

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.¹ 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.²

¹The 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.

²Petitioner 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.³
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

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

³ORS 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.⁴ The city's motion to dismiss for lack of
2 jurisdiction is denied.⁵

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

⁴In 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.

⁵The 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.