BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DOROTHY BARR MILLER, Petitioner, v THE CITY OF PORTLAND, Respondent.	)	LUBA NO. 80-100
	)	FINAL OPINION AND ORDER*

Appeal from City of Portland.

Darwin K. Anderson, Portland, filed a brief and argued the cause for Petitioner.

Ruth Spetter, Portland, filed a brief and argued the cause for Respondent.

Bagg, Referee; Reynolds, Chief Referee; Cox, Referee; participated in the decision.

AFFIRMED 3/25/81

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a).

*Incorporated in this opinion is the LCDC determination of March 24, 1981.

BAGG, Referee.

STATEMENT OF THE CASE

This case is about the City of Portland's comprehensive plan designation of petitioner's 2.94 acre lot within the City of Portland. The comprehensive plan designation is low density single-family residential (R-10). The R-10 zone has a 10,000 square foot minimum lot size. Petitioner requested a higher density multi-family residential (R-2) designation.

STANDING

Petitioner has stated facts alleging her interests were adversely affected and aggrieved because she was denied the zoning she specifically requested of the City of Portland. She alleges that the "economics of development" of her property at R-10 density is "infeasible" and would "preclude her from continuing her ownership of that property."

Petitioner further alleges that she made application to the governing body for the requested R-2 zoning and appeared both orally and in writing during the course of the proceedings to adopt the City of Portland's comprehensive plan.

In short, petitioner claims to have standing no matter whether the land use decision appealed is considered legislative or quasi-judicial.[1]

The City of Portland challenges petitioner's standing on the ground that the land use decision appealed was a legislative decision, and petitioner has failed to allege sufficient facts showing how she has been adversely affected or

aggrieved.

The Board views petitioner's proposition that she has standing whether the decision is characterized as legislative or quasi-judicial to be correct. The petitioner has alleged an economic injury from the city's denial of her desire to develop her property to a greater density than allowed under the R-10 zone. Petitioner has alleged that her personal interest is adversely affected, and we believe that allegation to be sufficient.

FACTS

The R-10 designation given petitioner's property is part of the final comprehensive plan and zoning map adopted in October of 1980. The plan went through several draft proposals as part of the plan adoption process. During that process, then Mayor Connie McCready sent a letter to individual citizens as well as neighborhood groups advising them of a time and place for public testimony on land use plan goal and policy amendments.[2] In response to the letter, petitioner submitted her proposed changes on May 12, 1980. Included in that submittal was a copy of the City of Portland's report entitled "Environmental Geology of the Marquam Hill Area." The report contains information on development hazards existing in the vicinity of and on petitioner's property. Also included was a geotechnical report on the Edgecliff Cluster Subdivision. That subdivision is uphill from petitioner's property. The report discusses unstable soil in other geologic conditions but

concludes that the site is stable and can be expected to remain stable "given precautions in preparation and grading." Letter of Charles R. Lane and Neil H. Twelker, Northwest Testing Laboratories, April 17, 1980.

On August 11, 1980, petitioner, by and through her attorney, addressed the City Council and explained her request. A transcript of that presentation is included in the record and shows concern over access to the property and the stability of the soil. Petitioner's point, however, is that notwithstanding unstable ground in the area, if the recommendations of Chapter 70 of the Uniform Building Code are followed, "losses can be minimized or completely eliminated by either avoidance of hazardous sites or careful planning and design of developments to accommodate the limitations and prevent hazards." Letter of Darwin Anderson of May 12, page 9.

Petitioner considers the letter of then Mayor McCready to be some sort of invitation to "apply" for a particular land use designation. Petitioner claims her letter of May 12, 1979 and attachments thereto were proposals for specific land use plan amendments and were "requests for land use decisions under Section 3 (1) (a), Chapter 772, Oregon Laws 1979 * * * *" Petition for Review, page 4. Petitioner concludes that she was an "applicant" under LUBA 3(A). Petitioner goes on to support her arguments with quotes from Neuberger v. City of Portland, 288 Or 155, 603 P2d 771 (1979), wherein the distinction between

legislative and quasi-judicial actions was described. From that case and others, petitioner concludes the City of Portland's action was quasi-judicial, and, therefore, she was entitled to all quasi-judicial procedures and safeguards.[3]

The property in question involves two tax lots, one of 2.94 acres and an abutting tax lot of .81 acres. The property lies west of SW Barbur Blvd. and east of Terwilliger Boulevard and its bordering "Parkway."[4]

Comprehensive Plan Adoption as a Legislative Decision

Before discussing the individual assignments of error raised by petitioner, the Board believes it important to characterize this land use decision. As mentioned above, the decision appealed is a land use designation for a particular piece of property owned by petitioner. Petitioner did appear before the city and argued her views on the appropriate land use designation of her land. Her appearance has been characterized as an "application."

The Board recognizes that the formerly recognized distinction between legislative and quasi-judicial actions has been eroded. Neuberger, supra. However, that distinction is not entirely erased, and we believe the adoption of a comprehensive plan for an entire city to be a legislative act. Petitioner's appearance before the governing body and her request for an R-2 designation on her property is certainly in keeping with legislative procedures. Citizens are entitled to approach their local governments. The give and take involved

between citizens and their local government is contemplated and even required by LCDC Goal 1. This exercise of citizen rights does not alone turn the proceeding from a legislative one to a quasi-judicial one. Realty Investment Co. v. Gresham, ____ Or LUBA ____, LUBA No. 80-085, Footnote 5 (1981). Were the opposite the case, a local jurisdiction might be required to follow quasi-judicial proceedings, including notice and written findings for each piece of property in the jurisdiction. The Board believes such an interpretation of the city's act places too great a burden on local governments.

ASSIGNMENT OF ERROR NO. 1

The first assignment of error alleges respondent failed to follow the quasi-judicial procedure to which petitioner was entitled. Petitioner's allegation apparently is that the commissioner in charge of the Terwilliger Parkway, Commissioner Schwab, evidenced bias "against development of the vacant land abutting her parkway" and continued to participate in the proceedings after she knew of that conflict.

The only conflict alleged by petitioner is that Commissioner Schwab was responsible for the Terwilliger Parkway and voted "no" as soon as she understood the petitioner's property lay next to the parkway. Petitioner alleges that Commissioner Schwab was under some misinformation that access to petitioner's property would be through the Parkway, and that allegation is used to support the notion that Commissioner Schwab was prejudiced to the petitioner's detriment.

The Board does not believe that these facts, even if accepted as entirely true, would result in reversible error whether the proceeding is considered legislative or quasi-judicial. The fact that a particular member of the governing body may be in charge of some aspect of the governing body's business and may have particular feelings regarding development along a park is not a "bias" that would require the individual to abstain from a controversy or consideration of a development proposal over the property. See Eastgate Theatre v. Board of County Commissioners, 37 Or App 745, 751, 752, 754, 588 P2d 640 (1978).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

The second assignment of error alleges that the decision was not supported by substantial evidence in the whole record. The assertion here is that the information submitted by petitioner showed that her proposed development at R-2 level density would cause no interference with the Terwilliger Boulevard Parkway and would result in no unsafe construction. Petitioner claims that denial was based solely on irrelevant and incompetent comments from the staff planner.

The city replies that the record shows the city to believe the property to be on an unstable piece of soil. Record 13, comments of Commissioner Schwab. Additionally, a report to the city, included in petitioner's submittals to the city, entitled "Evironmental Geology of the Marquam Hill Area" shows the area

to be geologically unstable.[5]

From our review of the briefs, the record and oral argument, we understand petitioner not to challenge that the area suffers from geologic instability. Petitioner's point is that the property can be made safe for development provided certain precautions are taken.

The record, in particular the document "Environmental Geology of the Marquam Hill Area" and maps submitted after oral argument, reveal the area to be hazardous. As discussed more fully, infra, pp. 10-12, the plan sets forth a policy to designate hazardous areas for low density (R-10) development. The information presented on the nearby Edgecliff Cluster Subdivision by petitioner shows this neighboring area to be hazardous unless certain precautions are taken. That the area is hazardous is sufficient justification for the city, in accordance with its comprehensive plan policies, to designate petitioner's property residential.

The fact that this particular petitioner is willing to undertake improvements like those taken for the neighboring subdivision to insure that the development of the property is not dangerous, does not mean that the land use designation given in the comprehensive plan is not based on substantial evidence. A comprehensive plan designation assumes a use of the property irrespective of present use or the future intent of the owner. A local jurisdiction is under no obligation to apply a land use designation that recognizes future intention

of individual landowners. Moreoever, the plan policy to designate hazardous areas for low density appears to apply regardless of whether the property can be made safe for a higher density development.

We believe the "Environmental Geology of the Marquam Hill Area" report to be substantial evidence that this property is hazardous to development.[6] The existence of the hazard is alone enough to supply "substantial evidence" in the record for the decision.

Assignment of error no. 2 is denied.

THIRD ASSIGNMENT OF ERROR

The third assignment of error alleges that the decision was unconstitutional. The error alleged appears to claim a violation of equal protection under Article 1, Section 20 of the Oregon Constitution and the Fourteenth Amendment, Section 1 of the United States Constitution. As near as the Board can tell, petitioner believes the present R-10 zoning of the nearby Hillvilla Restaurant does not reflect the actual commercial use of the property. That disparity is evidence to petitioner of a violation of equal protection of the law.

We are aware of no goal or law requiring a local jurisdiction to zone property in accordance with its present use. The concept of nonconforming use allows for existing uses to continue in incompatible zones while strictly controlling their expansion. This control allows a person to exercise a property right that would otherwise be prohibited. There is

nothing unconstitutional about nonconforming uses per se. See Anderson, American Law of Zoning, sec 6.01-6.07 (2d ed, 1976). The facts alleged by petitioner to show some sort of unequal treatment prohibited by the Federal and Oregon State Constitutions simply do not rise to a level of an allegation of a legal injury.

FOURTH ASSIGNMENT OF ERROR

Petitioner alleges the city failed to recognize the quality and residential development potential of her property. This failure results in a violation of statewide goals and county comprehensive plan goals relevant to residential use, as we understand petitioner's argument. Petitioner asserts the city should have accepted petitioner's solution (special construction techniques) to allow housing. In other words, accepting petitioner's plan is the only means to achieve goal compliance as petitioner's plan is the only plan that maximizes "this unique view site abutting the City's prized S.W. Terwilliger Boulevard Parkway . . . ." Petitioner's brief at 45.

We believe the city has met its burden of explaining its decision when the facts, in the form of inventories showing the land is geologically hazardous, are combined with plan policies to arrive at a proper land use designation. Gruber v. Lincoln Co., _____ Or LUBA _____, LUBA No. 80-088 (1981). In this case, the process can be traced easily.

The comprehensive plan for the City of Portland shows petitioner's property to be designated R-10. The city argues

that the reason for the R-10 zoning is the existence of a geologic hazard, clearly shown in the inventories of the area. See "Environmental Geology of The Marquam Hill Area" and "Map of Marquam Hill and Vicinity Showing Interpretive Data."[8] Consistent with this information, the City Comprehensive Plan map shows the property in a yellow color which is described on the legend to be "Low Density Single-Family." The yellow color "identifies areas subject to significant development constraints and limits residential sites to a minimum lot size of 10,000 square feet. Maximum zoning classification permitted is R-10." "Legend," City Land Use Designations, City of Portland Comprehensive Plan. The Plan Section VIII,"Environment" at paragraph 8.12, requires the city to "control the density of development in areas of natural hazards consistent with the provisions of the city's building code, Chapter 70, the floodplain ordinance, and the subdivision ordinance." These policies, taken together, clearly require an R-10 zoning in areas of hazard or significant development constraints. By any commonly understood definition, geologic hazards are such significant development contraints.

Without more specific allegations of how the city has erred in this matter, we believe the city's action to be consistent with the information it had before it on the property, much of it furnished by petitioner, and to be consistent with the policies of the comprehensive plan. Given that consistency, we see no obligation on the part of the city to explain its action

further in findings of fact and conclusions of law peculiar to petitioner's property.[9]

The fourth assignment of error is denied.

The land use decision of the city of Portland is affirmed.

FOOTNOTES

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[1] Oregon Laws 1979, ch 772, secs (2) and (3) state:

"(2) Except as provided in subsection (3) of this section, any person whose interests are adversely affected or who is aggrieved by a land use decision and who has filed a notice of intent to appeal as provided in subsection (4) of this section may petition the board for review of that decision or mayu, within a reasonable time after a petition for review of that decision has been filed with the board, intervene in and be made a party to any review proceeding pending before the board.

"(3) Any person who has filed a notice of intent to appeal as provided in subsection (4) of this section may petition the board for review of a quasi-judicial land use decision if te person:

"(a) Appeared before the city, county or special district governing body or state agency oally or in writing; and

"(b) Was a person entitled as of right to notice and hearing prior to the decision to bve reviewed or was a person whose interests are adversely affected or who was aggrieved by the decision."

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[2] The text of the letter is attached hereto as Exhibit A.

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[3] A goodly portion of petitioner's brief includes a discussion of petitioner's original notice of intent to appeal filed against a resolution of the City of Portland resolving

"that the Portland City Council hereby accepts and approves the City of Portland Comprehensive Plan as recommended by the City Planning Commission and amended by the City Council as of this date, and directs the Portland Bureau of Planning to prepare final adoption ordinances, documents and maps, incorporating all City Council amendments, to be presented for formal adoption at the earliest possible date." Resolution 32739.

Petitioner claims it is that decision which is being appealed. A motion to dismiss was filed alleging that the resolution was not a final land use decision, that only the adoption of the ordinance adopting the comprehensive plan was the final order. The parties agreed to a continuation of the case to October 8, when it was expected the comprehensive plan was to be adopted. The comprehensive plan was not adopted on that date but was several days later, and the City of Portland did not renew its motion to dismiss. The Board does not understand why petitioner has included discussion of the old resolution 32739 in its brief, and the Board considers the land use decision under appeal to be the City of Portland Comprehensive Plan as it applies to petitioner's property.

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[4] The Terwilliger Boulevard Parkway is 200 feet wide and includes an additional 200 feet on either side of the parkway called a "Design Zone." The Parkway is shown on respondent's comprehensive plan as open space. Uses on the property are restricted, and in petitioner's brief there is a long and confusing discussion of the nature of this parkway and whether access is permitted through it.

The 200 foot wide Design Zone adjacent to the S.W. Terwilliger Boulevard Parkway is apparently a provision for design review of any structure proposed for that area.

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[5] Materials submitted by the city show the area to be in an area of ground instability. See "Map of Marquam Hill and Vicinity Showing Interpretative Data."

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[6] Perhaps if petitioner were to submit an application for a zone change, her personal willingness to improve the property and make it safe would be a consideration that the governing body would have to make in deciding whether or not to grant the requested change.

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[7] The petitioner's statement of the fourth assignment of error includes an allegation of violation of Statewide Planning Goals 8, 10, 11, 12, and 13 and numerous portions of respondent's comprehensive plan. Petitioner failed to explain the errors claimed beyond simply naming the goals and comprehensive plan policies. We are, therefore, unable to review the city's action in exactly the manner petitioner requests. We can, however, summarize her complaint by reading

petitioner's assignment of error and her argument thereon. It is from her assignment of error and her argument that we conclude her complaint is an allegation that the city failed to allow her to develop her land to the fullest extent possible.

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[8] The "Environmental Geology of the Marquam Hill Area" shows that various geologic hazards exist on the property. The "Map of Marquam Hill and Vicinity Showing Interpretive Data" shows petitioner's property to have "severe limitations" by reason of surface texture, coarse fragments in soil, surface stones, coarse fragments on surface and equipment limitations.

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[9] Petitioner has not alleged a violation of LCDC Goal 1. Conceivably, the city might owe petitioner, through the "feedback" mechanism in Goal 1, some explanation of how it was that the city came to choose something other than petitioner's alternative course of action. We note, however, that as the citys decision appears to be in compliance with the information available on the property and its plan policies, and as petitioner received some indication at the hearing as to why her proposed zoning might be rejected, it may be that even with the goal 1 allegation, we would find in the city's favor. That is, the city provided a mechanism for feedback during its plan adoption process. There were no alternative courses of action apparently available under the city's plan policies, and goal 1's requirement "[t]he rationale used to reach land use policy decisions shall be available in the form of a written record" is available right on the face of the comprehensive plan. That is, areas of building constraints and geologic hazard will carry no greater density than that allowed in the R-10 zone.

BEFORE THE
LAND CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF OREGON

MILLER, Petitioner(s),	)	
v.	)	LUBA 80-100
	)	LCDC Determination
PORTLAND, Respondent.	)	

The Land Conservation and Development Commission hereby adopts the recommendation of the Land Use Board of Appeals in Miller v. Portland, LUBA 80-100, with the following modification:

1. Page 2, line 7: change "acre" to "square foot".

DATED THIS 24th DAY OF March, 1981.

W. J. Kvarsten, Director
For the Commission

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