.58.020(E) in this case.

7       There is no "similar use" provision in CGZO 18.28.030,  
8 which governs conditional uses in the CT zone. Therefore,  
9 the first construction would not permit the city to find, as  
10 it ultimately did in the challenged decision, that shopping  
11 centers are allowable as a conditional use in the CT zone.  
12 Neither was the second interpretation actually applied by  
13 the city in this case, because the city makes no attempt  
14 whatsoever to explain why a shopping center is similar to  
15 any of the conditional uses in the CT zone listed at CGZO  
16 18.28.030. The approach actually followed by the city in  
17 deciding that shopping centers may be allowed in the CT zone  
18 as conditional uses ignores the above quoted interpretive  
19 findings and seems generally to reflect the third  
20 interpretation.<sup>6</sup> We therefore consider that interpretation  
21 briefly.

22       An initial and fatal problem with the third  
23 interpretation is that it is not expressed in the city's

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<sup>6</sup>Although CGZO 18.58.020(E) includes no standards for determining that a building or use should be "considered to be permitted," in this case the city relied on general language in relevant comprehensive plan policies and the language of the zoning ordinance itself.

1 decision and is inconsistent with the interpretation that is  
2 included in the decision and quoted above. See Eskandarian  
3 v. City of Portland, \_\_\_ Or LUBA \_\_\_ (LUBA No. 93-012,  
4 October 15, 1993), slip op 21-22. Moreover, there is a  
5 fundamental problem with the idea that the city may simply  
6 conclude that its failure to list shopping centers as a  
7 permitted or conditional use in any of its existing zoning  
8 districts creates an ambiguity and, on that basis, determine  
9 that it will allow shopping centers as a conditional use in  
10 the CT zone. Such an action constitutes an amendment to the  
11 CGZO. The city may well be able to justify such an  
12 amendment, for the reasons stated in the decision challenged  
13 in this appeal. However, it may not do so in the guise of  
14 "interpreting" its zoning ordinance. See Goose Hollow  
15 Foothills League v. City of Portland, 117 Or App 211, 218,  
16 843 P2d 992 (1992).

17 While the line between proper application of "similar  
18 use" provisions and improper addition of unlisted uses to  
19 the zoning ordinance may be hazy in particular cases, the  
20 approach actually followed by the city in its decision in  
21 this case clearly crosses the line and constitutes a de  
22 facto amendment of the CGZO. Although the city's  
23 interpretive findings can be read to suggest it was  
24 proceeding on the basis that shopping centers are similar to  
25 listed conditional uses, the balance of the decision takes a  
26 very different approach, and makes no attempt to identify or

1 explain any such similarity.

2 We do not determine in this decision that the city  
3 necessarily is precluded from using its "similar use"  
4 provisions to allow shopping centers in the CT zone or some  
5 other zoning district. However, if the city elects this  
6 course, it must express an interpretation adequate for our  
7 review, see Weeks v. City of Tillamook, 117 Or App 449,  
8 453-54, 844 P2d 914 (1992), and Larson v. Wallowa County,  
9 116 Or App 96, 104 840 P2d 1350 (1992), and ensure that its  
10 interpretation is not contrary to the language, apparent  
11 purpose or policy of the CGZO, read in context. Clark v.  
12 Jackson County, supra. Just as importantly, the city must  
13 thereafter actually apply the interpretation it adopts and  
14 explain how its decision is consistent with that  
15 interpretation.

16 Alternatively, if the city concludes on remand that its  
17 "similar use" provisions do not provide a legally defensible  
18 way to allow shopping centers as conditional uses in its CT  
19 zone, the city may amend the CGZO and, if necessary, the  
20 Cottage Grove Comprehensive Plan. If the city selects this  
21 route, it must follow its own procedures for  
22 postacknowledgment amendments to its land use regulations or  
23 comprehensive plan, as well as relevant statutory  
24 requirements and the Land Conservation and Development  
25 Commission's administrative rules on postacknowledgment  
26 amendments. ORS 197.610 et seq; OAR Chapter 660, Division

1 18.

2       The first and second assignments of error are  
3 sustained.

4       The city's decision is remanded.