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

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GENERAL GROWTH OF CALIFORNIA, INC.,)	
)	
Petitioner,)	LUBA No. 87-110
)	
vs.)	FINAL OPINION
)	AND ORDER
CITY OF SALEM,)	
)	
Respondent.)	

Appeal from the City of Salem.

Kenneth Sherman, Jr., Salem, filed a petition for review and argued on behalf of petitioner. With him on the brief was Sherman, Bryan, Sherman & Murch.

Paul A. Lee, Salem, filed a response brief and argued on behalf of respondent city. With him on the brief was William J. Juza.

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

DISMISSED 03/01/88

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

1 Opinion by Holstun.

2 NATURE OF THE DECISION

3 Petitioner appeals Resolution 87-126, the second of two
4 resolutions adopted by the city to interpret a policy in its
5 comprehensive plan prohibiting "regional shopping and service
6 facilities" outside the central business district.

7 FACTS

8 The acknowledged Salem Area Comprehensive Plan (SACP)
9 contains 15 policies to implement its commercial development
10 goal of promoting the central city core and encouraging only
11 certain commercial activities in outlying areas. The first of
12 those policies is as follows:

13 "The central business district shall be maintained and
14 developed as the regional retail and employment center
15 for the Salem urban area and regional shopping and
service facilities outside the central business
district should be prohibited."¹ (Emphasis added)
SACP Policy F.1.

16 The term "regional shopping and service facilities" is not
17 defined in the general definitions sections of the SACP, or the
18 Salem Zoning Code (Code).

19 On January 12, 1987, the city adopted Resolution 87-02
20 interpreting the term "regional commercial or retail center" to
21 include retail developments encompassing "thirty-five (35)
22 acres, or more, of site area, and, * * * 300,000 square feet,
23 or more, of gross leasable space * * *."² (Emphasis added).

24 Although petitioner has not submitted a request for city
25 approval, petitioner has expressed a desire to construct a
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1 shopping center containing approximately 432,000 square feet of
2 gross leasable area to be located on less than 35 acres.

3 Because the shopping center would not be located on a site 35
4 acres or larger, it would not be a "regional commercial or
5 retail center" as defined in Resolution 87-02.

6 On November 9, 1987, the city adopted the resolution
7 challenged in this appeal, Resolution 87-126.³ Resolution
8 87-126 indentifies a need to clarify the city's intent
9 regarding the plan policy addressed in Resolution 87-02.
10 Resolution 87-126 interprets the terms "regional retail and
11 employment center" or "regional commercial or retail center" to
12 include retail developments encompassing "300,000 square feet,
13 or more, of gross leasable space, or, * * * thirty-five (35)
14 acres or more, of site area." (Emphasis added). The shopping
15 center petitioner has indicated a desire to build would be a
16 "regional retail or employment center" or "regional commercial
17 or retail center" as those terms are defined in Resolution
18 87-126, because it would include more than 300,000 square feet
19 of gross leasable space.⁴

20 Petitioner appeals Resolution 87-126, asserting four
21 assignments of error.

22 JURISDICTION

23 Petitioner's first two assignments of error actually are
24 arguments that the city's decision is a land use decision
25 subject to this Board's jurisdiction. In the first assignment
26 of error, petitioner argues the city has either amended its

1 comprehensive plan or adopted a new land use regulation. We
2 understand the second assignment of error to argue (1) the city
3 adopted a final decision applying a comprehensive plan
4 provision, and (2) the resolution has a significant impact on
5 land use.

6 The city responds that the resolution is not a land use
7 decision. According to the city, the resolution (1) did not
8 amend the comprehensive plan; (2) is not a new land use
9 regulation; (3) is not an application of the plan and code
10 because it is advisory only; and (4) does not have a
11 significant impact on land use because it does not affect any
12 pending application for a building permit or other request for
13 land use approval.

14 The Board's review jurisdiction is limited to land use
15 decisions. ORS 197.825(1). As this case once again
16 demonstrates, it is not always clear whether a decision is a
17 land use decision subject to review by this Board. See City of
18 Pendleton v. Kerns, 294 Or 126, 133, 653 P2d 992 (1982); Wagner
19 v. Marion County, 79 Or App 233, 235, 719 P2d 31, rev den 302
20 Or 86 (1986); Allen Associates v. City of Beaverton, 11 Or LUBA
21 140 (1984). "Land use decision" is defined as follows:

22 "(10) 'Land use decision':

23 "(a) Includes:

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

- 1 "(i) The goals;
- 2 "(ii) A comprehensive plan provision;
- 3 "(iii) A land use regulation; or
- 4 "(iv) A new land use regulation * * *."
5 ORS 197.015(10).

6 In addition to decisions satisfying the definition of land
7 use decision in ORS 197.015(10), this Board has jurisdiction to
8 review decisions satisfying the "significant impact test"
9 enunciated in Petersen v. Klamath Falls, 279 Or 249, 252-254,
10 566 P2d 1193 (1977), and City of Pendleton v. Kerns, supra.
11 See Billington v. Polk Co., 299 Or 471, 703 P2d 232 (1985).

12 In this case, while it is reasonably clear Policy F.1 is
13 the subject of the resolution, see footnote four supra, it is
14 not clear that Resolution 87-126 is a "final decision or
15 determination" concerning "the adoption, amendment or
16 application of" a plan provision, land use regulation or new
17 land use regulation. ORS 197.015(10)(a).

18 We first consider petitioner's argument that Resolution
19 87-126 in effect amends the SACP or adopts a new land use
20 regulation.

21 The action taken by the city in Resolution 87-126 is
22 ambiguous. The resolution states a "need has arisen to clarify
23 the intent" of the cities of Salem and Keizer regarding the
24 SACP policy.⁵ The resolution purports to adopt a "definitive
25 statement to provide guidance in the interpretation of" Policy
26 F.1. It is possible to read this language to express an intent

1 to adopt a definition that would be a binding, generally
2 applicable interpretation of Policy F.1. The fact the city
3 apparently felt it necessary to adopt Resolution 87-126 to
4 "clarify" what it said in Resolution 87-02 would support that
5 reading.

6 However, the resolution does not purport to amend the
7 comprehensive plan to add this definition to the definition
8 section of the plan. Had the city done so, adoption of the
9 definition clearly would be a land use decision subject to our
10 review. ORS 197.015(10)(a)(A)(ii). Neither does the
11 resolution clearly purport to adopt a new land use
12 regulation.⁶ Had the city done so, adoption of such a land
13 use regulation would be subject to our review.
14 ORS 197.015(10)(a)(A)(iv).

15 In this case, the language of the resolution raises
16 sufficient question that we decline to accept petitioner's
17 characterization of Resolution 87-126 as binding on the city
18 over the city's argument that it did not adopt a binding,
19 generally applicable interpretation. We therefore will not
20 assume the city in effect amended the SACP or adopted a new
21 land use regulation when it adopted Resolution 87-126. The
22 city's failure to follow post acknowledgement plan amendment
23 procedures supports its argument to the Board that the effect
24 of Resolution 87-126 was not to adopt a plan amendment or new
25 land use regulation.⁷

26 Having concluded the city did not amend its plan or adopt a

1 new land use regulation, we turn to petitioner's argument that
2 the city adopted a final decision concerning the application of
3 a comprehensive plan provision.

4 This Board has held on numerous occasions that a decision
5 rendered by a local government in a quasi-judicial proceeding
6 in which the application for approval is withdrawn prior to the
7 decision is "advisory in nature and is therefore not a
8 reviewable land use decision."

9 In Friends of Lincoln County v. Newport, 5 Or LUBA 346
10 (1982), the city council reviewed the planning commission's
11 approval of a subdivision application. Prior to the city
12 council's decision, the applicants withdrew their subdivision
13 application. The city council noted that the application had
14 been withdrawn and declared the appeal moot, but then proceeded
15 to adopt findings "to provide guidance to the administrative
16 staff". Friends of Lincoln County v. Newport, 5 Or LUBA at
17 348. On appeal to this Board the petitioners argued the city's
18 findings

19 "set policies and established facts which can and will
20 be used by the city staff in making administrative
21 decisions regarding land use matters relating to the
22 subject property and possibly other similar situated
23 properties." 5 Or LUBA at 350.

24 In dismissing the appeal, the Board stated:

25 "We view the extensive findings discussing the merits
26 of this subdivision application to be surplusage. We
do not view the findings as having any more force and
effect than a memo from the city council to the
planning staff. To the extent that this 'memo' may
include erroneous information or erroneous conclusions
as to statewide land use requirements, the memo may

1 come to haunt the city in a later proceeding, but the
2 memo itself is not appealable as a 'decision'. When
3 these findings are adopted in support of a land use
4 decision (if they are adopted), then the decision may
5 be subject to invalidation. We do not believe this
6 Board has the power to declare mere words or
7 expression of opinion of the public body to be
8 invalid. The only way to test the views of a public
9 body is through a specific land use action in which
10 those views are expressed as part of the decision."
11 Id. at 351-352 (emphasis added).

12 Our decision in Friends of Lincoln County v. City of
13 Newport suggests that when a local government simply defines or
14 interprets existing plan or land use regulation provisions
15 without amending or adopting a plan provision or land use
16 regulation, such decisions are land use decisions only if they
17 are rendered as part of a final decision that grants or denies
18 a request for a permit or other land use approval. See also
19 Lamb v. Lane County, 14 Or LUBA 127, 130 (1985); Robert Randall
20 Construction Company v. City of Wilsonville, 8 Or LUBA 185
21 (1983).

22 In Medford Assembly of God v. Medford, 297 Or 138, 681 P2d
23 790 (1984), the Supreme Court identified an additional situation
24 in which a local government's effort to interpret or define a
25 plan or land use regulation provision is a land use decision.
26 In that case the city issued a written interpretation of its
zoning ordinance pursuant to a procedure in the zoning
ordinance analogous to the Administrative Procedures Act
provisions for declaratory rulings regarding the applicability
of a "rule or statute" to a specific "person, property, or
state of facts." See ORS 183.410. The Supreme Court concluded

1 such decisions are land use decisions subject to our review.

2 Id at 140.

3 The city does have a procedure in its code for declaratory
4 rulings interpreting provisions of the code. Code Section
5 110.050. However, it is not clear that procedure could be
6 utilized to obtain a declaratory ruling on the meaning of a
7 SACP provision such as "regional shopping and service
8 facilities". In any event, the city's decision was not
9 rendered pursuant to the declaratory ruling procedure and
10 therefore is not the kind of decision that would be reviewable
11 by this Board under Medford Assembly of God v. Medford.

12 We believe the "memo * * * to the planning staff"
13 description in Friends of Lincoln County v. Newport accurately
14 describes, by analogy, the city's decision in this case. In
15 effect, Resolution 87-126 is a memo from the city. It may
16 express correct or erroneous conclusions as to the meaning of
17 the plan provision it addresses. However, until the city
18 repeats those interpretive conclusions in support of a land use
19 decision, in a declaratory ruling, or in a new or amended plan
20 or land use regulation provision, we have no authority to
21 review the city's expression of opinion.⁸

22 Finally, we do not believe Resolution 87-126 is a
23 "significant impact" land use decision. Petitioner's argument
24 that the resolution will significantly impact land use is
25 founded on its concern the city would be obliged to apply
26 Policy F.1 to a future application for shopping center

1 approval, as that policy is defined in the resolution. Because
2 we conclude the city is not so obligated, Resolution 87-126 has
3 no impact on land use.

4 In view of our conclusion that we lack jurisdiction in this
5 matter, it is unnecessary for us to discuss petitioner's third
6 and fourth assignments of error.

7 The appeal is dismissed.

FOOTNOTES

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3 The plan states that the term "shall" when used in policy
4 statements is mandatory. The term "should" when used in policy
5 statements is advisory but persons "have the burden of either
6 following the plan directive or showing good cause why they
7 cannot comply." SACP at 18. While we note the prohibition of
8 "regional shopping and service facilities" apparently is
9 advisory rather than mandatory, the nature of the prohibition
10 is not an issue in this case.

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14 We note the difference in the operative terms in Policy F.1
15 and Resolution 87-02. While Policy F.1 states "regional
16 shopping and service facilities outside the central business
17 district should be prohibited," Resolution 87-02 offers an
18 interpretation of "regional commercial or retail center."
19 Resolution 87-02 and Resolution 87-126 also specify other
20 interpretative criteria that are not at issue in this appeal.

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22 3
23 Resolution 87-126 provides as follows:

24 "WHEREAS, the Salem-Keizer Area Comprehensive Plan
25 provides that the central business district shall be
26 maintained and developed as the regional retail and
employment center for the Salem urban area; and

"WHEREAS, this policy was previously interpreted by
Salem Resolution 87-2 and Keizer Resolution R87-251;
and

"WHEREAS, the need has arisen to clarify the intent of
the jurisdictions relative to said policy; NOW,
THEREFORE BE IT RESOLVED BY THE COMMON COUNCIL OF THE
CITY OF SALEM, OREGON:

"THAT as a definitive statement to provide guidance in
the interpretation of the Salem-Keizer Area
Comprehensive Plan the terms 'regional retail and
employment center' or 'regional commercial or retail
center' is a contiguous retail outlet which is:

"(a) Planned or phased as a single or cohesive
development, and

"(b) Directly accessible to a major four lane arterial

1 street, and, either:

2 "(a) 300,000 square feet, or more, of gross leasable
3 space.[sic] or,

4 "(b) thirty-five (35) acres, or more, of site area.

5 "ADOPTED by the Common Council this 9th day of
6 November, 1987." (Emphasis added).

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9 As in Resolution 87-02, the terms defined in Resolution
10 87-126 "regional retail or employment center" or "regional
11 commercial or retail center" are not identical to the term
12 "regional shopping and service facilities" used in Policy F.1.
13 The parties assume it was the city's intent to provide
14 interpretative guidance for the term used in Policy F.1. For
15 purposes of this opinion we will assume that the parties are
16 correct. We will ignore the differences between the plan
17 language and the corresponding language in the resolutions, and
18 assume the city was attempting to clarify what it meant
19 "regional shopping and service facilities" to include.

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22 We note that while the City of Keizer adopted a resolution
23 corresponding to Resolution 87-02, it apparently has not
24 adopted a resolution corresponding to Resolution 87-126.
25 Record 4-5.

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28 We see no reason why the city could not, if it chose to,
29 adopt a land use regulation separate from the plan to define
30 terms used in the plan.

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33 It is well settled that local governments may interpret
34 ambiguous terms in their plan and land use ordinances during
35 quasi-judicial proceedings, and this Board is bound to defer to
36 such interpretations as long as they are reasonable, even if
37 other reasonable interpretations are possible. See, e.g.,
38 Gordon v. Clackamas Co., 73 Or App 16, 21, 698 P2d 49 (1985);
39 Fisher v. Gresham, 69 Or App 411, 416, 685 P2d 49 (1985);
40 Alluis v. Marion Co., 64 Or App 478, 481, 688 P2d 1242 (1983).

41 However, local governments may also include in their plan
42 or land use regulations definitions of ambiguous terms to make

1 the meaning and application of those terms clearer. Local
2 governments electing this latter course give up the discretion
3 they would otherwise have to apply any reasonable
4 interpretation of those terms. The definitions included in an
5 acknowledged comprehensive plan or land use regulation must be
6 followed in land use proceedings where the terms they define
7 are applicable. See ORS 197.835(3). Of course if such
8 definitions no longer express the city's view of what an
9 ambiguous term means, the city is free to amend the definition
10 following applicable local procedures and post acknowledgement
11 procedures set forth in ORS 197.610 et seq.

12 Our reading of Resolution 87-126 to not adopt a binding,
13 generally applicable interpretation of Policy F.1 makes it
14 unnecessary for us to decide whether the city would be required
15 to adopt such a binding interpretation by plan amendment or
16 land use regulation. It would appear, however, that such
17 binding, generally applicable interpretations of acknowledged
18 plan provisions could only be accomplished by plan amendment.
19 Arguably, a binding, generally applicable interpretation of a
20 plan provision could also be accomplished by a "land use
21 regulation" as that term is defined in ORS 197.015(11).

22 We note the city has adopted general definitions as part of
23 its comprehensive plan and zoning ordinance. SACP 17-19; Code
24 Chapter 111. Apparently, the city recognizes that it may adopt
25 binding generally applicable interpretations of its plan by
26 plan amendment. We also note the city apparently considered
but elected not to proceed by plan amendment prior to adoption
of Resolution 87-02. Record 36.

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In its brief the city offers the following argument:

"Petitioner would have the Board invalidate Resolution
87-126 because it was not passed in accordance with
the procedural rules applicable to enactment of
comprehensive plan amendments and land use
regulations. * * * This would leave the council with
an unwritten definition of regional shopping facility
and would see them revert back to the case by case ad
hoc construction of the policy" Respondent's Brief
4-5.

The above quoted argument suggests, incorrectly, that the
city would be bound by, and therefore could simply rely
on, the definition in Resolution 87-126 in a case where
policy F.1 is implicated. We view the resolution as a
nonbinding expression of the city's opinion of the meaning
of Policy F.1. In carrying out its obligation to

1 reasonably interpret and apply Policy F.1, it is Policy
2 F.1, not Resolution 87-126, which the city must apply in
3 cases implicating that policy. The city is, of course,
4 free in such cases to apply the same construction
5 announced in Resolution 87-126 and we would review that
6 construction on appeal to determine if it is reasonable.
7 See footnote 7, supra.

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