

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39

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

ELIZABETH ANDERSON,)
)
Petitioner,)
)
vs.)
)
CITY OF SHADY COVE,)
)
Respondent,)
)
and)
)
JAMES C. SHIELDS,)
)
Intervenor-Respondent.)

LUBA No. 96-183
FINAL OPINION
AND ORDER

Appeal from City of Shady Cove.

Elizabeth Anderson, Shady Cove, filed the petition for review and argued on her own behalf.

No appearance by respondent.

James C. Shields, Shady Cove, filed the response brief and argued on his own behalf.

GUSTAFSON, Referee; HANNA, Chief Referee, participated in the decision.

REVERSED 04/23/97

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

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the city's adoption of a zone
4 change.

5 **MOTION TO INTERVENE**

6 James Shields, the applicants' agent below, moves to
7 intervene on the side of respondent. There is no opposition
8 to the motion, and it is allowed.¹

9 **FACTS**

10 The applicants before the city filed an application to
11 change the zoning designation of two contiguous parcels
12 totaling approximately 7 acres, from R-1-20 to R-1-10. The
13 applicants propose to develop the subject property, along
14 with an adjacent parcel, with a residential planned unit
15 development. No development application has yet been
16 submitted to the city for approval.

17 After conducting public hearings on the zone change
18 request, the city planning commission denied the
19 application, issuing a "final order of denial." The
20 applicants appealed that denial to the city council, which
21 set the matter for an appeal hearing. Notice of the appeal
22 hearing was provided to surrounding property owners.
23 Because the planning commission had conducted a public

¹In this appeal, intervenor represents only himself, and not the local applicants.

1 hearing on the application, the city's code required that
2 the appeal hearing be based on the record established during
3 the planning commission hearing. However, at the
4 commencement of the appeal hearing, the city council voted
5 to treated its hearing as a "legislative" proceeding to
6 amend the zoning on the subject property. Accordingly, the
7 city council treat the planning commission's decision as a
8 "recommendation" to the city council rather than a final
9 decision, and the hearing was held de novo. At that
10 hearing, the city council then accepted new evidence from
11 the applicant in support of the zone change. Following the
12 hearing, the record was left open for seven days for
13 additional new evidence, and an additional seven days for
14 the applicant to respond to any additional new evidence. On
15 the last day of the first seven-day period, the applicant
16 submitted new evidence, to which opponents were precluded
17 from responding.

18 On the date of the city council hearing to render a
19 decision on the application, the mayor pro-tem visited the
20 subject property with the applicants. At the hearing, after
21 an opponent raised the issue of the site visit, the mayor
22 pro-tem acknowledged the visit and stated that the purpose
23 was "to properly understand the site in question, and to
24 make an informed vote." Record 23. No opportunity was
25 provided for hearing participants to question the mayor pro-
26 tem on the scope or substance of the site visit. At that

1 hearing, the city council approved the application.

2 Petitioner appeals that approval.

3 **FIRST ASSIGNMENT OF ERROR**

4 Petitioner asserts the city council erred by treating
5 the application that led to the challenged decision as
6 legislative, and by converting the proceeding that led to
7 the decision from an appeal of the planning commission's
8 final order of denial on a quasi-judicial application to a
9 review of a planning commission recommendation in a
10 legislative proceeding. Intervenor responds, essentially,
11 that since the planning commission recognized that the
12 proposed development would have an impact beyond the
13 boundaries of the subject property, it should have processed
14 the application as a legislative proceeding, and that,
15 therefore, the city committed no error in recognizing the
16 application as "legislative" rather than "quasi-judicial."
17 Intervenor further argues that the city council's process
18 provided all the procedural protections of ORS 197.763, so
19 any error in treating the application as legislative rather
20 than quasi-judicial was harmless.

21 The city's development code, Ordinance 111-1, provides,
22 in relevant part:

23 "26.2 Initiation of Action

24 "A. A 'legislative' amendment to the text of
25 the comprehensive Plan or a land use
26 regulation may be initiated by the City
27 Council or the Planning Commission.

1 "B. A 'quasi-judicial' amendment to the
2 Comprehensive Plan Map or Zoning Map, as
3 it affects a specific property or area,
4 may be initiated by the Planning
5 Commission, City Council, or by a
6 property owner or his authorized agent.

7 " * * * * *

8 "26.4 Major or Legislative Amendments

9 "A. Major or legislative amendments are
10 those which may have widespread and/or
11 significant impact on the neighborhood
12 or community beyond the limits of the
13 specific property. A major amendment
14 may also involve a qualitative change of
15 land use or a special change affecting a
16 large area or a number of properties.

17 "B. Major or legislative amendments require
18 at least one public hearing before the
19 Planning Commission. If approved by the
20 Commission, the City Council will also
21 conduct at least one hearing prior to
22 making the final decision.

23 "26.5 Minor Amendments

24 "A. Minor or quasi-judicial amendments to
25 the Comprehensive Plan or Zoning Map are
26 those which involve one parcel or a
27 small group of parcels and which will
28 not have any significant impact on other
29 lands.

30 "B. Minor amendments require at least one
31 public hearing before the Planning
32 Commission. If approved by the
33 Commission, the City Council will also
34 conduct at least one hearing prior to
35 making the final decision. If denied by
36 the Planning Commission, the applicant
37 may appeal that decision to the City
38 Council in accordance with the City's
39 appeal procedures.

1 "* * * * *

2 "27.3 Action on the Appeal

3 "* * * * *

4 "B. In accepting public testimony at the
5 public hearing, the City Council shall
6 allow all parties to speak and present
7 their arguments, may permit others to
8 speak, at the discretion of the
9 chairperson, and shall also review the
10 record of the previous decision.

11 "C. If there is significant new information
12 that was not available at the time of
13 the appealed decision, or if there are
14 special circumstances or unusual
15 characteristics of the property
16 involved, then the City Council may
17 determine that the original decision was
18 correct, but that the matter should be
19 remanded to staff or another body to
20 reconsider the request and new
21 information.

22 "* * * * *

23 "F. When the original decision followed a
24 public hearing, the appeal of that
25 decision shall be heard and considered
26 only on the record of that decision and
27 testimony and arguments shall be
28 confined to that record. If the
29 decision being appealed did not involve
30 a public hearing, the record shall
31 consist of the application materials,
32 the record of the decision, supporting
33 documentation from both staff and the
34 applicant prior to the decision, and the
35 appellant's appeal statements."
36 (Emphasis supplied.)

37 The threshold question in this case is whether the city
38 council could, on its own initiative, decide that the
39 planning commission should have treated the application as

1 legislative, and thereby convert an on-the-record hearing on
2 a quasi-judicial appeal into a de novo hearing on a planning
3 commission legislative recommendation. The answer is,
4 unequivocally, no. At the very least, the procedures used
5 by the city council in considering the applicant's appeal
6 violated the city's code requirements in numerous respects.
7 For example, the city's code clearly states that a
8 legislative proceeding can be commenced only by the planning
9 commission or the city council. Intervenor could not file
10 an application to initiate a legislative proceeding, and in
11 fact did not attempt to do so in this case.² In addition,
12 the code does not provide for "converting" an appeal on a
13 planning commission final order on a quasi-judicial
14 application into a legislative proceeding. Finally, the
15 city's code requires that appeals of planning commission
16 final decisions where a public hearing has been held must be
17 heard on the record. The code does not allow for a de novo
18 review of such proceedings, as was done in this case.

19 The real question in this appeal is not whether the
20 city violated its code, but rather the consequences of those
21 violations. That answer turns on whether the city's errors
22 are procedural or substantive. The Court of Appeals

²Whether the proceeding that led to the challenged decision should have been characterized by the planning commission as legislative, and thus, whether the planning commission erred in accepting the application from the applicants is not relevant to this proceeding, and we do not decide that question.

1 discussed the distinction between procedural and substantive
2 errors in Smith v. Douglas County, 92 Or App 503 (1988),
3 aff'd 308 Or 191 (1989), where the county had violated its
4 procedural requirements for conduct of an appeal hearing by
5 considering issues not raised in the opponents' notice of
6 appeal. The court stated:

7 "Petitioner assigns as error LUBA's holding that
8 the Board's [of Commissioners] violation of its
9 scope of review pursuant to [Land Use and
10 Development Ordinance] LUDO §2.700(2) was a
11 procedural, not a substantive error, and that,
12 therefore, [the Board] could consider the issue on
13 remand. The pertinent provision of the county's
14 ordinances provides:

15 "Review by the Board shall be a de novo
16 review of the record limited to the grounds
17 relied upon in the notice of review * * * if
18 the review is initiated by such notice.'
19 LUDO §2.700(2).

20 "The issue of compatibility was not raised by the
21 opponents in their notice of review to the Board.
22 Therefore, we conclude, as did LUBA, that the
23 Board violated the ordinance and exceeded its
24 scope of review in considering the compatibility
25 issue. Although the Board, in enacting the
26 ordinances, could have reserved to itself the
27 authority to consider issues beyond those
28 identified in a notice of review, it did not do
29 so.

30 "We hold, however, that LUBA erred in concluding
31 that the error was procedural rather than
32 substantive. LUBA characterized the Board's
33 action as a failure to follow adopted appeal
34 procedures and, as such, held that it was a
35 procedural error. The propriety of the Board's
36 action, however, does not concern how the Board
37 exercised its authority but, rather whether the
38 Board had authority to do what it did. In
39 considering the compatibility issue, the Board

1 exceeded its scope of authority as defined in its
2 ordinance and, consequently, acted inconsistently
3 with its land use regulations. See ORS
4 197.835(3). That is a substantive error. OAR
5 661-10-071(1)(c) provides that LUBA 'shall reverse
6 a land use decision if the decision 'violates a
7 provision of the applicable law and is prohibited
8 as a matter of law.' See ORS 197.835(1). The
9 Board's violation of its ordinance required a
10 reversal. LUBA erred in holding that the Board
11 can consider the compatibility issue on remand."
12 Id. at 506-07. (Emphasis in original omitted.)

13 As was the case in Smith v. Douglas County, in this
14 case the city's error was substantive. The city council
15 exceeded its authority when it converted a quasi-judicial
16 appeal into a legislative proceeding and approved a
17 legislative zone change based on that quasi-judicial appeal.
18 The city's decision is prohibited as a matter of law.
19 Therefore, the city's decision must be reversed.

20 The first assignment of error is sustained.

21 Because the city's decision must be reversed based on
22 the city council's lack of authority to process the
23 application as it did, we do not reach petitioner's
24 additional assignments of error that challenge the city's
25 compliance with provisions of ORS 197.763 and the merits of
26 the city's decision.

27 The city's decision is reversed.