

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 MURPHY CITIZENS ADVISORY)
5 COMMITTEE,)
6)
7 Petitioner,)
8)
9 vs.)
10)
11 JOSEPHINE COUNTY,)
12)
13 Respondent,)
14)
15 and)
16)
17 COPELAND SAND AND GRAVEL, INC.,)
18)
19 Intervenor-Respondent.)

LUBA No. 93-066
FINAL OPINION
AND ORDER

20
21
22 Appeal from Josephine County.

23
24 Matthew G. Fawcett, Medford, filed the petition for
25 review and argued on behalf of petitioner.

26
27 No appearance by respondent.

28
29 James R. Dole, Grants Pass, represented intervenor-
30 respondent.

31
32 KELLINGTON, Chief Referee; HOLSTUN, Referee; SHERTON,
33 Referee, participated in the decision.

34
35 REMANDED 11/10/93

36
37 You are entitled to judicial review of this Order.
38 Judicial review is governed by the provisions of ORS
39 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals an order of the board of county
4 commissioners determining that "soil remediation" is a use
5 similar to other uses permitted outright in the Rural
6 Industrial (RI) zone.

7 **MOTION TO INTERVENE**

8 Copeland Sand and Gravel, Inc., moves to intervene on
9 the side of respondent. There is no objection to the
10 motion, and it is allowed.

11 **FACTS**

12 In connection with intervenor's application for site
13 review, petitioner requested the Josephine County Planning
14 Director to determine whether an aspect of the proposed use,
15 "soil remediation," is similar to listed, permitted uses in
16 the RI zone. The planning director determined soil
17 remediation is similar to listed, permitted uses in the RI
18 zone.

19 Petitioner appealed the planning director's decision to
20 the Josephine County Planning Commission. After a public
21 hearing, the planning commission determined that soil
22 remediation is not similar to listed, permitted uses in the
23 RI zone.

24 Intervenor appealed the planning commission decision to
25 the Josephine County Board of Commissioners. After a public
26 hearing on the appeal, the board of commissioners determined

1 that soil remediation is similar to listed, permitted uses
2 in the RI zone. This appeal followed.

3 **FIRST, SECOND, FOURTH AND FIFTH ASSIGNMENTS OF ERROR**

4 Under these assignments of error, petitioner argues the
5 challenged decision does not explain what the proposed "soil
6 remediation" use is, does not explain what the essential
7 characteristics of permitted uses in the RI zone are, and
8 fails to analyze the similarities, if any, between "soil
9 remediation" and permitted uses in the RI zone. Further,
10 petitioner argues the record lacks evidentiary support for
11 the determination in the challenged decision that the
12 proposed "soil remediation" is similar to listed, permitted
13 uses in the RI zone.

14 Petitioner is correct that the challenged decision does
15 not explain what the characteristics of the proposed "soil
16 remediation" use are, and does not compare those
17 characteristics with listed, permitted uses in the RI zone.
18 Consequently, the county's findings are inadequate to
19 demonstrate that the proposed "soil remediation" use is
20 similar to listed, permitted uses in the RI zone.¹

21 The first, second, fourth and fifth assignments of
22 error are sustained.

¹Petitioner also includes evidentiary challenges under some of these assignments of error. However, because we determine the findings are inadequate, no purpose is served in reviewing the evidentiary support for the findings.

1 **THIRD ASSIGNMENT OF ERROR**

2 Under this assignment of error, petitioner argues that
3 in determining the proposed soil remediation use is
4 permissible in the RI zone, the county failed to interpret
5 and apply Josephine County Comprehensive Plan (plan) Goal
6 10, Policy 1(G)(2). Petitioner argues this plan provision
7 contemplates that only resource dependent uses are allowed
8 in the RI zone.

9 Plan Goal 10, Policy 1(G)(2) provides:

10 "Rural Industrial: Areas for industrial use that
11 are located in close proximity to the natural
12 resources on which they rely on for raw materials.
13 These uses shall not require full urban services
14 and linkage shall be established to demonstrate
15 that the location is appropriate and necessary for
16 resource utilization."

17 The challenged decision mentions that plan Goal 10,
18 Policy 1 provides for the RI zone, and states that RI lands
19 are to be "located in close proximity to the natural
20 resources on which they rely for raw materials." Record 30.
21 However, the challenged decision fails to address whether
22 plan Goal 10, Policy 1 imposes any limitation on the kinds
23 of uses allowable in the RI zone and, if so, to what extent.
24 It is the county's responsibility to interpret its plan to
25 determine whether it imposes limitations on uses allowed in
26 the RI zone. See Weeks v. City of Tillamook, 117 Or App
27 449, 454, 844 P2d 914 (1992). The county's failure to
28 express such an interpretation requires that we remand the
29 challenged decision. Gage v. City of Portland, 123 Or App

1 269, _____ P2d _____ (1993).

2 The third assignment of error is sustained.

3 **SIXTH ASSIGNMENT OF ERROR**

4 Under this assignment of error, petitioner argues the
5 challenged decision is, in fact, an amendment to the JCZO
6 because it adds "soil remediation" to the list of permitted
7 uses in the RI zone.

8 Petitioner correctly states it is impermissible for a
9 local government to amend a land use ordinance or plan
10 provision in the guise of interpreting either. Goose Hollow
11 Foothills League v. City of Portland, 117 Or App 211, 218,
12 843 P2d 992 (1992); Loud v. City of Cottage Grove, _____ Or
13 LUBA _____ (LUBA No. 93-104, October 27, 1993). However,
14 here, we cannot tell whether the county made a declaratory
15 ruling that the particular, proposed "soil remediation" use
16 is similar to listed, permitted uses in the RI zone, or
17 whether the decision attempts to amend the Josephine County
18 Zoning Ordinance (JCZO) to include "soil remediation" in
19 general as a permitted use. If it is the latter, then
20 county must amend the JCZO. If it is the former, then the
21 county must interpret and apply the relevant provisions of
22 the plan and JCZO in its decision, and its determination
23 concerning the proposed use must be supported by substantial
24 evidence.

25 The sixth assignment of error is sustained.

26 The county's decision is remanded.