BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

JAMES ALEXIOU, ELAINE ALEXIOU, ALLEN CARRE, ANITA CARRE, JOSEPH M. ELLIS, PAMELA W. ELLIS, LOYD EWALT, SUSAN EWALT, BOB GOODELL, PAT GOODELL, JOHN HAYES, KAREN HAYES, ROBERT HYATT, SHARON HYATT, JEANNETTE M. LARSON, JOHN MENDONSA, MAXINE MENDONSA, ROGER POWELL, NANCY POWELL, ALBERT ROMERO, ELIZABETH ROMERO, CHARLES RENKER, DAVID SNAZUK, ROBERT SWEET, KATHRYN SWEET, WAYNE ZURFLUEH, and NANCY ZURFLUEH,	)
Petitioners,	)
vs.	)
CURRY COUNTY,	)
Respondent.	)
	LUBA No. 91-185
	FINAL OPINION AND ORDER

Appeal from Curry County.

Roger Gould, Coos Bay, filed the petition for review and argued on behalf of petitioners. With him on the brief was Joelson, Gould, Wilgers & Dorsey.

Bill Kloos, Eugene, filed the response brief and argued on behalf of respondent. With him on the brief was Johnson & Kloos.

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

AFFIRMED 02/14/92

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

Opinion by Kellington.

NATURE OF THE DECISION

Petitioners appeal Curry County Ordinance No. 91-19. Ordinance No. 91-19 amends the county's Flood Damage Prevention Ordinance (flood damage ordinance). In addition, Ordinance No. 91-19 determines that 58 lots within a coastal subdivision are properly considered "high hazard area[s]" warranting a "Velocity Flooding" (V) overlay zone designation.

FACTS

Ordinance No. 91-19 amends the county's flood damage ordinance in several respects. As relevant here, Ordinance No. 91-19 requires the V overlay zone to be applied to all properties subject to "velocity flooding," based on certain factors.[1] The challenged ordinance applies the V overlay

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[1]Ordinance No. 91-19, section 8.1-1 identifies areas subject to the V overlay zone designation as follows:

> "Coastal high hazard areas * * * have special flood hazards associated with high velocity waters from ocean waves and tidal surges. For coastal areas extending from offshore to the inland limit of a primary frontal dune along an open coast and any other area subject to high velocity wave action from storms or seismic sources where the county has not identified coastal high hazard areas, the coastal area shall be treated as a V zone or a study shall be prepared by an Oregon Registered Professional Engineer and approved by the county and FEMA to define the coastal high hazard area for a section of coastline. Primary frontal dunes will not be considered as effective barriers to base flood storm surges and associated wave action where the cross-sectional area of the primary frontal dune, as measured perpendicular to the shoreline and above the 100-year stillwater flood elevation and seaward of the dune crest, is equal to, or less than, 540 square feet."

zone to 58 lots within the Rogue Shores subdivision, a subdivision platted in 1966. The significance of the V overlay zone designation is that development within it is severely restricted.[2] Under Ordinance No. 91-19, section 4.3-5, particular property may be removed from the V zone designation if the property owner applies for a variance and establishes that, based on actual field conditions, the property is not in fact subject to velocity flooding.[3]

Petitioners are owners of lots in the Rogue Shores subdivision to which the challenged ordinance applies the V overlay zone. Prior to the adoption of Ordinance No. 91-19, these properties were within a less restrictive flood overlay zone under the prior flood control ordinance, and were subject to relatively minor building restrictions.

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[2]As we understand it, the underlying zone imposed pursuant to the terms of the Curry County Zoning Ordinance (CCZO), of which Ordinance No. 91-19 is not a part, continues to apply to the property. Our reference to the V overlay zone designation refers to Ordinance No. 91-19, not the CCZO.

[3]Ordinance No. 91-19, section 4.3-5 provides:

> "* * * * *
>
> "[Duties of the Building official shall include making] interpretations where needed, as to exact location of the boundaries of the areas of special flood hazards (for example, where there appears to be a conflict between a mapped boundary and actual field conditions). The person contesting the location of the boundary shall be given a reasonable opportunity to appeal the interpretation as provided in Section 4.4."

Ordinance No. 91-19, section 4.4 is entitled "Appeal and Variance Procedure." Section 4.4-2 specifically governs variances.

STANDING

Respondent challenges the standing of some of the petitioners.

These petitioners cite portions of the record establishing they appeared below through their attorney. Record 55.[4] Consequently, they have standing to appeal to this Board.

FIRST ASSIGNMENT OF ERROR

> "The reclassification of Rogue Shores lower level from a 'B' Zone to a 'V' Zone is not supported by substantial evidence in the whole record, is not in compliance with Curry County's Comprehensive Plan, and results from an erroneous construction of applicable law."

Petitioners contend the portion of Ordinance No. 91-19 which applies the V overlay zone to the 58 lots within the Rogue Shores subdivision lacks evidentiary support. Petitioners argue the portion of Ordinance No. 91-19 which applies the V overlay zone to the subject 58 lots is the result of quasi-judicial decision making and, therefore, the ordinance must be supported by substantial evidence in the whole record.

The county argues Ordinance No. 91-19 is the result of legislative decision making and need not be supported by

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[4]While the minutes at Record 55 inaccurately spell the names of the petitioners whose standing is challenged, the phonetic approximations contained in the minutes are close enough to enable us to determine their names were included among those whom petitioners' attorney stated he represented.

substantial evidence. Alternatively, the county contends that even if Ordinance No. 91-19 is the result of quasi-judicial decision making, it is supported by substantial evidence in the whole record.

We are cited to no local or other requirement that a local legislative decision must be supported by substantial evidence.

ORS 197.835(7) provides that LUBA:

> "* * * shall reverse or remand a land use decision under review if the board finds:
>
> "(a) the local government * * *
>
> "* * * * *
>
> "(C) Made a decision not supported by substantial evidence in the whole record;
>
> "* * * * *."

While this statute makes no distinction between legislative and quasi-judicial land use decisions, the Court of Appeals held that its predecessor, written in substantially identical terms, did not impose a substantive requirement that legislative decisions be supported by substantial evidence. Lima v. Jackson County, 56 Or App 619, 625, 643 P2d 355 (1982). Therefore, if the challenged ordinance was adopted as the result of legislative decision making, it need not be supported by substantial evidence in the whole record.

Whether a decision is legislative or quasi-judicial in

nature is a complex question which has been the subject of several cases before the courts of this state, as well as before this Board. In Strawberry Hill 4-Wheelers v. Benton Co. Bd. of Comm., 287 Or 591, 602-03, 601 P2d 769 (1979), the Oregon Supreme Court set forth three factors which must be considered in determining whether a local government decision is quasi-judicial. Those factors may be summarized as follows:

1. Is "the process bound to result in a decision?"

2. Is "the decision bound to apply preexisting criteria to concrete facts?"

3. Is the action "directed at a closely circumscribed factual situation or a relatively small number of persons?"

It is not clear whether the portion of Ordinance No. 91-19 applying the V overlay zone to the 58 lots at issue in this appeal involves legislative or quasi-judicial decision making.[5] It appears that the first Strawberry Hill 4-Wheelers factor is not satisfied. Nothing in adopting Ordinance No. 91-19 inherently requires the county to rezone the 58 lots at the time that ordinance is adopted. The county had no specific application before it. There is simply nothing of which we are aware which necessarily imposes, on the county, a legal duty to rezone the 58 lots

[5]There is no real dispute that the portion of Ordinance No. 91-19 which amends the substantive provisions of the flood damage ordinance itself is legislative in nature.

to conform to the requirements of Ordinance No. 91-19.

It appears the second of the Strawberry Hill 4-Wheelers factors is satisfied, in the sense that the amended V overlay zone provisions are preexisting criteria. These preexisting criteria were applied to the "concrete" facts associated with the particular 58 lots at issue here, in order to determine whether those 58 lots properly meet the V overlay zone standards.

Whether the third of the Strawberry Hill 4-Wheelers factors is satisfied is uncertain. While the challenged ordinance directly affects 58 lots, Ordinance No. 91-19 does not itself appear to be "directed at a closely circumscribed factual situation or a relatively small number of persons." Rather, Ordinance No. 91-19 creates enhanced public flood protection standards. Property having certain characteristics must necessarily be subject to the V overlay zone. The 58 lots which were changed to the "V" overlay zone apparently possess the requisite characteristics. Further, the area affected by Ordinance No. 91-19 encompasses the entire county, far more than just those 58 lots placed in the V overlay zone. In addition, the proceeding that led to adoption of the challenged decision, including the decision to place the 58 lots in the V overlay zone, was initiated by the county in connection with recommendations from the Federal Emergency Management Agency, and that process was directed at a variety of public

safety issues having to do with flooding. See Davenport v. City of Tigard, ___ Or LUBA ___ (LUBA Nos. 91-133 and 91-137, January 24, 1992), slip op 4.

While not without doubt, it appears the county correctly determined Ordinance No. 91-19 is legislative, rather than quasi-judicial, in nature. If we are correct in this regard, petitioners' argument that Ordinance No. 91-19 is not supported by substantial evidence in the whole record provides no basis for reversal or remand of the ordinance. Lima v. Jackson County, supra.

However, even if Ordinance No. 91-19 is properly characterized as quasi-judicial in nature, respondent argues there is substantial evidence to support the county's determination that the 58 lots should be subject to the V overlay zone designation.

We have examined all of the evidence cited by the parties. This evidence includes the Currin letter and Currin testimony (Record 63-66, 145, 167, 262); the Rittenhouse-Zeman & Associates, Inc. report (Record 226, 252); the H.G. Schlicker & Associates, Inc. report (Record 210-61); the survey commissioned by the county as background information concerning the adoption of Ordinance No. 91-19 (Record 112-21); photographs of the flooding of a house in the Rogue Shores subdivision and a letter from the former Curry County Planning Director describing storm waves overtopping a foredune and striking one of the homes in the

Rogue Shores subdivision (Record 143, 247, 248). We believe there is substantial evidence to support the application of the V overlay zone to the subject 58 lots.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

> "Curry County erred in failing to exempt Rogue Shores subdivision lower level from application of the Flood Damage Prevention Ordinance No. 91-19. Each lot in Rogue Shores has a vested right to be used for residential development and the County may pass no ordinance which places new or additional conditions upon construction of lots in the subdivision."

Petitioners contend Ordinance No. 91-19 violates ORS 92.044(1)(a)(B), 92.205(2) and 92.285.[6] As we

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[6]ORS 92.044(1)(a)(B) provides, in relevant part:

> "The governing body of a county * * * shall, by regulation or ordinance, adopt standards and procedures, in addition to those otherwise provided by law, governing * * * the submission and approval of tentative plans and plats of subdivisions * * *.
>
> "(a) Such standards may include, taking into consideration the location and surrounding area of the proposed subdivisions * * *, requirements for:
>
> "* * * * *
>
> "(B) Securing safety from fire, flood, slides, pollution or other dangers;
>
> "* * * * *."

ORS 92.205(2) provides:

> "The Legislative Assembly finds, therefore, that it is necessary for the protection of the public health, safety and welfare to provide for the review of undeveloped subdivisions for the purpose of modifying such subdivisions, if necessary, to comply with the current comprehensive plan, zoning ordinances and regulations and modern subdivision control

understand it, petitioners argue no zoning ordinance enacted after the date a subdivision is given tentative plat approval (here 1966) may affect the uses otherwise allowed at the time tentative plat approval was given. Petitioners cite several cases they contend support this assertion.

We disagree with petitioners' interpretation of the cases they cite. Nothing in any of those cases can reasonably be read to state so broad a proposition. In Millcrest Corp. v. Clackamas County, 59 Or App 177, 650 P2d 963 (1982), the court determined that a developer had a vested right to complete a planned unit development. Similarly, Mason v. Mountain River Estates, Inc., 73 Or App 334, 698 P2d 529 (1985), and Webber v. Clackamas County, 42 Or App 151, 600 P2d 448 (1979), concern whether a vested right had been established.[7] In Drain v. Clackamas County, 36 Or App 799, 585 P2d 746 (1978), the court denied a

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> standards, or, if such modification is not feasible, of vacating the nonconforming, undeveloped subdivisions and to vacate any lands dedicated for public use that are described in the plat of each such vacated subdivision."

ORS 92.285 provides:

> "No retroactive ordinances shall be adopted under ORS 92.010 to 92.048, 92.060 to 92.095, 92.120, 93.640, 93.710 and 215.110."

[7]To the extent individual property owners believe there is a lawful nonconforming use of any of the affected Rogue Shores subdivision lots, CCZO 5.060 contains a procedure to apply for a determination from the county that a nonconforming use exists. We see no reason why such property owners may not avail themselves of this procedure. In addition, we believe that under CCZO 5.060, a property owner could also seek from the county a determination that the owner possesses a vested right to develop a particular subdivision lot. See DLCD v. Curry County, 19 Or LUBA 237 (1990).

request for a writ of mandamus to force local officials to cancel building permits for lots within a subdivision, on the basis of equitable principles involving the balancing of hardships. In Drain, supra, 36 Or App at 804-05 n 3, the court noted it expressed no position on whether gaining local approval of a tentative plat protected the platted lots from zoning ordinances which postdated tentative plat approval and limited the permissible uses of such lots.

In short, none of these cases say that a local government may not further regulate land uses within a platted subdivision once tentative plat approval is given. Moreover, the legal principle argued by petitioners has been squarely rejected by the Court of Appeals in Columbia Hills v. LCDC, 50 Or App 483, 490, 624 P2d 157, rev den 291 Or 9 (1981):

> "The only prior land use decision which has arguably been made regarding these parcels is the recording of the plat, which occurred in 1957. Petitioners argue that the recording of the plat entitled the land owner to use the land for what was obviously the intended purpose, given the lot sizes, at the time the plat was recorded, viz., for residential purposes.
>
> "There is, however, no such entitlement. The county could adopt a comprehensive plan and zoning ordinances designating the permissible uses of land without regard to the fact that there was a plat recorded in 1957. * * *"

Finally, we see nothing in any of the cited statutes limiting the county's ability to regulate the uses of land within a platted subdivision. Those statutes regulate

subdivision plats, and forbid "retroactive" ordinances that would change plat requirements. They say nothing about local regulation of land uses within platted subdivisions. As we stated in Schoonover v. Klamath County, 16 Or LUBA 846, 851 (1988):

> "* * * The legal existence of * * * recorded subdivisions is protected by ORS 92.285, and we find nothing in the plan and zone designations applied by the county which affects that existence. Existing lawful uses may be continued under ORS 215.130. However, if the property owners now or in the future wish to construct single family residences on the lots, they must comply with the land use regulations in effect at the time the property is put to such use." (Emphasis in original; footnote omitted.)

Consequently, that the tentative plat of the Rogue Shores subdivision was previously approved has no bearing on whether the county may impose land use regulations, different from those in existence at the time the tentative subdivision plat was approved, on all or part of the subdivision.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

> "Ordinance 91-19 is a prohibited taking of private property by Curry County without just compensation and is so vague in its language that its application to any property designated as within a coastal high hazard area would constitute a deprivation of due process."

Petitioners contend Ordinance No. 91-19 violates Article 1, Section 18 of the Oregon Constitution, as well as the Fifth Amendment to the United States Constitution.

Petitioners argue Ordinance No. 91-19 constitutes a "taking" of private property without compensation.

In Dolan v. City of Tigard, ___ Or LUBA ___ (LUBA No. 90-029, January 24, 1991), slip op 21, we determined that claims that certain conditions of approval requiring dedication of portions of an applicant's property for a greenway and a pedestrian/bicycle pathway constituted an unconstitutional "taking" under both the United States and Oregon Constitutions, were not "ripe" for review, because relief through a variance process provided by local ordinance provisions had not been sought. Similarly, Ordinance No. 91-19, section 4.4-2 authorizes applications for variances from the requirements of that ordinance. Petitioners must seek relief from the V overlay zone provisions, through the variance process outlined at section 4.4-2, before they may obtain review of any "taking" claims.[8] Dolan v. City of Tigard, Id.

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[8]Petitioners argue that Ordinance No. 91-19, section 4.4-2(8)(i) forbids authorizing "use" variances and, therefore, would not allow approval of a variance to construct a single family dwelling in the V overlay zone. We disagree. Ordinance No. 91-19, section 4.4-2(8)(i) provides that variances "shall" not:

> "[G]rant, extend or increase any use of the property prohibited by the Curry County Zoning Ordinance."

As we pointed out supra, Ordinance No. 91-19 is not part of the CCZO. What Ordinance No. 91-19, section 4-4.2(8)(i) prohibits is a variance which would authorize a use of property not allowed by the underlying zone, applied pursuant to the CCZO. Section 4-4.2(8)(i) does not prohibit a variance to allow a use not otherwise allowed by Ordinance No. 90-19 itself.

Petitioners also argue the criteria for determining whether a lot is subject to high velocity flooding are unconstitutionally vague.

The criteria for determining whether a parcel is subject to high velocity flooding in section 8.1-1 are quoted in n 1 above. Section 8.1-1 requires a careful examination of certain conditions to determine whether a lot is subject to velocity flooding. Section 8.1-1 is not impermissibly vague. See Lee v. City of Portland, 57 Or App 798, 802-03, 649 P2d 662 (1982).

The third assignment of error is denied.

The county's decision is affirmed.