BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

WILLIAM G. HAY and GEORGIANA F. HAY, Petitioners, vs. CITY OF CANNON BEACH, Respondent, and JEANNINE COWLES and DONALD and EMILY KONTZ, Intervenors-Respondent.	LUBA No. 88-054 88-093 FINAL OPINION AND ORDER

Appeal from City of Cannon Beach.

Wayne D. Palmer and David C. Noren, Portland, filed the petition for review and David C. Noren argued on behalf of petitioners. With them on the brief was Kell, Alterman & Runstein.

No appearance by respondent city.

Mark J. Greenfield, Portland, filed a response brief and argued on behalf of intervenors-respondent. With him on the brief was Mitchell, Lang & Smith.

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

AFFIRMED 12/27/88

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioners challenge two decisions by the city in this consolidated review proceeding. Both of the city's decisions deny petitioners' request for a zone change.

MOTION TO INTERVENE

Jeannine Cowles and Donald and Emily Kontz move to intervene in this proceeding. There is no opposition to the motion, and it is allowed.

FACTS

Petitioners own property occupied by the Surfview Resort in Cannon Beach. The property is zoned Residential/Motel (RM). The properties adjoining the Surfview Resort to the north and to the south are zoned Medium Density Residential (R2). Petitioners own a 10 foot wide parcel of land totaling .08 acres (the strip) adjoining the northern edge of the property occupied by the Surfview Resort. The strip is zoned R2.

Petitioners wish "to enlarge the guest registration lobby of the Surfview Resort." Petition for Review 3. This improvement would not create any additional motel units, but the enlarged lobby would occupy a portion of the strip. The proposed lobby enlargement is not permitted under the present R2 zoning applied to the strip. Petitioners requested a zone change for the strip from R2 to RM to permit the planned enlargement.

The city council voted tentatively to approve the requested

zone change in April, 1988, subject to preparation of written findings. In reaching this decision, the city interpreted the Cannon Beach Comprehensive Plan (plan) Economic Policy 7 (Policy 7) to prohibit rezoning property to RM, only if the rezoning would allow the creation of additional motel units.[1] Intervenors-respondent (intervenors) objected to the interpretation tentatively adopted by the city and reflected in the proposed "Findings of Fact, Conclusions and Order." Supp Record 10-15.[2] The city reconsidered its interpretation of Policy 7 during its meeting on June 14, 1988 and concluded the policy is "clear and unambiguous" and prohibits "designation of any additional land as * * * RM." Record 6.

The decision adopted by the city on June 28, 1988, denied petitioners' request on the basis of the city's interpretation of Policy 7 as prohibiting the requested rezoning. Petitioners appeal that decision in LUBA No. 88-054 (first assignment of error).[3]

On June 23, 1988, petitioners filed a separate zone change request to rezone the strip to Residential/Motel Moderate Density (RMA). After considering the proposal at its July 28, 1988 meeting, the city planning commission voted to deny the requested rezoning, specifying three grounds for denial. The planning commission's decision was appealed to the city council; and, at its October 4, 1988 meeting, the city council adopted a final order denying the requested rezoning. Record (LUBA No. 88-093) 5-10. Petitioners appeal this

decision in LUBA No. 88-093 (second through fourth assignments of error).

FIRST ASSIGNMENT OF ERROR

> "Respondent City of Cannon Beach improperly construed applicable law when it concluded that the Economy Policy No. 7 was plain and unambiguous, and that the council therefore could not consider that the intent of the provision was to restrict additional units."

Plan Policy 7, as noted supra at n 1, provides as follows:

> "Where plan and zoning designations permit, motels interspersed among residential neighborhoods shall be allowed to expand only on existing motel property. (No additional land shall be designated Residential/Motel, RM)."

Intervenors argue Policy 7 plainly and unambiguously prohibits the requested rezoning. Therefore, intervenors argue, there is no need to interpret the policy and no need to resort to legislative history to assist in such interpretation.

Petitioners urge Policy 7 must be interpreted as a whole and that if the policy is read as a whole, it is ambiguous. Petition for Review 5. According to petitioners, because the policy is ambiguous, it is necessary to interpret the intent of the policy and resort to legislative history in identifying that intent is proper.

Petitioners initially focus on the first sentence of Policy 7, which provides:

> "Where plan and zoning designations permit, motels interspersed among residential neighborhoods shall be allowed to expand only on existing motel property."

Petitioners argue

> "If the adjoining property were zoned RM, then the

plan and zoning designations for RM would obviously not permit the restriction; a motel could expand onto another property if that property were in a zone that permitted motels."[4] Petition for Review 6.

Petitioners then argue

> "Because the simple device of a zone change to RM could circumvent the intent of the main clause to prevent expansion into residential neighborhoods, the final parenthetical qualification was added, but it applies only to prevent motels from 'expanding' into residential neighborhoods. Surely, if the intent of the policy were flatly to prohibit all new RM zones, it would simply have said so, rather than set out the restriction as a parenthetical qualification of a narrow restriction involving residential neighborhoods." Id.

Petitioners finally argue that if Policy 7 is interpreted in the way they set forth, it only restricts the conditions in which certain motels may "expand" and the city must interpret what it means by "expand." Petitioners argue the city's refusal to interpret what "expand" means in Policy 7, therefore, was error.

If we understand petitioners correctly, they view Policy 7 in the following manner. First, the main clause of the first sentence creates a restriction, i.e., motel expansion is limited to existing motel property. Second, the application of this restriction is limited by the first clause (i.e., where adjoining property is zoned RM it does not apply; where adjoining property is not zoned RM it does apply). Finally, to avoid circumvention of the restriction on expansion by simply rezoning the adjoining property RM, the parenthetical sentence prohibits additional RM zoning. Viewed in this manner,

according to petitioners, the policy prohibits rezoning of property to RM only if that rezoning would allow "expansion." Petitioners argue if Policy 7 is viewed in this manner, the critical question in understanding Policy 7 is what was meant by expansion, and since that term is not defined it must be interpreted.

We agree with petitioners that if literal application of the parenthetical prohibition in Policy 7 in context with the balance of Policy 7 raises a sufficient question about the policy's meaning, it would be permissible to resort to extrinsic aids, including legislative history, to discover the city's intent. Davis v. Wasco IED, 286 Or 261, 266, 593 P2d 1152 (1979); 1000 Friends of Oregon v. LCDC (Tillamook County), 303 Or 430, 441, 737 P2d 607 (1987). Although both Davis and 1000 Friends of Oregon involved construction of different sections of a statute, and we deal here with different sentences of a single plan policy, the principle is the same.[5] The same rules that apply to statutory construction apply to construction of municipal ordinances. City of Hillsboro v. Housing Devel. Corp., 61 Or App 484, 489, 657 P2d 726 (1983); Lane County v. Heintz Const. Co., 288 Or 152, 364 P2d 627 (1961); Sevcik v. Jackson County, ___ Or LUBA ___ (LUBA No. 87-087, May 23, 1988).

In Davis v. Wasco IED, supra, the Supreme Court refused to apply the definition of "public employee" as defined in ORS 236.610(2) to public school teachers. In that case, the

issue was whether a public school teacher was protected by ORS 236.610 to 236.650 which provides job security rights for public employees. The court acknowledged that public school teachers fell within the literal words of the definition in ORS 236.610(2). However, the Supreme Court found ambiguity in references to "merit system procedures" in ORS 236.610 to 236.650 because public school teachers are not merit system employees. Id. at 267. In addition, the court found a reference in ORS 236.620(3) to retention of "seniority" but "no provision for the retention of that very unique form of job security enjoyed by teachers known as 'permanent teacher status' or tenure." Id. at 268.

We do not find the kind of textual ambiguity in Policy 7 that the Supreme Court found in the statutes in Davis. We are unable to accept petitioners' reconstruction of the city's thought process in drafting plan Policy 7. Unlike the statute at issue in Davis, we find nothing in the actual language of the plan policy to suggest the parenthetical proscription was not intended to apply to petitioners' situation.

We read Policy 7 to limit expansion of motels interspersed among residential neighborhoods to existing motel property already zoned to allow motel use. The parenthetical prohibition against additional RM zoning simply makes it clear the city will zone no additional property RM.

The parenthetical proscription against RM zoning in plan Policy 7 has some similarity to the savings clause the Supreme

Court construed in Whipple v. Howser, 291 Or 475, 632 P2d 782 (1981). In Whipple v. Howser, the issue was the scope of a savings clause barring application of the main act "to an action or other proceeding commenced before the effective date of this act." Id. at 478.

The Oregon Supreme Court rejected arguments that the language in the savings clause should be construed to save actions or proceedings that had "accrued" before the effective date of the act but which had been "filed" after the effective date of the act. Id. at 486. The Supreme Court said that had the legislature intended that result

> "it would have been a simple matter to add the word 'accrued' so as to read:
>
> > "'this act does not apply to an action or other proceeding which accrued or commenced before the effective date of this act.'" Id.

The same can be said in this case. We would be more receptive to petitioners' argument that Policy 7 is ambiguous if the last sentence provided

> "(No additional lands shall be designated residential/motel, RM, to expand existing motels.)"

Although plan Policy 7 could be clearer, we find petitioners' arguments unconvincing that the policy is so ambiguous that legislative history must be consulted to determine whether the clear and unambiguous prohibition in the parenthetical sentence should apply in this case.

Finally, even if we agreed with petitioners that

legislative history could be consulted to determine the city's intent, petitioners call our attention to no legislative history supporting their view of the plan policy, and as far as we can tell no such legislative history was raised before the city below. Petitioners only refer to a comment by the city attorney that the city had interpreted the plan policy in the way petitioners urge in a prior land use decision.

Post adoption interpretation of a plan policy by the city council is not legislative history showing the intent of the city in adopting the policy. See Barbee v. Josephine County, ___ Or LUBA ___ (LUBA No. 88-004, May 13, 1988), slip op at 7. Thus, even if we agreed with petitioners that we could consider the legislative history of Policy 7, such consideration would not result in an interpretation of Policy 7 different than that made by the city in its decision.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

> "Respondent City of Cannon Beach improperly construed applicable law when it concluded that the Economy Policy 7 prohibited designation of the subject parcel as an RMA zone."

In this assignment of error, petitioners challenge the city's October 4, 1988 decision denying their request that the strip be rezoned RMA. The main difference between this decision and the decision attacked in the first assignment of error, is that rezoning to RMA is not explicitly prohibited by the parenthetical sentence in Policy 7.

Petitioners repeat their arguments under the first assigment of error. Petitioners also point out that the city adopted language in other parts of its plan which petitioners argue unambiguously imposes the same prohibition the city seeks improperly to find in Economic Policy 7. Petitioners cite a policy applied to the Tolavana Park area:

> "2. Motels shall be allowed to expand only within the presently designated motel zones. Such expansion shall be architecturally compatible with surrounding residential uses. No increase of motel zoning shall be permitted." Plan 29.

Petitioners repeat their argument that, properly interpreted, Policy 7 simply prevents expansion of existing motels onto adjoining property if the expansion includes construction of additional motel units.

In pertinent part, the city's findings on this issue are as follows:

> "The applicant is making the map designation request in order to expand an existing motel to allow construction of a registration lobby. The first sentence of the policy is clear that existing motels are permitted to expand only on existing motel property, that is to say property already designated for motel use and zoned accordingly. The subject property is not already planned and zoned for motel use. Rather, the property is designated R-2, Medium Density Residential. This designation does not permit motel use. * * * "
>
> "The fact that the sentence in parenthesis 'No additional land shall be designated Residential/Motel, RM' does not reference a prohibition on additional land designated RMA does not change the clear intent of this policy not to permit new parcels of land to be designated for motel use. The sentence in parenthesis cannot be considered alone but must be considered in conjunction with the first sentence of the policy which clearly limits future motel use to property

already designated and zoned for motel use. To permit a small parcel of land to be designated RMA at a location that is approximately one-quarter mile from the nearest land designated RMA, simply because there is no specific statement prohibiting additional land being designated RMA, would be inconsistent with the City's stated policy of prohibiting the expansion of motel uses in this area. Further, placing so small a parcel in the RMA designation, where the remainder of the motel property is designated RM, would clearly be a circumvention of the policy's clear intent not to permit additional property to be designated for motel use.

"The applicant has argued that it was the intent of the policy to only limit the number of additional motel units and not accessory uses to a motel such as a registration lobby. However, the City Council finds that the policy's reference is to '... allowed to expand only on motel property.' There is no reference in the policy to only limiting the number of additional motel units. Therefore, the applicant's argument is incorrect." Record (LUBA No. 88-093) 6-7.

We can find no reason to fault the city's interpretation of its plan. Petitioner is correct that in its findings, quoted supra, the city explains it reads "where plan and zoning designations permit" to mean where current plan and zoning designations permit. However, we find the city's clarification of its view of the policy language and the city's explanation of how the clarification squares with the rest of the policy to be both reasonable and correct.

The clarification the city adopted in the above-quoted findings contrasts significantly with the clarification or interpretation of the word "expand" the petitioners would like the city to adopt. Petitioners understand that word to permit motel enlargement as long as no additional motel units are created. Presumably, in addition to the lobby enlargement, a

variety of recreational or other uses auxillary to existing motels could be built on adjoining lands rezoned RMA, under petitioners' interpretation. We find no fault in the city's refusal to read the term "expand" in the more limited fashion argued by petitioners.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

> "Respondent improperly construed applicable law by concluding that the proposed use of the subject parcel was not appropriate for an RMA zone designation."

Petitioners argue the city improperly based its denial of the requested rezoning in part on the purpose clause of the RMA zone.[6] Petitioners argue that, even though the Surfview Resort is the city's largest resort, (1) the proposed enlargement is small, (2) motel accessory uses are permitted outright in the RMA zone, (3) the lot size specified in the RMA zone is not violated, and (4) density standards specified in the RMA zone are met.

The city found that the RMA zone is intended to apply to small scale motels and is inappropriate for the proposed expansion of the Surfview Resort, the city's largest motel. Petitioners do not argue that it is improper for the city to consider whether a proposed rezoning to RMA is consistent with the purpose of that zone.

We believe the city's findings adequately explain its reason for not viewing the proposed enlargement separate from the rest of the Surfview Resort.[7] As we read the city's

findings, it simply refused to rezone the property to allow an accessory use for the Surfview Resort without also considering the Surfview Resort itself in judging whether the proposed use as a whole was consistent with the purpose of the RMA zone. We find no error.

The third assignment of error is denied.

FOURTH ASSIGNMENT ERROR

> "Respondent improperly construed applicable law when it found that expansion of motel use would be incompatible with the residential pattern of the neighborhood."

Petitioners argue the city's only reason for concluding the proposed rezoning would be incompatible with the residential pattern of the neighborhood was that Policy 7 prohibits additional motel zoning.

The city found:

> "Comprehensive plan, the Economy, Policy 7, states that there shall be no additional land designated RM for motel use where such motel use is interspersed among residential neighborhoods. The Surfview Resort is located between two residential neighborhoods. Thus, applying the Economy, Policy 7, it has been determined that expansion of motel use would be incompatible with residential development pattern in the vicinity." Record (LUBA No. 88-093) 9-10.

We disagree with the city's apparent interpretation of Policy 7 to adopt a legislative determination of incompatibility between motels and residential neighborhoods. Policy 7 says nothing about incompatibility of motels with adjoining neighborhoods. The policy prohibits certain rezoning to motel zones, but that prohibition could easily have nothing

to do with compatibility.

The fourth assignment of error is sustained.

CONCLUSION

Petitioners' final argument is that the city proceeded inconsistently in applying Policy 7 to their requests to rezone the strip RM and RMA. In the first case, the city applied a literal interpretation. In the second, the city concluded the parenthetical prohibition could not be considered alone but rather must be considered in conjunction with the first sentence of the policy. Petitioners argue the city's analysis is inconsistent.

In petitioners' second appeal, the requested rezoning was to the RMA zoning designation. The parenthetical prohibition of Policy 7 does not clearly or unambiguously apply to petitioners' request for RMA zoning as it does to their request for RM zoning. We see no inconsistency in the way the city applied Policy 7 in its two decisions on petitioners' rezoning requests.

Because we deny the first assignment of error, the city's decision in LUBA No. 88-054 denying petitioners' request to rezone the strip RM is affirmed.

Although we sustain the fourth assignment of error, we deny the second and third assignments of error. Accordingly, we sustain two separate reasons given by the city for denying petitioners' request to rezone the strip RMA. Sustaining the fourth assignment of error, therefore, provides no basis for

remand of the city's decision. The city's decision in LUBA No. 88-093, denying rezoning to RMA, is affirmed.

FOOTNOTES

1

Comprehensive Plan Economic Policy 7 provides as follows:

"Where plan and zoning designations permit, motels interspersed among residential neighborhoods shall be allowed to expand only on existing motel property. (No additional land shall be designated Residential/Motel, RM)."

This policy replaced an identically worded Policy 3 which applied during earlier stages of the proceedings below. We shall refer to the policy as Policy 7 in this opinion.

2

Although the appeals decided in this proceeding were consolidated, separate records were filed in LUBA Nos. 88-054 and 88-093. We shall distinguish citations to the record in LUBA No. 88-093 as follows: "Record (LUBA No. 88-093) ____."

3

Petitioners make one assignment of error in LUBA No. 88-054 and three assignments of error in LUBA No. 88-093. We renumber the three assignments of error in LUBA No. 88-093 as the second through fourth assignments of error in this opinion to avoid confusion.

4

It is not so obvious to us that a motel subject to Policy 7 could expand across its existing property onto adjoining RM zoned property. We assume that Policy 7 uses the words "existing motel property" to mean the property owned by the motel at the time the policy was adopted.

5

Policy 7 easily could have been stated in separate sections.

6

The RMA zone purpose statement provides as follows:

"The purpose of the RMA zone is to provide a limited number of small-scale motels and galleries in an area primarily devoted to moderate density residential

uses. Residential uses at a maximum density of 11 dwelling units per net acre are permitted * * * ." Cannon Beach Zoning Ordinance Section 3.075.

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[7] The applicable finding is as follows:

"Finding: The Surfview Resort has 110 units, making it the largest motel complex in the city. The RMA zone standards and requirements were not designed to accommodate a large scale complex of this nature. RMA zoning stipulates 'the maximum lot size for motels and other tourist accommodation shall be 20,000 square feet.' The Surfview complex covers 104,108 square feet with 110 motel units. The total area and motel units per square footage of property are in excess of RMA requirements.

"The applicant has stated that the requested designation change is not for the entire Surfview Resort, but only for the approximately .08 acre parcel. Therefore, the request is well within the 20,000 square foot site limitation. The City Council finds this reasoning incorrect. The applicant has stated that the sole purpose of the designation change is to permit the expansion of the registration lobby of the Surfview Resort. Such a use is an accessory use to the Surfview Resort. Thus, the use of the .08 acre parcel cannot be viewed separately from the remainder of the property that contains the Surfview Resort. The two parcels must be considered together and as such they exceed the 20,000 square foot site limitation in the RMA zone." Record (LUBA No. 88-093) 8.