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

MARION BROGOITTI, LOVINE BROWN,)
DEBORAH BURKE, MAX GRAYBEAL, and)
DAVID GILBERT,)

Petitioners,)

vs.)

WALLOWA COUNTY,)
Respondent,)

LUBA No. 91-189

and)

FINAL OPINION
AND ORDER

JAMES W. BROYLES, PENNY C.)
BROYLES, GUY STEPHENSON, JOANN)
HARRISON, CHARLES PHILLIPS, CRAIG)
HARDIN, CHUCH MORRIS, JERRY)
HARRIS, JOHN GORSLINE, DONALD)
STAR, KARREN STAR, VIRGIL BENTZ,)
DWANE WIGGINS and BUD TAYLOR,)
Intervenors-Respondent.)

Appeal from Wallowa County.

Timothy J. Sercombe, Portland, filed the petition for review and argued on behalf of petitioners. With him on the brief was Preston, Thorgrimson, Shidler, Gates & Ellis.

No appearance by respondent.

Mildred J. Carmack, Portland, filed the response brief and argued on behalf of intervenors-respondent. With her on the brief was Schwabe, Williamson & Wyatt.

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

AFFIRMED 05/13/92

1 You are entitled to judicial review of this Order.
2 Judicial review is governed by the provisions of ORS
3 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal an order of the county court
4 interpreting the county code to allow single family
5 dwellings in the Recreational Residential (R-2) zoning
6 district to be used for short-term rental purposes.

7 **MOTION TO INTERVENE**

8 James W. Broyles, Penny C. Broyles, Guy Stephenson,
9 Joanne Harrison, Charles Phillips, Craig Hardin, Chuch
10 Morris, Jerry Harris, John Gorsline, Donald Star, Karren
11 Star, Virgil Bentz, Dwane Wiggins and Bud Taylor move to
12 intervene on the side of the respondent. There is no
13 opposition to the motion, and it is allowed.

14 **FACTS**

15 Much of the west shore area around Wallowa Lake is
16 planned Recreational Residential and zoned R-2. Single
17 family residential dwellings are permitted uses in the R-2
18 zone. Some dwellings located along the west side of the
19 Wallowa Lake are owned by persons who rent those dwellings
20 to visitors on a short-term basis.

21 In 1985, a former county counsel opined that short-term
22 rental use of dwellings in the R-2 zone was prohibited by
23 the Wallowa County Zoning Ordinance (WCZO). On May 31,
24 1990, the Wallowa County planning director wrote a letter to
25 an owner of a dwelling located in the west shore area in the
26 R-2 zoning district, advising that short-term rental use of

1 dwellings in the R-2 zoning district was prohibited by the
2 WCZO. On August 13, 1990, by letter to the planning
3 director, some of petitioners requested that the planning
4 director provide them with:

5 "an interpretation of the R-2 zoning ordinance in
6 regards to a commercial activity." Record 155.

7 The planning director referred the request for an
8 interpretation to the planning commission. On August 28,
9 1990, the planning commission conducted a public hearing on
10 the request. The then district attorney provided legal
11 advice that short-term residential use of dwellings in the
12 R-2 zone is not allowed. However, on June 6, 1991, a newly
13 elected district attorney opined that the short-term rental
14 use of dwellings is a permitted use in the R-2 zone. Before
15 its next public hearing concerning the matter, the planning
16 commission provided the following notice:

17 "[The planning commission is conducting a hearing]
18 to review and render an opinion pertaining to the
19 use of privately owned cabins being used as
20 rentals on the west side of Wallowa Lake. The
21 west side of Wallowa Lake is zoned R-2,
22 Recreational Residential." Record 122.

23 On June 11, 1991, the planning commission held a
24 hearing and adopted a motion "to accept the current District
25 Attorney's interpretation" of the R-2 zoning district.
26 Record 72-73. In other words, the planning commission
27 determined that short-term residential use of dwellings is a
28 permitted use in the R-2 zoning district.

29 The decision of the planning commission was appealed to

1 the county court. On September 30, 1991, the county court
2 conducted a public hearing on the appeal. Thereafter, the
3 county court affirmed the decision of the planning
4 commission, and adopted the challenged order. This appeal
5 followed.

6 **MOTION TO DISMISS**

7 Intervenor move to dismiss this appeal on the basis
8 that the challenged order is an advisory opinion, and not a
9 final land use decision over which this Board has
10 jurisdiction under ORS 197.825(1) and ORS 197.015(10).¹
11 Intervenor argue the challenged decision is similar to a
12 decision determined not to be a final land use decision
13 subject to our review authority in General Growth v. City of
14 Salem, 16 Or LUBA 447 (1988).²

15 The challenged order states the following:

¹ORS 197.825(1) provides, in relevant part,:

"[The Land Use Board of Appeals] shall have exclusive
jurisdiction to review any land use decision * * *."

ORS 197.015(10) defines land use decision to include:

"A final decision or determination made by a local government
* * * that concerns the * * * application of * * * a land use
regulation * * *."

²In General Growth, the challenged decision was a Salem City Council
resolution interpreting comprehensive plan provisions. In that case, the
challenged resolution was not initiated by any particular application or
request for an interpretation of the plan. That resolution simply stated
"a need has arisen to clarify the intent' of the cities of Salem and
Keizer regarding a [plan policy]." General Growth, supra 16 Or LUBA
at 450. Further, there is no indication in General Growth that any public
hearings were held concerning interpretation of the plan policy that was
the subject of the resolution.

1 ** * * * *

2 "This matter arises out of a question of
3 interpretation of the permitted uses in the
4 County's [R-2] zone. Pursuant to the authority
5 vested in the Planning Director in [WCZO] 1.030,
6 the Planning Director interpreted the R-2 zone to
7 allow short-term rental of single family
8 dwellings. On appeal, the Planning Commission
9 affirmed the interpretation made by the Planning
10 Director.

11 "This matter comes now on appeal to the County
12 Court. The County enters these findings of fact
13 and conclusions of law and affirms the
14 interpretation of the [WCZO] made by the planning
15 director and the planning commission. The County
16 Court finds that the R-2 zone allows the use of
17 single-family dwellings as short-term rentals as
18 outright permitted uses.

19 ** * * * *" Record 2.

20 In Hollywood Neigh. Assoc. v. City of Portland, ___ Or
21 LUBA ____ (LUBA No. 91-063, July 12, 1991), slip op 5, LUBA
22 stated the following concerning when a local government
23 interpretation of plan or land use regulation provisions is
24 a final decision subject to its review:

25 "When a local government interprets existing
26 comprehensive plan or land use regulation
27 provisions without amending or adopting plan or
28 land use regulation provisions or granting or
29 denying development permit or other land use
30 approval, such a decision is a final decision if
31 it is issued pursuant to an established local
32 process for issuing binding declaratory rulings."

33 In Townsend v. City of Newport, ___ Or LUBA ____ (LUBA
34 No. 90-157, June 13, 1991) (Townsend) this Board held that
35 even though a local determination in the nature of a
36 declaratory ruling is not adopted pursuant to a formal

1 declaratory ruling process established by the local code,
2 such a determination may still result in a land use decision
3 where the determination results in the last local
4 determination concerning land use standards applicable to a
5 pending application.

6 Taken together, we believe that these cases establish
7 certain factors relevant to whether a local government
8 decision interpreting plan or code provisions, without
9 amending the plan or code or granting or denying development
10 permit approval, is a land use decision subject to our
11 jurisdiction. Where a formal declaratory ruling process
12 established in the local code is not used, but an
13 application or request for a plan or code interpretation
14 initiates a process which provides the equivalent of a
15 formal declaratory ruling process, including the right to
16 notice and hearing, and that process results in the adoption
17 of a written decision by the highest level local government
18 review authority interpreting the plan or code, the decision
19 is a land use decision subject to our review authority.

20 The challenged decision interprets the provisions of
21 WCZO Article 18.³ The challenged decision was rendered
22 pursuant to procedures outlined in the WCZO governing
23 "Administrative Reviews" which provide the equivalent of a

³The challenged decision states it also interprets the county comprehensive plan. However, the comprehensive plan was only used as an aid to interpreting WCZO 18.015.

1 declaratory ruling process.⁴ The challenged decision was
2 initiated by a particular request for an interpretation of
3 the WCZO. In addition, the decision was the consequence of
4 a quasi-judicial process that included notice and public
5 hearings, and resulted from a formal motion and vote,
6 followed by adoption of a written decision of the highest
7 county decision making body -- the county court.
8 Accordingly, we disagree with intervenors that the decision
9 is the kind of advisory decision at issue in General Growth,
10 supra.

11 The challenged decision is a final land use decision
12 subject to our review authority.

13 Intervenors' motion to dismiss is denied.

14 **FIRST ASSIGNMENT OF ERROR**

15 "The county court improperly construed the
16 applicable law in its interpretation of the R-2
17 zoning district. The decision was not responsive
18 to the code interpretation issue posed by the
19 applicants."

20 **SECOND ASSIGNMENT OF ERROR**

21 "Certain findings in the decision are not
22 supported by substantial evidence."

⁴WCZO 1.030 provides the planning director is the person responsible for administering the WCZO. WCZO Article 4 governs "Administrative Reviews" and states such reviews are for the purpose of providing "procedural guidelines for reviewing applications for uses and developments which may impact neighboring properties and developments * * *." WCZO 4.020-4.025 provide particular procedures to be used for conducting administrative reviews. WCZO 4.040 authorizes appeals of administrative review decisions. WCZO 4.045 provides the planning director with the authority to refer an administrative review to the planning commission.

1 WCZO Article 18 states the requirements of the R-2
2 zone. Permitted uses in the R-2 zoning district include
3 "Single family dwelling[s]" WCZO 18.015.

4 Under these assignments of error we must determine two
5 things. First, we determine how the county interpreted
6 WCZO 18.015 in the challenged decision. Second, we address
7 petitioners' contention that the county's interpretation of
8 WCZO 18.015 is erroneous.

9 **A. Interpretation of Challenged Order**

10 The challenged decision states, in part:

11 "[Petitioners] have placed heavy reliance on the
12 1985 opinion by [the former county counsel] and a
13 [former district attorney's legal opinion.] The
14 County Court disagrees with [those opinions].
15 Both of the opinions would restrict the use of
16 single-family dwellings to owner-occupants. The
17 opinions go too far. They indicate that single-
18 family dwellings could not be used by anyone other
19 than the owner, without regard to whether the
20 other party paid compensation. In other words,
21 under the former interpretations, friends or
22 family could not use the single-family dwelling
23 even if no compensation were paid. The County
24 Court believes that such an interpretation of the
25 Code was not intended. Instead, what was intended
26 was to continue the use that was ongoing in
27 single-family dwellings at the time which was for
28 the use of such dwellings by friends, guests and
29 short-term renters.

30 "The County Court after consideration of the whole
31 Comprehensive Plan and [WCZO], and giving effect
32 to the policies embodied therein, hereby finds
33 that short-term rental use of single-family
34 dwellings is allowed in the R-2 zone." Record 6.

35 We interpret the decision to reject the prior county
36 counsel's and prior district attorney's legal opinions that

1 the R-2 zone absolutely prohibits the short-term rental use
2 of dwellings. As far as we can tell from the unqualified
3 language of challenged decision quoted above, the decision
4 is fairly interpreted to state the R-2 zone allows the
5 short-term rental use of dwellings without any specific
6 limit on such a use.⁵

7 **B. Interpretation of WCZO 18.015**

8 Petitioners contend the challenged decision erroneously
9 interprets WCZO 18.015. Petitioners argue, advancing
10 various theories, that the phrase "single family dwelling"
11 does not include the rental of dwellings to tourists on a
12 short-term basis. Petitioners argue that such a use is
13 commercial in nature and that only noncommercial uses are
14 allowed in the R-2 zoning district.

15 WCZO 18.010 states the purpose of the R-2 zoning
16 district is:

17 "to provide minimum standards for residential
18 development and uses in areas of Wallowa County
19 that visitors from outside the county are
20 attracted to for natural and man-made amenities."

21 The plan acknowledges that tourism is an important industry
22 in the county and that the Recreation Residential zone is
23 intended to "provide areas suitable and desirable for
24 development in locations where demand is primarily for

⁵We do not decide, and the county did not purport to decide, whether there is a point at which the short-term rental of a single family dwelling could be so intense that such use might be considered a motel, rather than a single family dwelling use.

1 recreation."⁶ Plan 4.

2 The term "residential use" is broadly defined by
3 WCZO 1.028 and is not limited to owner occupied uses.
4 WCZO 1.09 defines a single family dwelling as:

5 "A detached building containing one dwelling unit
6 and designed for occupancy by one family only."

7 This definition does not limit the use of a single family
8 dwelling to occupancy by an owner. We see no justification
9 in the WCZO or in the comprehensive plan for the
10 noncommercial (owner occupied)/commercial (short-term
11 visitor occupied) residential use distinction drawn by
12 petitioners.

13 The county's refusal to interpret the WCZO as requiring
14 such a distinction between residential uses in the R-2 zone
15 is, therefore, consistent with the language of the WCZO.
16 See Fifth Avenue Corp. v. Washington County, 282 Or 591,
17 599-600, 581 P2d 78 (1978). We conclude the county
18 correctly interpreted the R-2 zone to allow short-term
19 rental of single family dwellings as a permitted use.⁷

20 The first and second assignments of error are denied.

21 The county's decision is affirmed.

⁶The two zoning designations implementing the plan Recreational Residential designation are the Commercial Recreational (CR-2) and R-2 zones. Motels are permitted in the CR-2 zone.

⁷Petitioners argue that certain findings relating to the benefits of using single family dwellings for short-term rental use are not supported by substantial evidence in the whole record. However, such findings are not necessary to the challenged decision.