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

SANDRA L. REA,)
)
Petitioner,)
) LUBA No. 94-047
vs.)
) FINAL OPINION
CITY OF SEASIDE,) AND ORDER
)
Respondent.)

Appeal from City of Seaside.

Sandra L. Rea, Seaside, filed the petition for review and argued on her own behalf.

Dan Van Thiel and Anna Braun, Astoria, filed the response brief. Anna Braun argued on behalf of respondent.

SHERTON, Referee; HOLSTUN, Referee, participated in the decision.

REMANDED 06/29/94

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

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner appeals an ordinance amending provisions of
4 the City of Seaside Zoning Ordinance (SZO) relating to
5 vacation rental dwellings.¹

6 **FACTS**

7 This is the second time the challenged ordinance has
8 been appealed to this Board. In Rea v. City of Seaside, 26
9 Or LUBA 444, 445 (1994) (Rea I), we set out the relevant
10 facts:

11 "On February 11, 1992, the city adopted an
12 ordinance amending the SZO by adding a definition
13 of 'vacation rental dwelling' and adding 'vacation
14 rental dwellings' to the list of conditional uses
15 allowable in the Residential Medium Density (R-2),
16 Residential High Density (R-3), Resort Residential
17 (R-R) and Residential/Commercial (R-C) zones
18 [(1992 ordinance)]. The 1992 ordinance also added
19 to the SZO a new section 6.137 establishing
20 standards and procedures for granting permits for
21 vacation rental dwellings. SZO 6.137(3) provided
22 that in the R-2 and R-3 zones, all vacation rental
23 dwelling permit applications 'must be complete and
24 on file prior to September 1, 1992 * * * in order
25 for permits to be issued prior to May 1, 1993.'
26 SZO 6.137(2)(h) provided that vacation rental
27 dwelling permits are personal in nature and are
28 not transferable, except to an heir or devisee
29 pursuant to a will or the state intestate
30 statutes. The 1992 ordinance was not appealed.

31 "On September 19, 1993, the city adopted the

¹SZO 1.030 defines "vacation rental dwelling" as follows:

"A single family dwelling, duplex or triplex which is rented or
hired out for a period of less than 30 days. * * *"

1 challenged ordinance [(1993 ordinance)]. The
2 [1993] ordinance amends SZO 6.137(2)(h) to read:

3 "Any property owner may apply for a
4 vacation rental dwelling permit at any
5 time, following the procedures as
6 outlined below. Permits are not
7 transferable. Upon transfer of the
8 property, the new owner, if he or she so
9 desires, may apply for a permit
10 following procedures as outlined below.'
11 (Emphasis added.)

12 "The [1993] ordinance also amends SZO 6.137(3) to
13 delete the time limit for filing vacation rental
14 dwelling permit applications for R-2 and R-3 zoned
15 properties. * * *" (Footnote omitted.)

16 The city did not adopt any findings to support the 1993
17 ordinance challenged in Rea I. In the absence of findings
18 interpreting arguably relevant comprehensive plan provisions
19 and explaining why the 1993 ordinance was consistent with
20 those provisions, we were unable to perform our review
21 function and, therefore, we remanded the 1993 ordinance.
22 Rea I, 26 Or LUBA at 447. On February 28, 1994, without
23 allowing submission of additional evidence or argument, the
24 city council adopted findings in support of the above
25 described 1993 ordinance.²

26 This appeal followed.

27 **TENTH ASSIGNMENT OF ERROR**

28 Petitioner argues the city council erred in allowing
29 two of its members, councilors Grant and Karge, to vote on

²We understand the city council's February 28, 1994 decision to have the effect of readopting the 1993 ordinance, with supporting findings.

1 adopting the challenged ordinance. Petitioner contends that
2 without the vote of these two councilors, the ordinance
3 would not have been adopted.

4 **A. Councilor Grant**

5 Petitioner argues councilor Grant should not have voted
6 on this matter because of a potential conflict of interest.
7 Petitioner contends councilor Grant made the following
8 statement before voting to adopt the challenged ordinance:

9 "People own these properties, and * * * if they
10 decide to make a vacation rental out of it, they
11 do so. I did this when I owned a house * * *, it
12 was basically a beach house, it's now a full-time
13 rental. But I used it as a vacation rental, and
14 if I were gone for the summer or something, I
15 might use it as a vacation rental again, assuming
16 I could meet all other requirements of the
17 ordinance." Petition for Review 13.

18 Petitioner presents no legal argument as to why the
19 existence of a "potential" conflict of interest should
20 disqualify an elected local government official from voting
21 on a legislative decision, such as the one challenged in
22 this appeal. In any case, the above statement reflects, at
23 most, a disregard for the appearance of objectivity. Under
24 Oregon law, even in quasi-judicial land use proceedings,
25 local government officials are not required to maintain the
26 "appearance of impartiality" required of judges. 1000
27 Friends of Oregon v. Wasco Co. Court, 304 Or 76, 84-85, 742
28 P2d 39 (1987).

29 This subassignment of error is denied.

1 **B. Councilor Karge**

2 Petitioner alleges that at the time of the challenged
3 decision, Councilor Karge had just completed requirements
4 for obtaining his realtor's license and knew that within
5 three to four weeks he "would be in a position to actively
6 market vacation rentals." Petition for Review 14.
7 Petitioner supports her argument by attaching to her brief
8 newspaper clippings dated approximately one month after the
9 challenged decision. Petitioner argues councilor Karge
10 should have disqualified himself because of this potential
11 conflict of interest.

12 Respondent objects to our consideration of documents
13 not in the record.

14 Petitioner's allegations with regard to councilor Karge
15 are not supported by evidence in the record, and petitioner
16 has not moved for an evidentiary hearing to submit evidence
17 pursuant to ORS 197.830(13)(b).

18 This subassignment of error is denied.

19 The tenth assignment of error is denied.

20 **FIRST ASSIGNMENT OF ERROR**

21 City of Seaside Comprehensive Plan (plan) 3.1.2
22 includes the following provisions regarding land designated
23 High Density Residential on the plan map:

24 "These areas are characterized by urban high
25 density [uses] such as apartment houses, as well
26 as some mix of single-family, duplex, and other
27 uses consistent with high density residential
28 areas. These areas may also contain limited

1 amounts of commercial uses that are a convenience
2 to residents of a high density area. * * *

3 "Dwelling units in this area should be for
4 full-time residential use." (Emphases added.)

5 Petitioner argues that while the 1992 ordinance limited
6 vacation rentals in the areas of the city designated High
7 Density Residential to those licensed in a single four-month
8 period, the challenged decision opens up the High Density
9 Residential areas to unlimited numbers of vacation rentals.
10 Petitioner contends the challenged decision fails to
11 establish this is consistent with the above plan
12 requirements that uses be consistent with high density
13 residential areas and dwelling units in High Density
14 Residential areas be maintained for full-time residential
15 use.

16 In the challenged decision, the city addresses
17 petitioner's arguments regarding the High Density
18 Residential provisions of plan 3.1.2 as follows:

19 "The High Density Residential R-3 zone also allows
20 vacation rentals as a conditional use.

21 "Petitioner seemed to be arguing that vacation
22 rental dwellings should not be allowed as
23 conditional uses under the R-2 and R-3 zones. The
24 decision that was being appealed to LUBA [in
25 Rea I] is the extension of licensing vacation
26 rentals past September 1, 1992. [SZO] 3.033
27 governing R-2 conditional uses and 3.043 governing
28 R-3 conditional uses have been reviewed by DLCD
29 and properly accepted as zone amendments
30 consistent with the * * * comprehensive plan. The
31 issue is whether the * * * decision to extend
32 licensing of a valid conditional use was
33 consistent with [the] plan, not whether vacation

1 rental dwellings are properly conditional uses in
2 the City's R-2 and R-3 zones." Record II 4.³

3 Additionally, in its brief, the city contends the second
4 plan provision emphasized above merely "indicates a
5 preference and is not a mandatory criterion." Respondent's
6 Brief 4.

7 This Board is required to defer to a local government's
8 interpretation of its own enactment, unless that
9 interpretation is contrary to the express words, policy or
10 context of the local enactment or to a state statute,
11 statewide planning goal or administrative rule which the
12 local enactment implements. ORS 197.829; Clark v. Jackson
13 County, 313 Or 508, 514-15, 836 P2d 710 (1992). Further,
14 under Gage v. City of Portland, 123 Or App 269, 860 P2d 282,
15 on reconsideration 125 Or App 119 (1993), rev allowed 318 Or
16 478 (1994), and Weeks v. City of Tillamook, 117 Or App 449,
17 453-54, 844 P2d 914 (1992), this Board is required to review
18 a local government's interpretation of its code and may not
19 interpret the local government's code in the first instance.

20 The city's decision does not interpret the plan 3.1.2
21 provisions concerning the High Density Residential
22 designation to be inapplicable to the challenged land use
23 regulation amendment, as the city argues in its brief.
24 Rather, the challenged decision contends any argument by

³The local record submitted in Rea I is part of the record in this appeal and is cited as "Record I." The local record of the proceedings on remand after Rea I is cited as "Record II."

1 petitioner that the challenged decision is inconsistent with
2 these provisions of plan 3.1.2 is precluded by the
3 acknowledged 1992 ordinance which listed vacation rentals as
4 a conditional use in the R-3 zone and allowed their
5 licensing for a four month period.

6 However, we do not understand petitioner to contend all
7 vacation rentals are inherently incompatible with the High
8 Density Residential plan designation. Petitioner argues the
9 challenged decision is inconsistent with the above
10 emphasized requirements of plan 3.1.2 because it extends the
11 four-month licensing period established by the 1992
12 ordinance, opening up the R-3 zone to unlimited future
13 licensing of vacation rentals. The challenged decision does
14 not address this issue or interpret the above emphasized
15 provisions of plan 3.1.2 with regard to the consistency of
16 opening up the city's High Density Residential designated
17 areas to unlimited future licensing of vacation rentals.
18 This Board may not interpret the city's plan in the first
19 instance. Gage v. City of Portland, supra; Weeks v. City of
20 Tillamook, supra.

21 The first assignment of error is sustained.

22 **SECOND, THIRD AND NINTH ASSIGNMENTS OF ERROR**

23 Petitioner challenges the evidentiary support for the
24 city's finding that there is a substantial need for vacation
25 rental usage in the R-2 and R-3 zones. Petitioner further
26 contends the challenged decision must be supported by a

1 demonstration that there is a shortage of available sites
2 for vacation rentals in zones other than R-2 and R-3.
3 Finally, petitioner argues the challenged decision must be
4 remanded because it fails to include findings that (1) there
5 is sufficient housing in the city for its permanent
6 residents, and (2) adequate police protection is provided to
7 permanent residents in the R-2 and R-3 zones.

8 Petitioner fails to identify any applicable legal
9 standard requiring the city to determine that there is a
10 substantial need for vacation rentals in the R-2 and R-3
11 zones, a shortage of sites for vacation rentals in other
12 zones, sufficient housing in the city for permanent
13 residents, or adequate police protection for residents of
14 the R-2 and R-3 zones. This Board can grant relief only if
15 petitioner demonstrates that an applicable legal standard is
16 violated by the challenged decision. Schellenberg v. Polk
17 County, 22 Or LUBA 673, 679 (1992); Lane School District 71
18 v. Lane County, 15 Or LUBA 150, 153 (1986).

19 The second, third and ninth assignments of error are
20 denied.

21 **FOURTH ASSIGNMENT OF ERROR**

22 Plan 1.0 provides, in relevant part:

23 "The [plan] was developed upon the premise that
24 Seaside would remain a resort town dependent on
25 its tourist oriented economy. In order to promote
26 the economy, Seaside must assure that land is
27 available and zoned for new and modern tourist
28 facilities [and] upgrade existing facilities * * *
29 to assure a flow of tourists all year."

1 The decision addresses this plan provision as follows:

2 "Allowing continued licensing of vacation rentals
3 in the R-2 and R-3 zones provides needed housing
4 for the many tourists who support Seaside's
5 tourist based economy." Record II 2.

6 Petitioner argues the city is capable of supporting its
7 tourist based economy without disrupting the residential
8 nature of its R-2 and R-3 zones.

9 Petitioner does not argue the city's decision is
10 inconsistent with the above plan provision, but rather that
11 the decision is unnecessary to implement that policy.
12 Petitioner's argument provides no basis for reversal or
13 remand.

14 The fourth assignment of error is denied.

15 **FIFTH ASSIGNMENT OF ERROR**

16 Plan 4.0 (Housing) provides, as relevant:

17 "Seaside has a two-fold need in the area of
18 housing. There is a need to adequately house the
19 permanent residents of the city and a need to
20 house the large number of visitors who use Seaside
21 and its surrounding areas for recreation.

22 "* * * * *"

23 The decision addresses this plan provision as follows:

24 "There is a conflict in this provision of [the
25 plan] as it applies to the issue of vacation
26 rental dwellings. It can be argued that allowing
27 licensing of vacation rentals in the R-2 and R-3
28 zones will deplete needed housing stock for
29 permanent residents. It can also be argued that
30 prohibiting licensing [of] vacation rentals in
31 those zones will decrease the needed housing for
32 tourists. Since this provision is in conflict,
33 the [City] Council must decide which goal is more

1 important to the [city]. The City Council has
2 decided the need to house tourists is the more
3 important goal in this situation." (Emphasis
4 added.) Record II 3.

5 Petitioner complains the challenged decision lacks a
6 finding that the city council is acting in the best
7 interests of its constituents, and that the record lacks
8 evidence to support such a finding. Petitioner also argues
9 that the city should put the needs of its residents ahead of
10 those of tourists.

11 Petitioner identifies no applicable legal standard
12 requiring a finding or determination by the city council
13 that it is acting in the best interests of its constituents.
14 At most, petitioner's argument expresses a disagreement with
15 the city's choice to recognize the needs of tourists for
16 vacation rentals as more important in this instance than the
17 needs of permanent city residents for housing. Petitioner's
18 argument does not establish there is any conflict between
19 the city's decision and the above quoted plan provision.

20 The fifth assignment of error is denied.

21 **SIXTH ASSIGNMENT OF ERROR**

22 Plan Housing Policy 4.1.1 provides, in relevant part:

23 "It is the policy of the [city] to maintain the
24 present predominantly single family housing
25 character of Seaside. * * *"

26 The decision addresses this plan policy as follows:

27 "Extending licensing of vacation rentals maintains
28 the single family [housing] character of Seaside
29 by making it economically feasible for a family to
30 own a home by renting it out for part of the

1 year." Record II 3.

2 Petitioner contends the above quoted finding is not
3 supported by evidence in the record. Petitioner also argues
4 the challenged decision will devastate, rather than
5 maintain, the existing single family housing character of
6 Seaside.⁴

7 The city provides no argument in support of its
8 determination of compliance with plan Housing Policy 4.1.1,
9 other than a citation to the above finding and to a
10 February 18, 1992 memorandum from a city planning
11 commissioner in the record. This memorandum states the
12 reasons the commissioner believes the 1992 ordinance's
13 prohibition on further licensing of vacation rentals in the
14 R-2 and R-3 zones is not in the city's best interest. We
15 assume the portion of the memorandum the city considers
16 relevant to the above quoted finding is the following:

17 "If the people we wish to encourage to visit
18 Seaside are 'families,' then we should not create
19 a market which eliminates affordable rentals.
20 Renting a home is sometimes more feasible than
21 renting multiple motel rooms." Record II 54.

22 Under ORS 197.835(5)(b), a land use regulation
23 amendment is required to comply with the statewide planning

⁴This section of the petition for review appears to contain several statements of fact that are not based on evidence in the record. The Board shall disregard such statements. Mannenbach v. City of Dallas, 25 Or LUBA 136, 138, aff'd 121 Or App 441 (1993).

1 goals and implementing rules.⁵ 1000 Friends of Oregon v.
2 Marion County, ___ Or LUBA ___ (LUBA Nos. 93-200 and 93-201,
3 May 31, 1994), slip op 3. Statewide Planning Goal 2 (Land
4 Use Planning) requires that land use planning decisions and
5 actions have an adequate factual base. The Goal 2
6 requirement for an adequate factual base applies regardless
7 of the legislative or quasi-judicial nature of a
8 comprehensive plan or land use regulation amendment. 1000
9 Friends of Oregon v. City of North Plains, ___ Or LUBA ___
10 (LUBA Nos. 93-154, 93-159 and 93-160, June 23, 1994),
11 slip op 5; League of Women Voters v. Klamath County, 16
12 Or LUBA 909, 914 (1988).

13 The challenged decision recognizes that plan Housing
14 Policy 4.1.1 is applicable to the challenged land use
15 regulation amendment. Only one basis is advanced by the
16 city, in either the decision or its brief, for determining
17 the land use regulation amendment will "maintain the present
18 predominantly single family housing character of Seaside,"
19 as required by this plan policy. That basis is that the
20 extension of vacation rental licensing in the R-2 and R-3
21 zones will "mak[e] it economically feasible for a family to
22 own a home by renting it out for part of the year."
23 Record II 3. The parties identify no factual basis in the

⁵The city does not identify specific plan policies or other provisions which it contends provide the basis for adoption of the challenged amendments to its zoning ordinance.

1 record for this finding or for any other explanation of why
2 the challenged decision complies with plan Housing
3 Policy 4.1.1.⁶

4 The sixth assignment of error is sustained.

5 **SEVENTH ASSIGNMENT OF ERROR**

6 Petitioner argues the city improperly failed to find
7 the challenged amendments to its regulations will not "allow
8 abuse of the Conditional Use statutes." Petition for
9 Review 11. Petitioner argues the city should be required to
10 place a limit on the total number of dwellings in the R-2
11 and R-3 zones that may become vacation rentals.

12 Petitioner does not explain her legal argument under
13 this assignment of error. We are not aware of any
14 "Conditional Use statutes" and petitioner does not identify
15 any legal standard requiring the city to impose a limit on
16 the total number of dwellings in the R-2 and R-3 zones
17 licensed as vacation rentals.

18 The seventh assignment of error is denied.

19 **EIGHTH ASSIGNMENT OF ERROR**

20 The challenged decision includes findings that vacation
21 rentals are not commercial uses and that they are similar to
22 home occupations. Record II 5. Petitioner contends these

⁶The planning commissioner memorandum cited by the city explains why she believes extending the licensing of vacation rentals in the R-2 and R-3 zones will make it more feasible for visiting families to rent vacation rentals, not why it will be more feasible for resident families to own homes in the R-2 and R-3 zones.

1 findings are not supported by evidence in the record.

2 The statements challenged by petitioner are more in the
3 nature of legal conclusions than findings of fact. However,
4 regardless of whether these statements are properly
5 considered findings or conclusions, petitioner fails to
6 explain why they are essential to the city's determination
7 of compliance with any applicable legal standard, and we do
8 not see that they are.

9 The eighth assignment of error is denied.

10 The city's decision is remanded.