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REVERSED

02/26/99

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

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the city's determination that petitioner's use of its quarry is an
4 illegal nonconforming use.

5 **MOTIONS TO INTERVENE**

6 Howard W. Houston, Jr. (Houston) moves to intervene on the side of petitioner.
7 Intervenors-respondent Scenic Highway Alliance and Ron Carroll (Alliance) move to
8 intervene on the side of the city. There is no opposition to these motions, and they are
9 allowed.

10 **FACTS**

11 Petitioner owns and operates a quarry on 70 acres of land, that petitioner acquired in
12 1954 in order to obtain and stockpile gravel for the state highway system. Two acres of the
13 subject property lie within the Mosier city limits, along its western edge. Approximately 12
14 acres of the subject property lie outside the Mosier city limits but within the city's urban
15 growth boundary (UGB). These 12 acres are subject to the jurisdiction of Wasco County
16 pursuant to a joint management agreement. The remaining 56 acres of the subject property
17 are outside the Mosier city limits and outside the city's UGB. The only road access to the
18 property and the quarry areas in the interior of the property is a haul road that runs north
19 through the two-acre portion of the property within the city limits to a public highway. The
20 haul road is also the only access for Houston's adjacent quarry, located solely within Wasco
21 County.

22 The city originally zoned the two-acre portion of the subject property within city
23 limits as agricultural, under which quarrying was a permitted use. In 1978, the city adopted
24 an ordinance that made quarrying a conditional use in the agricultural zone. By that time,
25 any quarrying operations on the two-acre portion of the property within city limits had
26 ceased. However, petitioner (and others) continued to use the haul road crossing the two-

1 acre portion of the subject property after 1978, in order to access the main part of the quarry,
2 the use of which is described below. In 1990, the city rezoned the two-acre portion of
3 petitioner's quarry from agricultural to residential. The residential zone prohibits aggregate
4 extraction and processing.

5 From 1959 to the present petitioner has used the portion of the quarry under county
6 jurisdiction to extract, process and stockpile gravel and other road materials. The nature,
7 intensity, and timing of petitioner's use of the quarry during this period varied considerably,
8 depending on the needs of nearby highway construction and maintenance. One peak of
9 activity occurred between 1974 and 1976, when petitioner extracted, processed, and
10 stockpiled 126,000 cubic yards of rock for use in construction of Interstate 84. From 1977 to
11 1988, petitioner extracted little or no rock, but used stockpiles accumulated in earlier years
12 for maintenance and repair activities. In addition, petitioner continued and has continued to
13 the present day to screen and store sand on the site for winter sanding. All activities
14 described above required petitioner's use of the haul road to access and remove material from
15 the property. In addition, pursuant to an intergovernmental agreement, petitioner allowed
16 Wasco County to extract, process, and haul rock from the quarry from 1977 to the present,
17 for use on county road projects. Further, beginning in 1981, petitioner leased a 2.3-acre
18 portion of its quarry and granted a license to use the haul road to Houston's predecessors-in-
19 interest. Houston or his predecessors extracted rock from the leased portion of petitioner's
20 quarry, and hauled it out over the haul road. Houston eventually reached an agreement with
21 petitioner for a permanent easement to use the haul road.

22 From 1989 to 1991, activity in petitioner's quarry increased substantially, with
23 petitioner, the county, and the Port of Hood River extracting and processing rock from the
24 quarry as well as using existing stockpiles. From 1992 to 1996 very little extraction occurred
25 in petitioner's quarry, although stockpiled materials continued to be carried out over the haul
26 road. In 1996, petitioner began discussions with the city and Wasco County regarding plans

1 to renew extraction activities in the main part of the quarry outside the city's UGB.
2 Petitioner entered into mediation with the city, during which time it agreed not to extract or
3 process any aggregate, and limited its use of the quarry and the haul road to hauling
4 stockpiled material.

5 After 18 months of mediation, petitioner and city representatives developed a
6 proposed operating agreement. However, at a September 3, 1997 meeting, the city council
7 rejected that proposed agreement. The city council voted to initiate a quasi-judicial hearing
8 process to determine the status of petitioner's use of the two-acre portion of the quarry within
9 city limits. Specifically, the city council voted to determine whether, pursuant to Mosier
10 Zoning Ordinance (MZO) 6.1(2),¹ petitioner's nonconforming use of the two-acre portion of
11 the property, including the haul road, had been discontinued for more than 12 months and
12 petitioner's use of the two-acre portion must therefore conform to current zoning restrictions.
13 The city held an evidentiary hearing October 15, 1997, at which it accepted evidence from
14 petitioner and Houston regarding historical uses on the two-acre portion as well as the
15 remainder of the subject property. Because quarrying activities on the two-acre portion had
16 ceased before 1978, the bulk of the evidence and the focus of argument both below and on
17 appeal concerns petitioner's use of the haul road in connection with activities on the portion
18 of the quarry within the county's jurisdiction. On November 12, 1997, the city issued the
19 challenged decision, determining that petitioner had not established a continuous
20 nonconforming use of any portion of the subject property and therefore had lost any right it
21 had to use the haul road on the two-acre portion of the property within city limits.

22 This appeal followed.

¹MZO 6.1(2) provides that "[i]f a nonconforming use is discontinued for a period of one year, further use of the property shall conform to this ordinance."

1 **FIRST ASSIGNMENT OF ERROR (HOUSTON)**

2 Houston challenges the city's authority to initiate a quasi-judicial hearing and make a
3 final land use decision with respect to petitioner's nonconforming use of the property in the
4 absence of an application from petitioner. Houston argues that nothing in the MZO or in
5 state statutes authorizes the city to initiate a quasi-judicial proceeding to determine
6 petitioner's nonconforming use rights unless petitioner first files an application for a permit.

7 The city found in the challenged decision that it had authority to convene the
8 proceeding at issue:

9 "This matter has come before the City Council pursuant to the City's
10 enforcement authority set forth in MZO 9.3 (abatement and penalty), the
11 City's plenary authority in ORS 227.215 to adopt land use regulations and its
12 authority in ORS 227.280 to enforce those regulations. Moreover, we
13 specifically find that the Council has the basic authority to interpret the
14 ambiguous provisions in its land use regulations, and we so interpret MZO 9.3
15 to authorize the City Council to convene a proceeding to inquire into
16 allegations that a property owner has a lawful nonconforming use right, and it
17 allows us to inquire into whether a particular owner's use of its property is in
18 violation of the City's land use regulations." Record 4.

19 MZO 9.3(2) provides that

20 "In case a building or other structure is or is proposed to be located,
21 constructed, maintained, repaired, altered, or used, or land is or is proposed to
22 be used, in violation of this ordinance, the building or land thus in violation
23 shall constitute a nuisance and the City may, as an alternative to other
24 remedies that are legally available for enforcing this ordinance, institute
25 injunction, mandamus, abatement or other appropriate proceedings to prevent,
26 enjoin temporarily or permanently, abate or remove the unlawful location,
27 construction, maintenance, repair, alteration or use."

28 ORS 227.215 provides generally that a city may adopt a development ordinance
29 under which the city may consider permits for development.² ORS 227.280 provides that a

²ORS 227.215 provides in relevant part:

"(1) As used in this section, 'development' means a building or mining operation, making a material change in the use or appearance of a structure or land, dividing land into two or more parcels * * * and creating or terminating a right of access.

1 city "may provide for enforcement of any legislation established under ORS 227.215."
2 Houston argues that MZO 9.3(2), ORS 227.215 or 227.180 do not, as the city contends,
3 authorize the city to initiate a quasi-judicial proceeding to determine petitioner's
4 nonconforming use rights.

5 Houston argues, first, that the statutory scheme of land use planning and adjudication
6 has preempted inconsistent local regulations, and thus the scope and extent of the city's
7 authority with respect to land use matters is defined exclusively by state statute. See
8 LaGrande/Astoria v. PERB, 281 Or 137, 156, 576 P2d 1204 (1978) (state laws addressing
9 state regulatory objectives prevail over contrary local legislation unless the state law is
10 irreconcilable with the local community's constitutional right to choose its own political
11 form). From this premise, Houston contends that ORS 227.170 to 227.175, the statutes
12 governing the city's land use proceedings, do not allow the city to initiate land use
13 proceedings, but only allow the city to act on applications for permits, zone changes, and
14 similar land use decisions. Houston notes that the parallel statute governing county land use
15 proceedings, ORS 215.402 to 215.416, also allow a county to act on applications for permits
16 and zone changes, but specifically authorize a county to conduct "contested-case
17 proceedings," defined as "a proceeding in which the legal rights, duties or privileges of

"(2) A city may plan and otherwise encourage and regulate the development of land. A city may adopt an ordinance requiring that whatever land development is undertaken in the city comply with the requirements of the ordinance and be undertaken only in compliance with the terms of a development permit.

"(3) A development ordinance may provide for:

"(a) Development for which a permit is granted as of right on compliance with the terms of the ordinance;

"(b) Development for which a permit is granted discretionarily in accordance and consistent with the requirements of ORS 227.173;

"(c) Development which need not be under a development permit but shall comply with the ordinance; and

"(d) Development which is exempt from the ordinance."

1 specific parties" under statutes or local land use regulations adopted pursuant thereto "are
2 required to be determined only after a hearing at which specific parties are entitled to
3 appeared and be heard." ORS 215.402(1). ORS 215.406 further allows a county to "conduct
4 hearings on applications for such classes of permits and contested cases[.]" Houston notes
5 that cities have no comparable authority under ORS chapter 227 to conduct contested case
6 proceedings and argues that the authority of cities to conduct quasi-judicial proceedings is
7 limited therefor to applications for permits. Consequently, Houston argues, while
8 ORS 227.280 allows cities to "provide for enforcement" of its development ordinances, the
9 city's limited authority to conduct quasi-judicial proceedings under ORS chapter 227 means
10 that the city cannot choose to enforce its development ordinances by means of city-initiated
11 quasi-judicial proceedings.

12 Finally, Houston argues, even if ORS 227.280 allows the city to adopt procedures
13 that allow it to enforce its development ordinance by means of city-initiated quasi-judicial
14 proceedings, the terms of MZO 9.3(2) do not provide for such proceedings. Houston
15 contends that MZO 9.3(2), by its terms, limits the city's enforcement actions to judicial
16 actions such as "injunction, mandamus, abatement or other appropriate proceedings to
17 prevent, enjoin temporarily or permanently, abate or remove" the unlawful use. Houston
18 argues that each of the actions described in MZO 9.3(2) are judicial remedies available only
19 in circuit court proceedings, and that the city's interpretation of MZO 9.3(2) to allow
20 enforcement through quasi-judicial proceedings is contrary to the plain text of that provision.
21 ORS 197.829(1)(a).³ Stated differently, Houston contends that the city's interpretation adds

³ORS 197.829(1) provides in relevant part:

"The Land Use Board of Appeals shall affirm a local government's interpretation of its comprehensive plan and land use regulations, unless the board determines that the local government's interpretation:

"(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;

1 a completely different type of proceeding to the list of actions provided in MZO 9.3(2), and
2 thus the city has essentially amended MZO 9.3(2) in the guise of interpretation. Goose
3 Hollow Foothills League v. City of Portland, 117 Or App 211, 218, 843 P2d 992 (1992).

4 Alliance responds that MZO 9.3(2) properly implements ORS 227.280 and the city
5 properly interpreted MZO 9.3(2) to allow it to conduct the city-initiated quasi-judicial
6 proceeding in this case. At oral argument, Alliance cited to two phrases in MZO 9.3(2) that,
7 it contends, grant the city broad authority to conduct quasi-judicial enforcement proceedings,
8 emphasized in the passage below:

9 "In case * * * land is or is proposed to be used in violation of this ordinance,
10 * * * the City may, as an alternative to other remedies that are legally
11 available for enforcing this ordinance, institute injunction, mandamus,
12 abatement or other appropriate proceedings to prevent, enjoin temporarily or
13 permanently, abate or remove the unlawful location, construction,
14 maintenance, repair, alteration or use." (Emphasis added).

15 According to Alliance, a quasi-judicial enforcement proceeding is a "legally
16 available" remedy or "other appropriate proceeding" within the meaning of MZO 9.3(2).
17 Alliance contends that the city council made an interpretation to that effect, and that
18 interpretation should be affirmed because it is not contrary to the text, purpose or underlying
19 policy of MZO 9.3(2), or "clearly wrong." ORS 197.829(1)(a)-(c); Goose Hollow Foothills
20 League, 117 Or App at 217.

21 We need not resolve Houston's contention that the city lacks statutory authority to
22 enforce its land use regulations by means of quasi-judicial enforcement proceedings, because
23 we agree with Houston that, even if ORS 227.280 grants the city that authority, ORS 227.280
24 also requires that the city exercise that authority by providing, that is, setting forth in its land
25 use regulations, the means of enforcement authorized under its code. The city has apparently

"(b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;

"(c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation[.]"

1 done so in adopting MZO 9.3(2). The relevant question is thus whether MZO 9.3(2)
2 "provide[s] for enforcement" of its land use regulations by means of quasi-judicial
3 proceedings. ORS 227.280.

4 Although the city interprets MZO 9.3(2) to allow it to enforce its code requirements
5 by means of quasi-judicial proceedings, that interpretation is conclusory and not linked to
6 any particular language in MZO 9.3(2). It may be, as Alliance contends, that the city council
7 implicitly interpreted MZO 9.3(2) along the lines suggested in Alliance's brief, that the city
8 council viewed a quasi-judicial proceeding as one of the "alternatives" to the proceedings
9 described in MZO 9.3(2) or an "other appropriate proceeding." See Alliance for Responsible
10 Land Use v. Deschutes Cty, 149 Or App 259, 942 P2d 836 (1997), rev dismissed 327 Or 555
11 (1998) (a local government's implicit interpretation of a local provision may be adequate for
12 review). However, even if we may fairly infer that interpretation from the challenged
13 decision, we disagree with Alliance that the city's interpretation is consistent with the text of
14 MZO 9.3(2) and sustainable under the standard described in Goose Hollow Foothills League.

15 In Huntzicker v. Washington County, 141 Or App 257, 261, 917 P2d 1051 (1996),
16 the Court of Appeals explained that the "clearly wrong" standard described in Goose Hollow
17 Foothills League means that "no person could reasonably interpret the provision in the
18 manner that the local body did." As Houston points out, each of the remedies listed in MZO
19 9.3(2) are equitable remedies, remedies traditionally available only from a court, and thus not
20 remedies that the city can seek in a quasi-judicial proceeding.⁴ None of the listed remedies

⁴We note that the text of MZO 9.3(2) is nearly identical to, and was presumably borrowed from, ORS 215.185(1), which grants a county authority to seek judicial remedies in enforcing its building code and land use regulations. ORS 215.185(1) provides:

"In case a building or other structure is, or is proposed to be, located, constructed, maintained, repaired, altered, or used, or any land is, or is proposed to be, used, in violation of an ordinance or regulation designed to implement a comprehensive plan, the governing body of the county or a person whose interest in real property in the county is or may be affected by the violation, may, in addition to other remedies provided by law, institute injunction, mandamus, abatement or other appropriate proceedings to prevent, temporarily or

1 or types of proceedings in MZO 9.3(2) state or even suggest quasi-judicial remedies or
2 proceedings such as the city engaged in here. Even if the city council's interpretation relies
3 upon the two phrases that Alliance points to, no person could reasonably interpret those
4 phrases, considered in their context, in the manner attributed to the city council. The "other
5 appropriate proceedings" referred to in MZO 9.3(2) are limited by the terms of that provision
6 to proceedings "to prevent, enjoin temporarily or permanently, abate or remove the unlawful
7 location, construction, maintenance, repair, alteration or use." None of the listed actions or
8 forms of relief can be obtained through a quasi-judicial proceeding.

9 Similarly, the phrase stating that "the City may, as an alternative to other remedies
10 that are legally available for enforcing this ordinance," institute actions for equitable relief,
11 does not specify what other remedies are "legally available." As noted above, ORS 227.280
12 requires that the city may "provide for enforcement" of its land use regulations, which we
13 construe to mean that the city may adopt legislation that sets forth the means of enforcement.
14 A reference to other remedies that are "legally available" does not "provide for enforcement"
15 within the meaning of ORS 227.280, and any interpretation to that effect is contrary to the
16 statute. In addition, we agree with Houston that, assuming the city implicitly interpreted the
17 "legally available" language along the lines Alliance suggests, the city's interpretation of
18 MZO 9.3(2) imports not only a different type of relief, but an entirely different type of
19 proceeding into that provision than the proceedings described therein. In so doing, the city's
20 interpretation departs so profoundly from the text of MZO 9.3(2) as to constitute a de facto
21 amendment of that provision. Goose Hollow Foothills League, 117 Or App at 218.

permanently enjoin, abate, or remove the unlawful location, construction, maintenance,
repair, alteration, or use. When a temporary restraining order is granted in a suit instituted by
a person who is not exempt from furnishing bonds or undertakings under ORS 22.010, the
person shall furnish undertaking as provided in ORCP 82 (A)(1)."

1 For the preceding reasons, we conclude that the city misconstrued the applicable law,
2 and made a decision that is prohibited as a matter of law. ORS 197.835(9)(a)(D).
3 Accordingly, the city's decision must be reversed. OAR 661-010-0071(1)(c). Because the
4 city lacks authority to conduct the proceedings challenged here, there is no point in
5 addressing Houston's remaining challenges and petitioner's assignments of error. Standard
6 Insurance Co. v. City of Hillsboro, 17 Or LUBA 901, 909 n 4 (1989).

7 The city's decision is reversed.
8 Holstun, Board Chair, dissenting.

9 I am unable to agree with the majority that the city council's implicit interpretation of
10 MZO 9.3(2) violates ORS 197.829. While the city's council's reliance on MZO 9.3(2)
11 admittedly is based on an expansive interpretation of that provision, I do not believe the
12 interpretation violates the "clearly wrong" standard, as that standard has been explained by
13 the Court of Appeals. deBardelaben v. Tillamook County, 142 Or App 319, 325, 922 P2d
14 683 (1996); Zippel v. Josephine County, 128 Or App 458, 461, 876 P2d 854 (1994); Goose
15 Hollow Foothills League, 117 Or App at 217.

16 I respectfully dissent.