BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FRAN RECHT, Petitioner, vs. CITY OF DEPOE BAY, Respondent, and JOHN H. MILLER and MARY EMMA MILLER, Intervenors-Respondent.	LUBA No. 92-120 FINAL OPINION AND ORDER

Appeal from City of Depoe Bay.

Fran Recht, Depoe Bay, filed the petition for review and argued on her own behalf.

No appearance by respondent.

Dale F. Evans, Lake Oswego, filed the response brief and argued on behalf of intervenors-respondent.

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

REMANDED 10/08/92

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

Petitioner appeals a city decision rezoning a 12 acre parcel from Residential R-2 to Residential R-5.

MOTION TO INTERVENE

John H. Miller and Mary Emma Miller, the applicants below, move to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

Under the Depoe Bay Zoning Ordinance (DBZO), the subject property is potentially developable with up to 106 single-family dwellings under either R-2 or R-5 zoning. Both zoning districts also permit development of two-family units, but only 53 such units could be developed under R-2 zoning, while up to 427 two-family units are potentially allowable under R-5 zoning. While up to 427 multi-family units could be developed under the proposed R-5 zoning, the R-2 zoning district does not permit multi-family units.[1]

The reason stated by the applicants for the requested rezoning is to allow "a more flexible means for planning the development of this property."[2] Record 54. Intervenors obtained city approval for the requested zone change for the

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[1]Planned unit developments are permitted under either R-2 or R-5 zoning, provided the property to be developed includes at least two acres. DBZO 3.410.

[2]The subject property includes severe slopes and intervenor's contend that only approximately seven of the total 12 acres are developable.

subject property in 1989. However, no ordinance was adopted following the 1989 rezoning proceeding. In 1992 the city planning commission conducted a public hearing to consider the request for rezoning to R-5 and again recommended that the requested rezoning be approved. The city council considered the request at a public hearing on June 1, 1992 and, thereafter, adopted an ordinance rezoning the property on June 11, 1992.

FIRST ASSIGNMENT OF ERROR

The only zoning ordinance criterion identified in the decision as applying to the challenged decision is DBZO 9.020(3), which provides as follows:

> "In considering an amendment to a zoning map, the Planning Commission shall seek to determine the following:
>
> "a. That the change is in accord with the Land Use Plan for the area, and;
>
> "b. That there has either been a substantial change in the character of the area since zoning was adopted and which warrants changing the zone; or that the zoning adopted for the area was in error.
>
> "* * * * *."

The city found the disputed rezoning should be granted because "the property was zoned * * * R-2 in error[.]"[3]

[3]A change in zoning is also allowable under DBZO 9.020(3)(b) if there has "been a substantial change in the character of the area since zoning was adopted." However, the challenged decision is not based on a finding that there has been a substantial change in the character of the area.

Record 1. Petitioner contends the city council's finding is an unexplained conclusion and fails to provide the "justification for the decision based on the criteria, standards, and facts * * *," as required by ORS 227.173(2). Moreover, petitioner contends the record includes no evidence, let alone substantial evidence, that the R-2 zoning currently applied to the property was applied in error. Petitioner is correct on all points, and we sustain the first assignment of error.

There simply are no findings, either in the decision or in the 1989 staff report upon which the decision relies, that make any attempt to explain why the R-2 zoning applied to the property was applied in error. In their brief, intervenors appear to argue that because it was reasonably clear the applicants proposed to construct mutli-family dwellings at the time the city approved their application to rezone the property in 1989, we may conclude there was a mistake in the current R-2 zoning. We do not follow the argument.

DBZO 9.020(3)(b) appears to adopt the "change or mistake" rule applied in a number of other states as a requirement for rezoning. See 1 Anderson, American Law of Zoning § 5.11 (3d rev ed 1986). In applying that criterion, the relevant focus is upon the time and circumstances under which the R-2 zoning was applied to the property. As far as we can tell, the existing R-2 zoning was applied to the

property sometime well before 1989. Whatever confusion or mistakes may have occurred during the 1989 rezoning proceeding, they provide no basis for determining compliance with the requirement of DBZO 9.020(3)(b) that the R-2 zoning was erroneous when applied. Neither the decision nor the record offer any explanation for why the city's prior decision to zone the subject property R-2 was erroneous.

We also have difficulty seeing the relevance of intervenors' arguments concerning the relative advantages of developing the property under R-2 and R-5 zoning. As petitioner correctly notes, the only apparent difference between the two zones is that multi-family dwellings and higher densities are possible under R-5 zoning. Aside from those differences, the development flexibility possible under the Planned Development zone may be achieved by combining the Planned Development zone with either the R-2 or the R-5 zoning district. More importantly, even if there are development advantages associated with R-5 zoning, those advantages have nothing to do with whether the existing R-2 zoning was erroneously applied in the first place. Even if a higher density and more aesthetically pleasing residential development might be possible under R-5 zoning, that does not mean the original R-2 zoning was applied in error.

Because the city's findings do not demonstrate the existing R-2 zoning was erroneously applied, as DBZO 9.020(3)(b) requires, and because there is no evidence

suggesting such is the case, the first assignment of error is sustained.

SECOND THROUGH FIFTH ASSIGNMENTS OF ERROR

Under these assignments of error, petitioner identifies comprehensive plan policies and administrative rule requirements which petitioner contends the city erroneously failed to address in its findings.[4] As we previously noted, DBZO 9.020(3) is the only approval criterion identified by in the challenged decision. Although DBZO 9.020(3)(a) requires that a zone change be "in accord with the Land Use Plan for the area," the city does not identify in its decision any land use regulation or comprehensive plan criteria as applying to the challenged decision. Clearly provisions of the city's comprehensive plan may apply as approval criteria when the zoning map is being amended. ORS 197.175(2)(d); 197.835(5)(a); Standard Insurance Co. v. Washington County, 16 Or LUBA 30, 38-39 (1987); see Joseph v. Lane County, 18 Or LUBA 41, 44-45 (1989). Similarly, administrative rules adopted by the Land Conservation and Development Commission may impose substantive requirements on local government land use decision making. ORS 197.040(1)(c)(A); Newcomer v. Clackamas County, 94 Or

[4]Those plan policies concern forest land protection, housing and public services (assignments of error three through five). The administrative rule identified by petitioner is OAR 660-12-060(1), which requires that certain amendments to acknowledged land use regulations be allowed only if they are consistent with the "function, capacity, and level of service" of transportation facilities.

App 33, 36-37, 764 P2d 927 (1988).

Intervenors do not contend that petitioner failed to raise issues below concerning the disputed plan policies and administrative rule. Moreover, as explained below, it is unclear to us whether all of the provisions identified by petitioner apply as approval criteria to the disputed zone change.

A. OAR 660-12-060 (Transportation Facilities)

OAR 660-12-060(1) imposes the following requirement:

> "Amendments to functional plans, acknowledged comprehensive plans, and land use regulations which significantly affect a transportation facility shall assure that allowed land uses are consistent with the identified function, capacity, and level of service of the facility. This shall be accomplished by either:
>
> "(a) Limiting allowed land uses to be consistent with the planned function, capacity and level of service of the transportation facility;
>
> "(b) Amending the [Transportation System Plan] to provide transportation facilities adequate to support the proposed land uses consistent with the requirements of this division; or
>
> "(c) Altering land use designations, densities, or design requirements to reduce demand for automobile travel and meet travel needs through other modes."

The challenged decision roughly quadruples (from 106 units to 427 units) the residential density at which the subject property may be developed. Petitioner contends the road system available to provide access to the subject property is inadequate. Because the city adopted no

findings addressing the requirement of OAR 660-12-060(1), we are unable to determine whether the rule applies. See ORS 197.646. If the rule does apply, without findings we cannot determine whether the disputed decision complies with its requirements. Sunnyside Neighborhood v. Clackamas County Comm., 280 Or 3, 19-21, 569 P2d 1063 (1977); Green v. Hayward, 275 Or 693, 706-08, 552 P2d 815 (1976); Hoffman v. DuPont, 49 Or App 699, 705-06, 621 P2d 63 (1980), rev den 290 Or 651 (1981); McCoy v. Tillamook County, 14 Or LUBA 108, 110-11 (1985).

B. Plan Forest Lands Policy 5

The city's comprehensive plan includes Forest Lands Policies. Forest Lands Policy 5 provides as follows:

> "Forestlands located within the city's urban growth area shall be retained for forest uses and low density residential development where these forestlands occur in areas of extreme natural hazards, excessively steep slopes, and provide buffer and critical wildlife habitat and safeguard against damage to property and human life."

Petitioner contends the record shows the property is forested and includes excessively steep slopes and that the city's action to rezone the property to allow higher density residential development violates Forest Lands Policy 5.

Intervenor argues that while there are trees on the subject property, the property is planned and zoned for residential development and, therefore, is not properly considered "forestlands," within the meaning of Forest Lands Policy 5. Although intervenor's interpretation of Forest

Lands Policy 5 may well be correct, we believe it is appropriate that the city interpret and apply Forest Lands Policy 5 in the first instance.

C. Plan Housing Policy 2 and Public Facilities and Services Policy 3

Plan Housing Policy 2 provides as follows:

> "Housing development approval shall be subject to the availability of public services and facilities."

Plan Public Facilities and Services Policy 3 imposes the following requirement:

> "Depoe Bay shall encourage[5] urban density development to take place first in the areas already being served by water and sewer facilities, then in areas where service can be provided simply by extending the lines (no additional pumps or storage facilities required)."

In response to petitioner's contention that both of the above plan policies are violated, intervenor contends that the policies will apply at the time a specific development proposal is made. Assuming that is the way the city interprets its plan, it is appropriate for the city to state that interpretation in the first instance.

D. Conclusion

On remand the city must first determine whether the

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[5]This Board has, on several occasions, interpreted land use regulatory provisions requiring that activities or purposes be "encouraged" as not imposing mandatory approval standards. Benjamin v. City of Ashland, 20 Or LUBA 265, 267 (1990) (and cases cited therein); Neuenschwander v. City of Ashland, 20 Or LUBA 144, 154-55 (1990).

plan and rule provisions discussed above apply to the challenged decision. If the city determines that one or more of those provisions do not apply, it must explain why not. In making this determination the city may interpret any ambiguous plan language, and this Board would be bound in any subsequent appeal to accord that interpretation appropriate deference. Clark v. Jackson County, 313 Or 508, ___ P2d ___ (1992).

Assuming one or more of the identified plan or rule provisions do apply, the city must explain in its findings why the challenged decision is consistent with the applicable plan or rule provisions.

The second through fifth assignments of error are sustained.

SIXTH ASSIGNMENT OF ERROR

This assignment of error is based on an assumption that the city may have based its decision on the portion of DBZO 9.020(3)(b) that permits a zone change if there has been "a substantial change in the character of the area since zoning was adopted * * *." We do not understand the decision to be based on that provision of DBZO 9.020(3)(b).

The sixth assignment of error is denied.

The city's decision is remanded.