

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

3  
4 R.J. BOEHM,                           )  
5    )  
6                    Petitioner,                           )  
7    )                   LUBA No. 95-103  
8            vs.    )  
9    )                   FINAL OPINION  
10 CITY OF SHADY COVE,                           )                   AND ORDER  
11    )  
12                    Respondent.                           )

13  
14  
15            Appeal from City of Shady Cove.

16  
17            James H. Boldt, Grants Pass, filed the petition for  
18 review and argued on behalf of petitioner.

19  
20            Tonia L. Moro, Medford, filed the response brief on  
21 behalf of respondent. With her on the brief was Law Offices  
22 of Martial E. Henault.

23  
24            GUSTAFSON, Referee; HANNA, Referee, participated in the  
25 decision.

26  
27                    REMANDED    04/01/96

28  
29            You are entitled to judicial review of this Order.  
30 Judicial review is governed by the provisions of ORS  
31 197.850.

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the city's denial of a zone change  
4 application.

5 **FACTS**

6 Petitioner applied to the city for approval of a zone  
7 change from R-3, High Density Residential, to GC, General  
8 Commercial.<sup>1</sup> The property is located near Crater Lake  
9 Highway. The record does not clearly reflect the  
10 surrounding zoning, though it appears from the record that  
11 properties along Crater Lake Highway are generally zoned for  
12 commercial use, and those further from the highway are  
13 residentially zoned.

14 The city planning commission recommended approval of  
15 the application, based upon a favorable staff report. The  
16 city council rejected the planning commission recommendation  
17 and denied the application.<sup>2</sup>

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<sup>1</sup>The application did not include a request for a comprehensive plan map amendment, though the record indicates that both the applicant and the planning commission acknowledged that an amendment to the city's General Land Use Plan Map was a necessary prerequisite to the zone change, and the planning commission notice of public hearing characterized the application as being for both a zone change and comprehensive plan map amendment. The city council characterized the application as only requesting a zone change, and in this appeal, both petitioner and the city characterize the challenged decision as denying only a zone change application.

<sup>2</sup>Petitioner notes that the city council first considered the planning commission's recommendation to approve the application on January 5, 1995, at which time it tabled the request until February 2, 1995. Then, with no apparent notice, at its January 19, 1995 meeting it considered the application and defeated a motion to approve the planning commission's

1 This appeal followed.

2 **MOTION TO DISMISS**

3 The city moves to dismiss this appeal for lack of  
4 jurisdiction. According to the city, this decision is not a  
5 land use decision subject to our review because it is merely  
6 a decision not to adopt a "legislative amendment to its  
7 zoning ordinance and zoning map." Respondent's Brief 2.  
8 The city argues the decision "does not concern the  
9 requirements of a new or amended goal, rule, or statute"  
10 and, therefore, under ORS 197.620, it is not appealable.<sup>3</sup>  
11 Id. The city further argues that "[t]he fact that the  
12 decision was rendered in a quasi-judicial proceeding is also  
13 irrelevant to interpreting and applying ORS 197.620." Id.  
14 at 2-3. We disagree with the city's arguments.

15 ORS 197.620 exempts from our review decisions not to  
16 adopt legislative amendments. That statute is not relevant  
17 to quasi-judicial decisions, such as the one challenged in

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recommendation. Petitioner does not, however, assign any procedural error  
to the city's consideration of the application.

<sup>3</sup>ORS 197.620 addresses post-acknowledgment procedures. ORS 197.620(1)  
states:

"Notwithstanding the requirements of ORS 197.830(2), persons  
who participated either orally or in writing in the local  
government proceedings leading to the adoption of an amendment  
to an acknowledged comprehensive plan or land use regulation or  
a new land use regulation may appeal the decision to the Land  
Use Board of Appeals under ORS 197.803 to 197.845. A decision  
to not adopt a legislative amendment or a new land use  
regulation is not appealable except where the amendment is  
necessary to address the requirements of a new or amended goal,  
rule or statute."

1 this case.<sup>4</sup> The city's motion to dismiss for lack of  
2 jurisdiction is denied.<sup>5</sup>

3 **ASSIGNMENTS OF ERROR**

4 Petitioner makes three assignments of error: that the  
5 decision is not supported by substantial evidence in the  
6 record; that the findings do not state the facts relied upon  
7 in rendering the decision; and that the findings  
8 insufficiently explain the justification for the decision.

9 Because the challenged decision is one to deny a quasi-  
10 judicial application, the city need only adopt findings  
11 adequate to demonstrate that one applicable criterion is not  
12 satisfied. Duck Delivery Produce v. Deschutes County, 28 Or  
13 LUBA 614 (1995); Garre v. Clackamas County, 18 Or LUBA 877,  
14 aff'd 102 Or App 123 (1990). However, before the city can

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<sup>4</sup>In Strawberry Hill 4-Wheelers v. Benton Co. Bd. of Comm., 287 Or 591, 601 P2d 769 (1979), the Supreme Court identified three factors to consider in determining whether a local decision is quasi-judicial or legislative. Generally, a local decision is quasi-judicial, rather than legislative, if "the process is bound to result in a decision," the decision is "bound to apply preexisting criteria to concrete facts," and the action is "directed at a closely circumscribed factual situation or a relatively small number of persons." Id. at 602-03. As even the city acknowledges, the challenged decision in this case is quasi-judicial.

<sup>5</sup>The city also moves to strike the petition for review because "respondent has no notice of what relief petitioner seeks." Respondent's Brief 1. The city's argument is that petitioner made an incorrect reference to our rules when he stated "[t]he relief sought is to remand the decision to the Respondent in accordance with OAR 661-10-075(2)(a), (b) and (d)." Petition for Review 1. As the city notes, the cited OAR section addresses filing and service, and not the grounds for remand. Notwithstanding the apparent clerical error in the petition for review, petitioner's statement that he seeks remand to the city is sufficiently clear to provide the city with "notice of what relief petitioner seeks." The city's motion to strike is denied.

1 reach a conclusion that any particular criterion is  
2 unsatisfied, the city must explain the applicable criteria,  
3 state the facts the city relied upon in reaching the  
4 decision, and justify the decision, based upon the criteria  
5 and facts. Ellis v. City of Bend, 28 Or LUBA 334 (1994).  
6 The city's findings in this case are inadequate to establish  
7 that any applicable criterion is unsatisfied.

8 As a threshold, the city has failed to explain the  
9 applicable criteria. The city does not dispute that there  
10 is no explanation of applicable criteria in the findings,  
11 but suggests this deficiency is inconsequential because the  
12 application itself lists the applicable criteria. A  
13 statement of what the applicant initially believes to be  
14 applicable criteria is insufficient to relieve the city of  
15 its obligation to explain the applicable criteria in its  
16 decision.

17 The deficiency created by the lack of a statement as to  
18 what criteria are applicable is readily apparent in this  
19 case where the nature of the application remains unclear.  
20 For example, the city states the request is only for a zone  
21 change, but faults the applicant for not sufficiently  
22 explaining how several of the Statewide Planning Goals  
23 (goals) are satisfied. The city has not, however, explained  
24 why the goals are mandatory approval criteria for the  
25 subject application. The city's failure to explain the  
26 applicable approval criteria alone renders the city's

1 findings inadequate to establish any basis for denial.

2 In addition, even if the applicable approval criteria  
3 were discernible, the city's findings are not made in  
4 relation to identified facts in the record. As the city  
5 argues, "[m]ost of the City's findings are based upon  
6 statements made in its Comprehensive Plan and its  
7 Comprehensive Plan Map. Other findings merely suggest that  
8 petitioner's arguments were not sufficient enough to render  
9 a finding that petitioner requested." Respondent's Brief 4.  
10 Essentially, the "facts" in the city's findings are what the  
11 city council apparently assumes to be inherent truths in its  
12 comprehensive plan. For example, the city finds:

13 "It is generally understood that commercial  
14 property primarily served by the automobile should  
15 be along major arterial streets, not exceed 200  
16 feet in depth, and be primarily accessible from  
17 the arterial street." Record 2.

18 The city does not, however, explain the basis for this  
19 general understanding. We are not cited to a point in the  
20 city's comprehensive plan where such a "general  
21 understanding" is established. Rather, the city simply  
22 makes this finding as a truth and summarily concludes that  
23 the location of the proposed zone change "is not good for  
24 Commercial Development." Record 2. Without establishing  
25 facts, and evaluating those facts under specific approval  
26 criteria, this finding is inadequate to demonstrate that the  
27 approval criterion to which this finding apparently responds  
28 is not satisfied. Other findings are also inadequately

1 justified for similar reasons.

2 Finally, the challenged decision is defective "because  
3 it does not inform the applicant of the steps it must take  
4 to gain approval of [his] application or, alternatively, of  
5 the standards the application does not meet." Ellis, 28 Or  
6 LUBA at 334. While "findings of noncompliance with a  
7 relevant approval standard need not be as exhaustive or  
8 detailed as those necessary to establish compliance with  
9 that approval standard, the city is obligated to offer an  
10 explanation for its conclusion that the standard is not  
11 met." Salem Keizer School Dist. 24-J v. City of Salem, 27  
12 Or LUBA 351, 371 (1994) (citing Hill v. Union County Court,  
13 42 Or App 883, 601 P2d 905 (1979)). The city has not  
14 adequately explained the deficiencies it found in this  
15 application.

16 For example, the city finds that the applicant's  
17 conceptual site plan is insufficient to demonstrate  
18 compliance with a criterion which requires "submittal of a  
19 conceptual or specific Development Plan for the subject  
20 property to show that property facilities, services, and  
21 utilities may be provided by the developer or other provider  
22 to serve the site needs." Record 3. The decision does not  
23 explain how petitioner's plan is deficient. Nor does it  
24 provide petitioner with any specific information as to what  
25 level of detail the city considers necessary for the  
26 required submission. Particularly given that both the

1 planning staff and the planning commission did not consider  
2 the conceptual site plan to be deficient, the city's  
3 unexplained conclusion that petitioner's plan was not good  
4 enough to satisfy an undefined standard, is inadequate.

5 The result of the city's conclusory determination to  
6 deny the challenged application is that petitioner is left  
7 with no understanding of why the application is  
8 insufficient, or what he would have to do to comply with  
9 whatever criteria are applicable.

10 The assignments of error are sustained.

11 The city's decision is remanded.