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

SANDRA KELLEY and RANDY MISLICK,)
)
 Petitioners,)
)
 vs.)
)
 CITY OF CASCADE LOCKS,)
)
 Respondent,)
)
 and)
)
 DENNIS SNYDER,)
)
 Intervenor-Respondent.)

LUBA No. 97-205
FINAL OPINION
AND ORDER

Appeal from City of Cascade Locks.

Sandra Kelley, Cascade Locks, filed the petition for review and argued on her own behalf.

Wilford K. Carey, Hood River, filed a joint response brief and argued on behalf of respondent. With him on the brief was Annala Carey Vankoten & Baker.

John F. Bradach, Portland, filed a joint response brief and argued on behalf of intervenor-respondent. With him on the brief was Bradach Law Offices.

GUSTAFSON, Board Chair; HANNA, Board Member, participated in the decision.

REMANDED 04/27/98

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 Petitioners appeal the city's approval of a comprehensive
4 plan amendment and zone change.

5 **MOTION TO INTERVENE**

6 Dennis Snyder (intervenor), the applicant below, moves to
7 intervene on the side of respondent. There is no opposition
8 to the motion, and it is allowed.

9 **MOTION TO DISMISS**

10 Intervenor moves to dismiss this appeal as to petitioner
11 Mislick, on the basis that Mislick did not submit a petition
12 for review. Because Mislick did not submit a petition for
13 review, he is not entitled to present oral argument. Such
14 failure, however, is not a basis for dismissal. Intervenor's
15 motion is denied.

16 **MOTION TO STRIKE**

17 Intervenor moves to strike documents attached to the
18 petition for review that are not a part of the record.
19 Intervenor's motion is granted.

20 **FACTS**

21 In March 1997, intervenor filed an application with the
22 city for a comprehensive plan amendment and corresponding zone
23 change for the subject property from Open Space (OS) to
24 Industrial (I). The property borders and slopes upward from
25 Herman Creek; the lower portion of the property is within the
26 Herman Creek 100-year floodplain, though the exact boundaries

1 of the floodplain have not been established. The city does,
2 however, require a 100-foot development setback from the
3 creek. Following public hearings, the planning commission
4 recommended approval of the application to the city council.
5 The city council conducted additional hearings, which included
6 substantial discussion of the floodplain boundaries and other
7 potential riparian values on the property. The city council
8 then approved the application for only a designated upland
9 portion of the subject property. It denied any change for the
10 lower portion of the property, which it determined to be
11 within the Herman Creek floodplain.

12 Petitioners appeal the city's approval of the
13 application.

14 **FIRST ASSIGNMENT OF ERROR**

15 Petitioner Kelley (petitioner) contends that the city's
16 decision is based on inadequate findings and lacks substantial
17 evidence. Petitioner does not specify any particular
18 criterion for which the findings are inadequate or lacking in
19 evidentiary support. Rather, it appears that petitioner
20 disagrees in numerous respects with the city's evaluation of
21 the facts and the conclusions it reaches. Such disagreement
22 does not establish any basis for remand or reversal of the
23 city's decision. The first assignment of error is denied.

24 **SECOND ASSIGNMENT OF ERROR**

25 Petitioner contends the city misconstrued the applicable
26 law and "erred about which criteria should be applied * * *."

1 Petition for Review 10.

2 Petitioner makes numerous general allegations that the
3 city misinterpreted its comprehensive plan, but does not
4 specify any plan provision for which the city's interpretation
5 is clearly wrong. We reject those allegations without further
6 discussion.

7 Petitioner also argues, at length, that the city erred
8 when the city planning consultant characterized the proposed
9 amendment as "minor" rather than "major." According to
10 petitioner, because of the impact she believes this amendment
11 will have, the city was bound to characterize it as major.

12 Petitioner does not cite to, and we have not located
13 anywhere in the city's decision, where this quasi-judicial
14 application is characterized as "minor." Our review is
15 strictly of the city's decision. The city planning
16 consultant's characterization of the application outside the
17 city's decision is irrelevant.

18 To the extent petitioner's argument is that the city
19 erred in not evaluating this quasi-judicial application as
20 "major", we disagree. The city's comprehensive plan
21 recognizes two types of processes for amendments to the plan,
22 "Major Revisions (Legislative)"¹ and "Quasi-judicial

¹The comprehensive plan defines a major revision as follows:

"A major revision to this plan is defined as a policy making change in the text or Plan Map that will have widespread and significant impact throughout the planning area. The proposed change will be considered as a legislative action * * * [.]"
Comprehensive Plan 77.

1 revisions."² Thus, under its plan, only legislative changes
2 are designated as "major." Applications, such as the one at
3 issue, that apply to a particular piece of property, are
4 characterized as "quasi-judicial." We find no error in the
5 city's failure to characterize this quasi-judicial application
6 as a "major" amendment.

7 Finally, petitioner alleges the city has misconstrued and
8 failed to satisfy the requirements of Statewide Planning Goal
9 5. The city does not dispute that Goal 5 applies to the
10 challenged decision, but responds that it has fully complied
11 with the goal's requirements, as evidenced by the ESEE
12 analysis in the city's findings.³

13 The city's ESEE analysis of the site's Goal 5 resources
14 applies the requirements of OAR 660-16-005. That rule,
15 however, is not applicable to the challenged decision. OAR
16 660-16-005 has been substantially revised and replaced by OAR

²The plan states:

"A quasi-judicial revision is defined as an amendment to the Comprehensive Plan Map which consists of an application of the policies of the plan to a particular piece of property with no widespread significance and having no general applicability to areas of similar use." Comprehensive Plan 78.

³The city conducted an ESEE analysis of the site's Goal 5 resources based on DLCD's instruction:

"Statewide Planning Goal 5 protects Open Spaces, Scenic and Historic Area, and Natural Resources. The City's Comprehensive Plan includes a Goal 5 element which lists areas designated as Open Space. The eastern portion of the subject property is included in this list. Because the portion of the applicant's property subject to this proposal is included on a list of Goal 5 sites in an acknowledged comprehensive land use plan, we feel it is necessary for the city to conduct an analysis of the Economic, Social, Environmental, and Energy (ESEE) consequences of removing the Open Space designation." Supp R 9.

1 660-23-040 (the new Goal 5 rule). The new Goal 5 rule applies
2 to all applications filed on or after September 1, 1996.
3 Since the subject application was filed in March 1997, the new
4 Goal 5 rule applies in this case. The city's findings of
5 compliance with the former Goal 5 rule are insufficient to
6 establish compliance with the new Goal 5 rule.

7 Petitioner's remaining arguments generally address
8 numerous alleged deficiencies in the city's ESEE analysis,
9 mostly related to alleged impacts of the amendment on wetlands
10 and other riparian values. Because the city has not made
11 findings based upon the new Goal 5 rule, we do not reach the
12 merits of those arguments.

13 The second assignment of error is sustained, in part.

14 The city's decision is remanded.

15

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