BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ALLAN T.J. McINNIS,	)	
	)	
Petitioner,	)	
	)	LUBA No. 93-135
vs.	)	
	)	FINAL OPINION
CITY OF PORTLAND,	)	AND ORDER
	)	
Respondent.	)	

Appeal from City of Portland.

Jack L. Orchard and Richard H. Allan, Portland, filed the petition for review. With them on the brief was Ball, Janik & Novack. Richard H. Allan argued on behalf of petitioner.

Kathryn Beaumont Imperati, Senior Deputy City Attorney, Portland, filed the response brief and argued on behalf of respondent.

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

AFFIRMED 03/03/94

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioner appeals a city ordinance that adopts the Albina Community Plan (ACP) and 11 neighborhood plans as part of the Portland Comprehensive Plan (plan); amends the text of the plan to add certain map designations and policies; amends the plan Transportation Element; amends the text of the Portland City Code (PCC) to add new zoning districts, standards and procedures; amends the city plan and zoning map[1]; and establishes three new land use review fees.

FACTS

The area affected by the challenged ordinance (ACP area) includes approximately 20 square miles of North and Northeast Portland, encompassing 11 recognized neighborhoods. The ACP area includes residential, commercial, industrial, public and recreational uses. The ACP area contains approximately 75,000 people, 20 per cent of the city's population. The challenged ordinance redesignates large portions of the ACP area, changing the designation of a roughly 80 acre area extending east from Interstate-5, between NE Marine Drive and NE Bridgeton Road, to Mixed Commercial/Residential (CM).

The ACP was developed over a four year period as a plan

[1]The city has adopted a single map as both its plan and zoning map.

to revitalize the inner north and northeast areas of the city. A discussion draft of the ACP and 11 neighborhood plans, including two alternative land use and urban design patterns, was developed through three area-wide workshops, 10 neighborhood workshops and over 140 meetings with citizen groups. The discussion draft was reviewed in 12 area-wide workshops, two neighborhood workshops and 62 neighborhood meetings.

A Proposed ACP was published in February, 1992. During April through July, 1992, the city planning commission held four public hearings and conducted 14 work sessions on the Proposed ACP. Notice of the planning commission hearings process was mailed to over 4,000 individuals and groups that participated in the development of the ACP. Flyers were distributed to approximately 45,000 households and businesses in the area. Additionally, the city Historic Landmarks Commission held four public hearings, and the Design Commission held two public hearings, on the proposed ACP.

In September, 1992, the planning commission's Draft ACP was published. The planning commission held three public hearings and conducted three work sessions on the Draft ACP in September through November, 1992. Notice of these hearings was sent to over 1,100 individuals and 200 organizations. The Historic Landmarks Commission also held a public hearing on the Draft ACP.

In February, 1993, the planning commission's Recommended ACP was published. The city council held three public hearings on the Recommended ACP. Written notice of the city council hearings was sent to all persons who participated in the planning commission, Design Commission or Historic Landmark Commission hearings. On July 28, 1993, the city council adopted the challenged ordinance.

Petitioner owns approximately 21.3 acres located east of Interstate-5 and north of NE Marine Drive. The challenged ordinance changes the plan and zone designation of petitioner's property to CM. Prior to adoption of the challenged ordinance, approximately eight acres of petitioner's property was designated and zoned General Industrial 2 (IG2) and the remainder was designated and zoned General Commercial (CG). While the ACP was being developed, petitioner applied for a quasi-judicial plan and zone map amendment to change the eight acres of his property designated IG2 to CG, to allow parking and access for a proposed warehouse-type retail store on his adjoining CG property. In late 1992, the city denied that plan and zone change, and this Board affirmed the city's decision. McInnis v. City of Portland, 25 Or LUBA 376, aff'd 123 Or App 123 (1993).

FIRST ASSIGNMENT OF ERROR

> "The City improperly treated the rezoning and redesignation of [petitioner's] property as legislative rather than quasi-judicial, and failed

> to make specific findings that the rezoning and redesignation [of petitioner's property] complie[s] with applicable statewide goals and [plan] policies."

This assignment of error depends on petitioner's contention that the redesignation and rezoning of petitioner's property by the challenged ordinance is quasi-judicial in nature. In Strawberry Hill 4-Wheelers v. Benton Co. Bd. of Comm., 287 Or 591, 602-03, 601 P2d 769 (1979), the Oregon Supreme Court identified three factors to 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?"

However, the three Strawberry Hill factors must be weighed together; no single factor is determinative. Estate of Paul Gold v. City of Portland, 87 Or App 45, 740 P2d 812, rev den 304 Or 405 (1987); Leonard v. Union County, 24 Or LUBA 362, 369 (1992).

The parties agree the first factor listed above is not present in this case. However, petitioner contends the other two factors are present. Petitioner argues the challenged decision was "bound to apply preexisting criteria

to concrete facts" because the adoption of the ACP and related plan and zoning amendments is required to comply with criteria established in the Statewide Planning Goals (goals) and the comprehensive plan.

Petitioner next contends the city's decision to redesignate and rezone his property was "directed at a closely circumscribed factual situation." Petitioner argues the area north of NE Marine Drive redesignated and rezoned to CM is one of only two areas changed to CM by the challenged decision, and is a very small portion of the total ACP area. Petitioner also argues the debate over the designation and zoning of his property during the ACP proceedings "took place in the context of the City's evaluation of Petitioner's proposal for a membership warehouse retail development on a portion of [his] property." Petition for Review 11. Petitioner argues that evidence specifically relating to his property was introduced and discussed at hearings below.

According to petitioner, even though most of the challenged ordinance may be legislative in nature, the redesignation and rezoning of his property must be considered quasi-judicial. Petitioner contends that in Hummel v. City of Brookings, 13 Or LUBA 25, 29-32 (1985), this Board concluded that the residential rezoning of a limited area was quasi-judicial in character, even though a larger commercial rezoning accomplished by the same

ordinance was legislative. Petitioner maintains the severability of the rezoning of his property is further demonstrated by the fact that on September 30, 1993, after this appeal was filed, the city adopted an ordinance identical to the challenged ordinance, except that it does not change the designation and zoning of petitioner's property.

The city recognizes the challenged decision is required by statute to comply with the goals and general criteria of the plan. Accordingly, the city concedes the second Strawberry Hill factor, being bound to apply preexisting criteria, is present in this case, as it is with regard to any land use decision. However, the city also argues the challenged decision "nevertheless embodies one of the hallmarks of legislative action -- making policy, rather than [merely] applying existing policy." Respondent's Brief 10. The city argues the ACP and its implementing measures are intended to change the pattern of land use in the ACP area over the next 20 years. The city argues a principal policy objective of the ACP is to convert commercial strips into commercial nodes surrounded by high density housing. According to the city, changing the designation of properties like petitioner's is one of its primary means of implementing this new policy.

The city denies that the third Strawberry Hill factor, being "directed at a closely circumscribed factual situation

or a relatively small number of persons," is present in this case. The city argues the challenged ordinance redesignated approximately 5,000 acres of property throughout the 20 square mile ACP area. The city further argues the areas redesignated CM alone comprise more than 110 acres and numerous ownerships.

The city contends the fact petitioner contemplated a specific development proposal at the time the ACP and its implementing measures were being developed and reviewed by the city is irrelevant to whether the challenged decision is properly characterized as legislative or quasi-judicial. The city argues this case is distinguishable from Hummel, because here petitioner's property was always within the ACP area and was not added to the challenged ordinance at petitioner's request. Finally, the city argues its subsequent readoption of the challenged decision, without the change in the designation petitioner's property, was done simply to allow the remainder of the ACP to become acknowledged and effective while petitioner pursues his appeal and has nothing to do with whether the challenged decision is legislative or quasi-judicial in nature.[2]

[2]The city's comprehensive plan and land use regulations have been acknowledged by the Land Conservation and Development Commission under ORS 197.251. Under ORS 197.625(2), a postacknowledgment plan or land use regulation amendment appealed to LUBA is not considered acknowledged until the date an appellate decision affirming the amendment becomes final. With certain exceptions not relevant here, postacknowledgment plan and land use regulation amendments adopted before November 5, 1993, are not effective until they are acknowledged. ORS 197.625(3)(d)(C); Von Lubken v. Hood

We agree with the city that its subsequent readoption of the challenged decision without a change to the designation of petitioner's property is irrelevant to the question of whether the challenged decision itself is legislative or quasi-judicial in nature. That petitioner made a specific development proposal during the course of the proceedings, and there was testimony introduced concerning petitioner's property, also has little bearing on this question. There is no dispute that the proceedings leading to the challenged decision concerned many thousands of acres, owned and occupied by many thousands of people. During the course of such legislative proceedings, there may well be testimony and discussion concerning specific properties. We do not believe this converts such legislative proceedings into a collection of many quasi-judicial proceedings.[3] See Culver v. Dagg, 20 Or App 647, 653, 532 P2d 1127 (1975).

Based on the above, we believe the third Strawberry Hill factor, of being "directed at a closely circumscribed factual situation or a relatively small number of persons," is not present in this case. Thus, the single Strawberry

---

River County, 118 Or App 246, 249, 846 P2d 1178 (1993). The ordinance adopted by the city on September 30, 1993 was not appealed to LUBA and, therefore, is acknowledged. ORS 197.625(1).

[3]Hummel is clearly distinguishable. The rezoning at issue in Hummel, which this Board found to be quasi-judicial, concerned property entirely separate from the large area that was the subject of the legislative proceedings, and was added to the legislative decision solely at the request of the property owner.

Hill factor present is that "the decision [is] bound to apply preexisting criteria to concrete facts." However, we agree with the city that the presence of this factor should be given lesser weight, because the challenged decision establishes new policy objectives as well. We therefore conclude the challenged decision is legislative in nature.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

> "The City erred by failing to demonstrate either in its Findings or in the Record as a whole, that the redesignation and rezoning of [petitioner's] property to [CM] complies with Statewide * * * Planning Goal 11 and Plan Policies 11.1 and 11.2."

In this assignment of error, petitioner assumes, for the sake of argument, that the challenged decision is legislative in nature. Petitioner points out the challenged decision identifies Goal 11 and plan policies 11.1 and 11.2 as applicable standards. Petitioner argues the findings do not demonstrate that redesignating petitioner's property CM complies with Goal 11 and plan policies 11.1 and 11.2.[4] Petitioner complains there is no indication in the findings that the adequacy of public facilities and services to serve the development allowable under a mixed commercial and

[4]There appears to be no dispute that, as relevant here, Goal 11 and plan policies 11.1 and 11.2 require urban development to be allowed only where appropriate levels of urban public facilities and services exist or can reasonably be made available.

residential CM designation was considered.[5] Therefore, according to petitioner, the challenged decision must be remanded unless the city can identify evidence in the record demonstrating that its legislative action to redesignate petitioner's property CM complies with Goal 11 and plan policies 11.1 and 11.2.

In order for us to review a legislative land use decision, it is necessary either that the legislative land use decision be accompanied by findings addressing relevant legal standards or that respondent explain in its brief how the challenged legislative decision complies with applicable legal standards. Riverbend Landfill v. Yamhill County, 24 Or LUBA 466, 472 (1993); Von Lubken v. Hood River County, 22 Or LUBA 307, 313-14 (1991). There is no requirement that a legislative land use decision redesignating numerous properties include findings specifically setting out the justification for the change in designation made for each affected property. With regard to such a legislative redesignation decision, we stated:

"* * * While we have said that 'findings' are

---

[5]According to petitioner, the Proposed ACP and the Recommended ACP submitted to the city council both recommended applying the Multi-Dwelling Residential (R1) designation to petitioner's property, and the city's findings reflect consideration of the development allowable under the R1 designation only. Petitioner argues the CM designation allows the same density of residential development as the R1 designation plus an equal square footage of commercial development, and the city failed to consider the adequacy of public facilities and services to serve this additional demand.

> needed to show compliance with applicable criteria whether the land use act be legislative or quasi-judicial * * *, we do not mean to say that a broad legislative enactment must contain a list of justifications for each and every property designation. We view the need for 'findings' in a [comprehensive] plan adoption to be met when the record shows facts and policies which, when read together, show a factual base for particular land use designations. Gruber v. Lincoln County, 2 Or LUBA 180, 186-87 (1981)."

The city argues its findings demonstrate that existing public facilities and services are adequate to serve the development pattern created by the ACP.[6] The city cites findings that the ACP area is already fully urbanized, and that future development will be infill and redevelopment. Record 399. The city finds population in the ACP area has decreased by 25,000 over the past 30 years. Record 398. The city predicts that the ACP's strategy of placing 3,000 additional medium to high density housing units in the ACP area over the next 20 years will result in maintaining, but not increasing, the existing population level, as household size continues to decline. Record 401.

The city finds that a full range of urban facilities and services are in place in the ACP area, and that the economic revitalization that the ACP is designed to achieve will more fully utilize these existing services. Id. The findings further explain the "availability of a full range

[6]The city also cites evidence in the record supporting its findings.

of public facilities and services to support economic activity growth and related population growth [was a] key factor in the development of revitalization plan policies, objectives, zoning provisions, and action charts." Record 384. The findings also explain the policy pursued in applying map designations in the ACP area:

> "[ACP] zoning provisions and applications encourage the clustering of commercial and employment activities in established centers and the creation of higher density residential nodes around these centers to create a land use pattern which supports the efficient delivery of public facilities and services." Record 629.

According to the city, its findings describe the inventory and assessment of public facilities and services by public agencies, service providers and neighborhood groups that occurred during the ACP development process. Record 406-08, 627-29. The city concluded that the ACP provisions resulting from the four-year ACP development process, including the multiple changes to plan and zoning map designations in the ACP area, "are consistent with community based needs and priorities, the availability of resources * * *, and policies and regulatory frameworks of urban service providers." Record 407.

We agree with the city that the above described findings adequately explain the basis for its decision to change the existing commercial and industrial designations between NE Marine Drive and NE Bridgeton Avenue to a mixed commercial and residential designation. The findings also

are adequate to explain why the city concluded the full range of urban facilities and services already in place in this area will be adequate to serve the development pattern created by the ACP and its implementing measures, as required by Goal 11 and plan policies 11.1 and 11.2.

Another principle worth noting here is that plan and zone amendments which lessen the impacts or demands that goal, plan and code standards were adopted to address are likely to be consistent with those goal, plan and code standards. Sokol v. City of Lake Oswego, 18 Or LUBA 375, 391 (1989), aff'd 100 Or App 494 (1990); see Semler v. City of Portland, 16 Or LUBA 320 (1987). In this case, the city's plan and land use regulations were acknowledged with approximately 2/3 of petitioner's property designated CG and 1/3 designated IG2. The CG designation allows more intensive development than the CM designation. PCC, Title 33, Table 130-1. The IG2 designation does not allow certain types of institutional uses allowed under the CM designation (group living facilities, schools and churches), but allows several categories of industrial uses not allowed under the CM designation. Compare PCC, Title 33, Tables 130-1 and 140-1. Thus, if the change in the designation of petitioner's property adopted by the city affects future demands for public facilities and services at all, it would tend to lessen those demands and, therefore, be consistent with the requirements of Goal 11 and plan policies 11.1 and

11.2.

We conclude the city's findings are adequate to demonstrate compliance with Goal 11 and plan policies 11.1 and 11.2. Consequently, the second assignment of error is denied.

The city's decision is affirmed.