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

OREGON DEPARTMENT OF)
TRANSPORTATION and DEPARTMENT OF)
LAND CONSERVATION AND)
DEVELOPMENT,)

Petitioners,)

vs.)

DOUGLAS COUNTY,)

Respondent.)

LUBA No. 98-045
FINAL OPINION
AND ORDER

Appeal from Douglas County.

Celeste J. Doyle, Assistant Attorney General, Salem, filed the petition for review. With her on the brief were Hardy Myers, Attorney General and Lucinda D. Moyano, Assistant Attorney General.

No appearance by respondent.

BASSHAM, Board Member; HOLSTUN, Board Chair; BRIGGS, Board Member, participated in the decision.

REMANDED 09/23/99

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

1 Opinion by Bassham.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the county's adoption of amendments to its Transportation System
4 Plan (TSP).¹

5 **FACTS**

6 OAR chapter 660, division 12, the Transportation Planning Rule (TPR) requires that
7 the county adopt land use regulations to protect transportation facilities, corridors and sites
8 for their identified functions. In particular, OAR 660-012-0045(2)(g) requires that the
9 county adopt "[r]egulations assuring that amendments to land use designations, densities, and
10 design standards are consistent with the functions, capacities and levels of service of
11 facilities identified in the TSP."

12 In 1997, the county adopted revisions to its TSP and land use ordinance to implement
13 the requirements of the TPR. In doing so, the county amended Land Use Development
14 Ordinance (LUDO) 6.500.2, in an attempt to implement OAR 660-012-0045(2)(g):

15 "The application [for a quasi-judicial comprehensive plan amendment] shall
16 address the following requirements, which shall be the standard for
17 Amendment:

18 "(a) That the Amendment complies with the Statewide Planning Goals and
19 applicable administrative rules adopted by the Land Conservation and
20 Development Commission pursuant to ORS 197.240 or as revised
21 pursuant to ORS 197.245."

22 Petitioners appealed this amendment to LUDO 6.500.2, to LUBA, arguing in their
23 second assignment of error that LUDO 6.500.2 is inconsistent with OAR 660-012-0045(2)(g)
24 because (1) it is limited to quasi-judicial plan amendments and does not govern legislative

¹This appeal was stayed until LUBA resolved the issues mandated by the Court of Appeals' remand in Dept. of Transportation v. Douglas County, ___ Or LUBA ___ (LUBA Nos. 97-178/181, July 8, 1998), rev'd on other grounds and rem'd, 157 Or App 18, 967 P2d 901 (1998) (Douglas County I). LUBA resolved those remaining issues in Dept of Transportation v. Douglas County, ___ Or LUBA ___ (LUBA Nos. 97-178/181, April 21, 1999)(Douglas County II).

1 plan amendments; and (2) it merely incorporates by reference the Statewide Planning Goals
2 and rules rather than adopting local regulations for assuring that amendments to land use
3 designations, densities, and design standards are consistent with the function, capacities and
4 levels of services of facilities identified in the county's TSP. In Dept. of Transportation v.
5 Douglas County, ___ Or LUBA ___ (LUBA Nos. 97-178/181, July 8, 1998), rev'd on other
6 grounds and rem'd, 157 Or App 18, 967 P2d 901 (1998) (Douglas County I), the county
7 argued that petitioners' objections were resolved by a comprehensive plan amendment
8 (finding XX) adopted by the same 1997 Ordinance. Finding XX states:

9 "Amendments to the comprehensive plan shall be consistent with the
10 provisions of ORS and OAR. The OARs now provide that amendments,
11 which significantly affect a transportation facility shall assure that allowed
12 uses are consistent with the identified function, capacity and level of service
13 of the facility." Record 2.

14 We agreed with petitioners that finding XX did not resolve petitioners' objections to LUDO
15 6.500.2:

16 "We disagree with the county that the amended plan provision cited satisfies
17 petitioners' first and second objections, and OAR 660-012-0045(2)(g). The
18 plan provision does not refer to the TPR by name or number, but merely
19 restates a TPR standard that is not responsive to the requirements of OAR
20 660-012-0045(2)(g). By its terms, the plan provision applies only to
21 amendments that 'significantly affect a transportation facility,' which is a
22 different, and higher, threshold than the standard required by OAR 660-012-
23 0045(2)(g)." Douglas County I, slip op 9.

24 Meanwhile, in response to petitioners' appeal in Douglas County I, the county
25 adopted Ordinance 98-2-1 to amend six provisions of the TSP, including the following
26 amendment to finding XX:

27 "Amendments to the Comprehensive Plan shall be consistent with the
28 provisions of ORS and OAR, specifically including OAR chapter 660,
29 division 12. The OARs now provide that amendments which significantly
30 affect a transportation facility and amendments to land use designations,
31 densities and design standards shall assure that allowed uses are consistent
32 with the identified function, capacity and level of service of the facility."
33 Record 2 (Emphasis reflects amendment additions by Ordinance 98-2-1)

1 Petitioners then appealed Ordinance 98-2-1 to LUBA.

2 **ASSIGNMENT OF ERROR**

3 Petitioners argue that finding XX, as amended, suffers from the same flaws as the
4 version addressed in Douglas County I, and, therefore, the county's legislation does not
5 comply with OAR 660-012-0045(2)(g).

6 According to petitioners, one of the fundamental difficulties with the county's
7 attempts to implement OAR 660-012-0045(2)(g) is the county's failure to recognize that
8 OAR 660-012-0045(2)(g) does not itself provide standards that are directly applicable to
9 "amendments to land use designations, densities, and design standards." Nothing in OAR
10 660-012-0045(2)(g) or elsewhere in the TPR directly requires that "amendments to land use
11 designations, densities, and design standards" be consistent with the "functions, capacities
12 and levels of service of facilities identified in the TSP." Instead, OAR 660-012-0045(2)(g)
13 requires that the county adopt land use regulations to achieve that result. Petitioners argue
14 that LUDO 6.500.2 and amended finding XX, even read together, fail to achieve the result
15 required by OAR 660-012-0045(2)(g), because they merely require that quasi-judicial and
16 legislative plan amendments be consistent with the TPR. Because nothing in the TPR
17 actually requires that amendments to land use designations, densities, and design standards
18 be consistent with the functions, capacities and levels of service of facilities identified in the
19 TSP, petitioners contend that the county's legislation effectively imposes no such
20 requirements, contrary to the mandate of OAR 660-012-0045(2)(g).

21 Further, petitioners argue that the amendment to finding XX does not cure an
22 additional problem: OAR 660-012-0045(2)(g) requires that the county adopt land use
23 regulations to implement the rule's requirements. According to petitioners, implementing
24 OAR 660-012-0045(2)(g) by adopting amendments to the county's comprehensive plan is not
25 responsive to the mandate of the rule. As we noted in Douglas County I, LUDO 6.500.2
26 does not comply with OAR 660-012-0045(2)(g) because, among other reasons, LUDO

1 6.500.2 is limited to quasi-judicial comprehensive plan amendments, and does not govern
2 legislative plan amendments. Slip op 9. More importantly, petitioners argue that the
3 operative terms of both LUDO 6.500.2 and finding XX are limited to comprehensive plan
4 amendments and thus do not impose requirements on any amendments to land use
5 designations, densities, or design requirements that do not also involve a comprehensive plan
6 amendment.²

7 Petitioners also complain that finding XX is inconsistent with OAR 660-012-
8 0045(2)(g) because it merely restates some of the rule's language without actually
9 effectuating the substance of rule. Petitioners argue that OAR 660-012-0045(2)(g) requires
10 the county to adopt regulations specific to its transportation system that provide a mechanism
11 for addressing impacts resulting from amendments to land use designations, densities, and
12 design standards, and for making these amendments consistent with the function, capacity
13 and level of service of facilities identified in the TSP.

14 The county did not file a response brief, or otherwise respond to petitioners'
15 contentions. We agree with petitioners that amended finding XX does not cure the flaws we
16 identified in LUDO 6.500.2 or the previous version of finding XX in Douglas County I.
17 OAR 660-012-0045(2)(g) requires that the county adopt land use "[r]egulations assuring that
18 amendments to land use designations, densities, and design standards are consistent with the
19 functions, capacities and levels of service of facilities identified in the TSP." The county's
20 land use regulations must be adequate to ensure that result whether the affected amendments
21 are quasi-judicial or legislative, and whether or not those amendments involve a
22 comprehensive plan amendment. We also agree with petitioners that mere recitation of the
23 language in OAR 660-012-0045(2)(g) in finding XX does not comply with the mandate of
24 the rule. The rule describes the types of amendments the county must regulate and the

²For example, a zone change might increase the allowed density without also requiring a comprehensive plan amendment.

1 objective the county must achieve; it does not specify the precise regulatory language or
2 approach the county must employ in achieving the regulatory objective. We agree with
3 petitioners that finding XX is inadequate to implement the rule.

4 The county's decision is remanded.