BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MARION SAHAGIAN, MADELYNNE DINESS SHEEHAN, and LILLIAN JONES,	)	
Petitioners,	)	LUBA No. 93-171
vs.	)	FINAL OPINION AND ORDER
COLUMBIA COUNTY,	)	
Respondent.	)	

Appeal from Columbia County.

Michael F. Sheehan, Scappoose, filed the petition for review and argued on behalf of petitioners.

John K. Knight, County Counsel, St. Helens, filed the response brief and argued on behalf of respondent.

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

REVERSED 08/10/94

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

Petitioners challenge a board of county commissioners order changing the comprehensive plan map designation of a 240-acre area from Community Service to Forest Resource and changing the zoning of the area from Community Service - Recreational (CS-R) to Primary Forest (PF-76).

MOTION TO STRIKE

The county filed a motion to strike 44 sections of the text and appendices to the petition for review. On June 14, 1994, we issued an order on the county's motion, stating we will not consider certain portions of the petition for review identified in the order. In that order, we erroneously listed footnote 22 of the petition for review as not to be considered. The reference to footnote 22 is hereby changed to footnote 19.

In addition, we failed to resolve section 24 of the county's motion in our June 14, 1994 order. Section 24 objects to the last three sentences of the first paragraph on page 14 of the petition for review. The first of these sentences is supported by evidence in the record cited by petitioners in their response to the motion to strike. We agree with the county that the last two sentences refer to facts not in the record, and we will not consider those sentences.

In all other respects, we adhere to our June 14, 1994

order on the motion to strike.

FACTS

The subject 240-acre area is owned by the county and is the western portion of an approximately 292-acre area generally known as Carcuss Creek Park. The history of this area is relevant to this appeal. On October 21, 1970, before the county adopted any comprehensive plan, the board of county commissioners adopted an order pursuant to ORS 275.320,[1] designating certain listed properties as "Columbia County Forest and/or Park and Recreational Areas" and dedicating those properties for "public use" (hereafter 1970 order). Record 62. One of the properties listed in the 1970 order is "Carcus Creek Park." Record 63.

The Columbia county Comprehensive Plan (plan) and Columbia County Zoning Ordinance (CCZO) were acknowledged by the Land Conservation and Development Commission (LCDC) under ORS 197.251 in 1985. Under the acknowledged plan and CCZO, Carcuss Creek Park was designated Community Service and zoned CS-R. Carcuss Creek Park is discussed in the "County Parks" section of the "Recreational Needs" chapter of the plan, as follows:

> "Carcuss Creek Park is also part of the County park system, however, lack of access prevents its use as a park at this time. The County is

[1]ORS 275.320 allows a board of county commissioners, by order, to designate real property acquired by the county as "county forests, public parks or recreational areas * * *."

> planning on a sanitation thinning of the 250 acre area, which could result in the development of roads for access into the park." Plan, p. 288.

The acknowledged plan also cites Carcuss Creek Park as an example of one of four major problems encountered in developing recreational sites -- "poor access to potential or existing sites." Plan, p. 291. The plan proceeds to discuss techniques for improving the county's recreational development situation, including ways to resolve access problems. Plan, pp. 292-94.

On September 30, 1992, the board of commissioners adopted an order pursuant to ORS 275.320, redesignating the 240-acre western portion of Carcuss Creek Park that is the subject of this appeal as "county forest" (hereafter 1992 order). Record 51. The 1992 order was not appealed.[2]

On June 3, 1993, the board of commissioners, as the property owner, filed an application to change the zoning of the subject 240 acres from CS-R to PF-76. Shortly thereafter, the county planning department determined that a corresponding plan map amendment from Community Service to Forest Resource is also required. After a public hearing, the planning commission recommended approval of the proposed

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[2]A subsequent order, adopted by the board of commissioners on September 22, 1993, amended the 1992 order to correct its citation to where in the county records the original 1970 order was recorded and filed. The 1993 order was appealed to this Board. However, we determined the 1993 order is not a land use decision and dismissed the appeal. Sahagian v. Columbia County, ___ Or LUBA ___ (LUBA No. 93-167, June 14, 1994).

plan and zone amendments. After an additional public hearing, the board of commissioners adopted an order approving the plan and zone amendments. This appeal followed.

FIRST AND THIRD ASSIGNMENTS OF ERROR

Petitioners contend the challenged decision is inconsistent with various provisions of state statutes, the Statewide Planning Goals (goals), the plan and the 1970 order dedicating Carcuss Creek Park to public use.

A. Underlying Issue

Almost all of petitioners' arguments under these assignments of error are premised on petitioners' belief that the subject 240 acres are part of a county park, based on the references to "Carcuss Creek Park" in the County Parks section of the acknowledged plan. The county's responses, on the other hand, are premised on the position that the subject 240 acres are not part of a county park, but rather are "county forest," based on the 1992 order changing the designation of the subject 240 acres under ORS 275.320 to "county forest." We resolve this issue before turning to petitioners' specific arguments.

Plan Recreation Policy 6 states:

> "Designate County Parks as Community Service in the Comprehensive Plan and implement this designation through the use of the Community Service-Recreational Zoning Designation." Plan, p. 295.

The challenged decision recognizes that under plan

Recreational Policy 6, county parks must be designated Community Service and zoned CS-R. Record 17. The challenged decision bases its approval of the change to the Forest Resource designation and PF-76 zone on its conclusion that the subject property is not a county park, but rather is a county forest. See, e.g., Record 23. The decision rejects the argument that an amendment to the plan text identifying the subject property as a county park must be adopted in order to change the plan and zoning map designations of the subject property to Forest Resource and PF-76, as follows:

> "The text [of the plan County Parks section] describes the properties that were in the County park system in 1984, when the Plan was originally submitted to LCDC for acknowledgment, and in 1985, when the Plan was finally acknowledged. This description of Carcus[s] Creek as part of the park system should not be confused with a designation of the property as a park. The designation as a park occurred on October 21, 1970 and continued until September 30, 1992 when 240 acres of the property was redesignated as a county forest. The time for noting this change in the status of the property is during periodic review, not during this rezone proceeding."[3] (Emphases in original.) Record 29.

ORS 197.015(5) defines "comprehensive plan," in relevant part, as follows:

> "[A] generalized, coordinated land use map and

[3]The plan interpretation quoted in the text is found in a memorandum to the planning commission from the county counsel. This memorandum is incorporated by reference into certain findings (Record 24), which are themselves incorporated by reference into the challenged order. Record 12.

> policy statement of the governing body of a local government that interrelates all functional and natural systems and activities relating to the use of lands, including but not limited to sewer and water systems, transportation systems, educational facilities, recreational facilities, and natural resources and air and water quality management programs. * * *" (Emphases added.)

Under ORS 197.175(2)(b) and Goal 2 (Land Use Planning), local government land use regulations are required to be consistent with and adequate to implement acknowledged comprehensive plans. Accordingly, we must determine whether the county's acknowledged comprehensive plan (1) requires that the subject property be treated as a County Park, subject to the requirements of plan Recreational Policy 6, as argued by petitioners; or (2) simply describes the county parks existing at the time of acknowledgment, without placing limitations the county's ability to put those lands to other uses, as interpreted by the county in the challenged decision.

This Board is required to defer to a local governing body's interpretation of its own enactment, unless that interpretation is contrary to the express words, purpose or policy of the local enactment or to a state statute, statewide planning goal or administrative rule which the local enactment implements. ORS 197.829; Clark v. Jackson County, 313 Or 508, 514-15, 836 P2d 710 (1992). Here, the express language of the plan refers to the subject 240 acres as part of a county park.

In addition, the County Parks section of the Recreational Needs chapter of the acknowledged plan clearly implements Goal 8 (Recreational Needs). Goal 8 requires a local government to plan for "meeting [its recreational] needs, now and in the future," "in such quantity, quality and locations as is consistent with the availability of the resources to meet such requirements." Once a county has inventoried particular property as a county park available to meet its present and future recreational needs and adopts a plan policy requiring such property to be designated and zoned for recreational use, and the plan is acknowledged on that basis, it is inconsistent with Goal 8 to interpret the plan to allow changing the designation and zoning of that property to a non-recreational use without amending the plan text and demonstrating that the amended plan remains in compliance with Goal 8.

The county believes that, despite the language in its plan, it effectively changed the use of the subject 240 acres by adopting the 1992 order. However, there is no dispute that the 1992 order was adopted pursuant to ORS 275.320 and was not adopted as a postacknowledgment plan amendment. ORS 275.320, which allows a county to designate real property it acquires as "county forests, public parks or recreational areas," deals with a county's proprietary power to manage county-acquired land. See Tillamook Co. v. State Board of Forestry, 302 Or 404, 415, 730 P2d 1214

(1986). It is followed by provisions which establish limitations on sale, conveyance or exchange of county properties set aside as county forests, public parks or recreational areas under ORS 275.320, or of products from such properties. ORS 275.330 to 275.340. Nothing in ORS 275.320 indicates the "designation" of county-acquired real property referred to therein is intended to supersede the comprehensive land use planning process established under ORS ch 197, and we do not believe it does.

Because the acknowledged plan inventories the subject property as a county park for planning and zoning purposes, it must be treated as a county park for such purposes, until the plan is amended to provide otherwise. Furthermore, because plan Recreational Policy 6 requires county parks to be designated Community Service and zoned CS-R, the challenged plan and zoning map amendments are prohibited by law and must be reversed.[4]

B. Vacation Statute

Petitioners contend the 1970 order dedicates the subject property to public park use, and that dedication was recorded in the county deed records. According to petitioners, once such a dedication has been made, the public's right to use the subject property as a park can be

[4]We address the remainder of petitioners' arguments under these assignments of error only to the extent they are separate from the issue of whether the subject property is properly viewed as a county park or county forest.

eliminated only through a vacation of the dedication pursuant to ORS 368.326 et seq. Petitioners argue the process leading to the challenged decision, and the decision itself, do not comply with the statutory requirements for vacation of the dedication.

We agree with the county that nothing in the challenged decision purports to effect a vacation of the 1970 dedication of Carcus Creek Park to "public use." Record 62. Therefore, any failure of the decision to comply with the statutory requirements for such a vacation does not provide a basis for reversal or remand. In addition, we note the Forest Resource designation and PF-76 zone permit parks as a conditional use. CCZO 503.3. Therefore, the challenged plan and zoning map amendments are not inherently inconsistent with any existing dedication of the subject property for public use as a park.[5]

This subassignment of error is denied.

The first and third assignments of error are sustained, in part.

SECOND ASSIGNMENT OF ERROR

Petitioners contend the members of the board of

[5]Although the county concedes the subject property remains dedicated to "public use" until that dedication is vacated pursuant to ORS 368.326 et seq, the county disagrees with petitioners that the dedication is specifically for public use as a park. Because petitioners' argument provides no basis for reversal or remand, regardless of whether the subject property is dedicated to public use in general or to public use as a park, we do not resolve this issue.

commissioners, the property owner and applicant in the proceeding below, prejudged the subject application. Petitioners argue the record shows that on June 9, 1993, only six days after the subject zone change application was filed, the board of commissioners approved an order to initiate proceedings to sell the subject property. Supp. Record 11. Petitioners further argue the minutes of the meeting at which this resolution was approved contain a statement by the county counsel that unless a zone change is approved, the property would not be saleable. Id. According to petitioners, these facts are sufficient to demonstrate that the board of commissioners impermissibly prejudged the application. Heiller v. Josephine County, 23 Or LUBA 551, 554 (1992).

In a long line of opinions following Fasano v. Washington Co. Comm., 264 Or 574, 507 P2d 23 (1973), we have held that parties in a quasi-judicial land use proceeding are entitled to an impartial decision maker -- i.e. a decision maker that is not biased and has not prejudged the merits of the application. We have also frequently stated the burden is on petitioners to demonstrate the decision maker was biased or prejudged the application and did not reach its decision by applying applicable standards to the evidence and arguments presented. Heiller v. Josephine County, supra; Schneider v. Umatilla County, 13 Or LUBA 281, 283-84 (1985).

The fact that a local government is the owner of the subject property and the applicant for a land use decision does not, in itself, mean the local government decision maker is partial and preclude the local government decision maker from making a decision on its own application. Waite v. Marion County, 16 Or LUBA 353, 357 (1987); Gordon v. Clackamas County, 10 Or LUBA 240, 245 (1984). To hold otherwise would mean that local governments could never change the use of local government-owned property, except in the context of a legislative decision affecting large portions of the local jurisdiction.

In this case, the acknowledged plan and CCZO require the board of commissioners to make the final decision on adopting the challenged plan and zoning map amendments. Plan Administrative Procedures Policy 5.C; CCZO 1502.1.B. The record shows the board of commissioners believed (erroneously) that by adopting the 1992 order, pursuant to ORS 275.320, it had effectively changed the use of the subject 240 acres, for land use planning purposes, from county park to county forest.[6] The challenged decision also indicates the board of commissioners interprets the CS-R zone not to allow commercial forestry management, an interpretation well within its discretion under ORS 197.829 and Clark v. Jackson County, supra. Record 24. At about

[6]We explain in the preceding section why that belief was erroneous.

the same time the board of commissioners filed the subject application for a zone change from CS-R to PF-76, it considered whether the county would obtain more revenue from the subject property by managing it for timber production or selling it. Supp. Record 11. The board of commissioners decided it would be more beneficial to the county to sell the property and adopted an order initiating the sale. Id.

We conclude the record shows the board of commissioners mistakenly believed the 1992 order changed the allowed use of the subject property for planning and zoning purposes, and that the board of commissioners' determinations in the challenged decision concerning compliance with applicable standards were based on this erroneous premise. We do not believe this is the equivalent of showing the board of commissioners prejudged the application and did not reach its decision by applying the applicable standards to the evidence and arguments presented.

The second assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

ORS 215.503(2)(a) provides:

> "All legislative acts relating to comprehensive plans, land use planning or zoning adopted by the governing body of a county shall be by ordinance."

The challenged decision is an order. Petitioners argue that under the above statute, the county may not amend its comprehensive plan and zoning maps by an order.

The county argues that because the challenged decision

affects only one property, it is quasi-judicial rather than legislative and, therefore, is not a "legislative act" subject to ORS 215.503(2)(a).

The challenged decision is quasi-judicial in nature, as it satisfies all three factors for identifying a quasi-judicial decision set out in Strawberry Hill 4-Wheelers v. Benton Co. Bd. of Comm., 287 Or 591, 602-03, 601 P2d 769 (1979). We agree with the county that ORS 215.503(2)(a) applies only to legislative decisions adopting or amending comprehensive plans and zoning ordinances. Petitioners cite no other basis for their argument that the challenged decision cannot amend the county's comprehensive plan and zoning ordinance by order.

The fourth assignment of error is denied.

The county's decision is reversed.