BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MAURIZIO VALERIO, ALLISON VALERIO, PHILIP WHITLEY, JUDY WHITLEY, RONALD LAY, ALOHA LAY and KEVIN MCNAMARA,	)	LUBA No. 97-150
Petitioners,	)	FINAL OPINION
vs.	)	AND ORDER
UNION COUNTY,	)	
Respondent.	)	

Appeal from Union County.

Timothy J. Sercombe, Portland, filed the petition for review on behalf of petitioners. With him on the brief was Preston Gates & Ellis.

No appearance by respondent.

LIVINGSTON, Administrative Law Judge; GUSTAFSON, Chief Administrative Law Judge; HANNA, Administrative Law Judge, participated in the decision.

REMANDED 10/27/97

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

Opinion by Livingston.

NATURE OF THE DECISION

Petitioners appeal a county board of commissioners' decision adopting Ordinance No. 1997-7, which amends the county comprehensive plan and zoning ordinance.

FACTS

Ordinance No. 1997-7 adopts text and map changes to the county comprehensive plan and the county Zoning, Partition and Subdivision Ordinance (ZPSO). The ordinance amends the plan to create a new land use category, "Small Lot Residential," and applies the designation to approximately 185 acres (the subject area), previously designated "Rural Center" and zoned "R-1 [one-acre] Rural Center." The ordinance amends the ZPSO to create a new "R-3 Small Lot Residential Zone" and applies that zoning to the subject area.

Prior to the adoption of Ordinance No. 1997-7, the subject area was subject to a committed exception to Goal 3, based on abandoned settlements in two small parts of the subject area: Medical Springs, the site of a former health resort and hotel; and Pondosa, the site of a former timber mill and related structures, whose use was discontinued in the 1950s. The Medical Springs site now includes one residence and a former store, post office, swimming pool and motel, which have not been open since 1980. The Pondosa site contains only a former hotel, which is used as a

residence; a general store; and outbuildings.

The surrounding area is agricultural, comprising parcels ranging in size from 40 to 876 acres, and is used for grazing and hay production. The closest cities or urbanized areas are LaGrande (33 miles away), Baker City (24 miles away), and Union (20 miles away).

The decision to adopt Ordinance 1997-7 followed our remand in McNamara v. Union County, 28 Or LUBA 396 (1994), of a minor partition approval. The county decided to reevaluate the existing R-1 zoning. After several community forums held in 1996, it became evident there was no community consensus: some property owners wished to retain the one-acre minimum lot size, while others advocated a ten-acre minimum. County staff then made a proposal which "combine[d] several recommendations discussed by area residents." Record 51. The county initiated the comprehensive plan and ZPSO amendments, and proposed rezoning about 85 acres of the subject area, located between Medical Springs and Pondosa, to R-3 (Farm Residential Zone, 10-acre minimum lot size). The county also proposed to amend the existing R-1 Rural Center zoning, to modify the development standards as they applied to the remaining 100 acres of the subject area, in part to accommodate steeply sloped areas that are inappropriate for one-acre lots.

The county's notice to the Department of Land Conservation and Development (DLCD) under ORS 197.610,

listed only Goal 2 as applicable to the proposed amendments to the plan text and map and the ZPSO. Record 53. The county's notice of public hearing stated that the applicable land use regulations "are found in Articles 6, 8 and 23 of the [ZPSO]." Record 55.

After a hearing on February 24, 1997, the county planning commission recommended approval of the proposed amendments to the county board. The county board held a hearing without additional public notice on April 2, 1997, and after hearing public testimony concerning appropriate lot sizes in the subject area, decided to conduct a site visit on April 15, 1997, and continue their discussion of the proposal on April 30, 1997. Without disclosing their impressions of the site visit, and without permitting additional testimony, the county board concluded that the 10-acre/1-acre proposal was an inadequate compromise, and asked staff to "prepare a three-acre zone" for all of the subject area. Record 31.

A new notice of public hearing was given, which stated that the applicable land use regulations "are found in Articles 6.00 and 23.00 of the [ZPSO]." Record 26. After the hearing, on July 16, 1997, at which testimony was heard both for and against the proposed R-3 Small Lot Residential Zone, the county board voted to adopt the proposed amendments to the plan text and map and the ZPSO. The decision was reduced to writing and formally adopted as

Ordinance 1997-7 on July 16, 1997.[1] The same day, the county gave DLCD the notice of adoption required by ORS 197.615. The notice of adoption indicated only a land use regulation amendment, not a comprehensive plan text or map amendment.

This appeal followed.

FIRST ASSIGNMENT OF ERROR

As petitioners state, the adoption of Ordinance No. 1997-7 arguably has both legislative and quasi-judicial aspects. Nevertheless, we conclude that it is essentially legislative. Our determination is based upon consideration of the three factors identified by the Oregon Supreme Court in Strawberry Hill 4-Wheelers v. Benton Co. Bd. of Comm., 287 Or 591, 602-03, 601 P2d 769 (1979), and addressed by the following three questions:

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?"

The more definitely these questions are answered in the negative, the more likely the decision under consideration is a legislative land use decision. The answer to each of

[1]The decision also changed the abbreviation for the Farm Residential Zone from R-3 to R-10 and the abbreviation for the Forest Residential Zone from R-4 to R-10, to reflect their minimum acreage requirements. Record 2.

the questions must be weighed; no single answer is determinative. Estate of Paul Gold v. City of Portland, 87 Or App 45, 740 P2d 812, rev den 304 Or 405 (1987).

Since the process of considering the amendments ultimately adopted in Ordinance 1997-7 could have been terminated by the county at any time without any action, the process was not "bound to result in a decision." The first question must therefore be answered in the negative.

The second factor is present to some extent in nearly all land use decisions, which almost invariably apply preexisting criteria to concrete facts. See Churchill v. Tillamook County, 29 Or LUBA 68, 71 (1995); Friends of Cedar Mill v. Washington County 28 Or LUBA 477, 482 (1995). In this case, which involves an amendment to the county's plan text and map and the county's zoning ordinance and zoning map, the application of the Statewide Planning Goals and local comprehensive plan was prompted by a specific proposal which concerns the subject area.

The third question must be answered in the negative. Not only do the text amendments to the county's plan and zoning ordinance potentially affect a variety of factual situations and people, but the rezone affects 185 acres in a number of different ownerships. Parcels outside the subject area may be indirectly affected. Therefore, the amendment cannot be viewed as "directed at a closely circumscribed factual situation or a relatively small number of persons."

Because only the second question can be answered in the affirmative, we conclude the decision to adopt Ordinance 1997-7 was a legislative land use decision.

Petitioners contend that regardless of the nature of the decision, the failure of the county to apply the Statewide Planning Goals to the proposed amendments to the plan text and map requires remand. Petitioners specifically identify Goal 3 (Agricultural Lands), Goal 5 (Open Spaces, Scenic and Historic Areas, and Natural Resources), Goal 11 (Public Facilities and Services), Goal 12 (Transportation) and Goal 14 (Urbanization) as applicable.

It is well-established that a plan amendment, including a plan map amendment, must comply with the goals. ORS 197.174(2)(a), 197.835(6); 1000 Friends of Oregon v. Jackson County, 79 Or App 93, 98, 718 P2d 753 (1986), rev den 301 Or 445 (1987); Ludwick v. Yamhill County, 72 Or App 224, 231, 696 P2d 536, rev den 299 Or 443 (1985). The fact that the challenged decision is a legislative decision does not affect this requirement. Davenport v. City of Tigard, 22 Or LUBA 577, 581 (1992). Although no statute or court case specifically requires that legislative comprehensive plan amendments be supported by findings, findings may be warranted nevertheless to allow a reviewing body to determine whether the amended plan remains internally consistent and is consistent with the Statewide Planning Goals. Von Lubken v. Hood River County, 22 Or LUBA 307

(1991). In reviewing the county's legislative amendments to its comprehensive plan text, we do not require the detailed findings required by ORS 215.416(9) for permits and required under appellate court decisions for other quasi-judicial land use decisions. However, even where a challenged plan amendment is legislative, Goal 2 requires a local government to explain why the amendment complies with applicable Statewide Planning Goals, either in findings or somewhere in the record.[2]

Petitioners are correct that the proposed plan text and map amendments appear to allow uses not permitted by the earlier Goal 3 exception. If that is the case, a new Goal 3 exception is required. OAR 660-04-018(3); Leathers v. Marion County, 144 Or App 123, 130, 925 P2d 148 (1996). We do not see that one was taken.

Even if a Goal 3 exception is not required, there was testimony below that the plan text and map amendments may have substantial impacts on existing agricultural lands and practices See Record 19. Petitioner contends these may require the application of Goal 3. Petitioner also contends Goal 5 and the new Goal 5 rule (OAR 660, division 23) may apply. On remand, the county must either explain why these goals are satisfied or else why they do not apply.

---

[2]LUBA may also rely on arguments and citations to the record by responding parties. Andrews v. City of Brookings, 27 Or LUBA 39, 43 (1994). However, in this case the county has not appeared.

Goal 11 requires a "timely, orderly and efficient arrangement of public facilities and services to serve as a framework for urban and rural development." There is testimony in the record that sewer, water, fire protection, streets and other services are lacking in the subject area. Record 20, 25. As petitioners maintain, the county must determine if Goal 11 is applicable, and if so, if it is satisfied.

Testimony in the record suggests that there is an insufficient road system to allow for the proposed level of residential development. Record 20, 42, 43. Because the plan text and map amendments may affect a transportation facility, petitioners are correct that the county must address Goal 12 and OAR chapter 660, division 12 (the Transportation Planning Rule), in particular OAR 660-12-060.

There is no clear line between urban and rural uses, as these terms are used in Goal 14. 1000 Friends of Oregon v. LCDC (Curry County), 301 Or 447, 477, 724 P2d 268 (1986). However, as petitioners point out, the proposed three-acre minimum density either is or approaches being urban in nature. See Department of Land Conservation and Development v. Fargo Interchange Service Dist., 129 Or App 447, 453, 879 P2d 224 (1994); Brown v. Jefferson County, ___ Or LUBA ___ (LUBA Nos. 96-091, 96-095, August 18, 1997), slip op at 33; Kaye/DLCD v. Marion County, 23 Or LUBA 452, 462-64 (1992); Hammack & Associates, Inc. v. Washington County, 16 Or LUBA

75, 80, aff'd 89 Or App 40 (1987).

By definition, all land outside an acknowledged urban growth boundary and not the subject of an exception to Goal 14 is rural land. Curry County, 301 Or at 498-501. Notwithstanding that Ordinance 1997-7 would actually reduce the allowed density in the subject area from one acre to three acres, a proposed plan and text amendment must comply with all of the Statewide Planning Goals, including Goal 14, at the time of the amendment, or an exception to Goal 14 must be taken. Churchill, 29 Or LUBA at 75. Thus the county must either demonstrate that Ordinance 1997-7 complies with Goal 14 or take a Goal 14 exception.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioners contend that in adopting Ordinance 1997-7, the county board did not address the standards in ZPSO 23.05.2, which states:

> "The burden of proof [at a planning commission and county board of commissioners' hearing] is placed on the applicant seeking an action pursuant to the provisions of this ordinance. Essential to presenting proof is the applicant['s], or an authorized agent['s] attendance at the prescribed hearing for the action unless otherwise prescribed by the hearing body. Unless otherwise provided for in this ordinance, such burden shall be to prove:
>
> "A. That granting the request is within the public interest, taking into consideration that the greater the departure from the present land use patterns, the greater the burden on the applicant.

"B. The proposed change is compatible with the Land Use Plan policies or LCDC Goals and Guidelines."

The county initiated the proposed amendments under ZPSO 23.01.[3] Petitioners assert that the county did not determine what was in the "public interest," but instead attempted a compromise "to advantage the private interests of a few persons." Petition for Review 10.

Petitioners' argument does not address a threshold issue: the code appears to make a distinction between the county, which itself "initiates" a plan or code amendment, and a property owner (or authorized agent), who "initiates by application" and is, therefore, an "applicant," as that term is used in ZPSO 23.05.2. The public interest standard stated in ZPSO 23.05.2.A. applies only if the county is an applicant. If the county concludes on remand that it is an applicant, it must consider the public interest standard stated in ZPSO 23.05.2.A. and determine that it has met its burden.

Petitioners contend next that the county failed to address certain land use policies stated in its comprehensive plan. We agree that the record does not

---

[3]ZPSO 23.01 states:

"An amendment to the text or map of the Union County Land Use Plan or the text or map of this or other land use regulations or adoption of a new land use regulation may be initiated by the Planning Commission, by the County Court, or by application from a property owner(s) or his authorized agent."

demonstrate the county board considered and applied the policies identified by petitioners to the proposed plan text and map amendments.[4] ZPSO 23.05.2.B requires that it do so.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

Petitioners contend the notices of hearings, quoted above, were neither sufficiently complete, in that they failed to mention the Statewide Planning Goals as standards, nor sufficiently specific, in that they referred to entire chapters of the ZPSO rather than to specific standards. Petitioners argue that their substantial rights were prejudiced because the county's failure to give proper notice under ORS 197.763(3)(b) left them unprepared to focus their testimony on the relevant criteria.

ORS 197.763 states the notice requirements and hearing procedures that apply to quasi-judicial land use hearings. Because we conclude the adoption of Ordinance 1997-7 was a legislative land use decision, ORS 197.763 does not apply.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners contend the failure of certain county commissioners to place on the record the substance of their site observations prejudiced petitioners' substantial rights

[4]These include Policies III.A.4, III.A.5, V.B.1, V.B.2, V.B.6, XIII.B.2, XIV.B.3 and XIV.B.11.

and requires reversal or remand under ORS 197.835(9)(a)(B). The record makes clear the view of the site played a part in the county board's deliberations. Record 31.

In McNamara, 28 Or LUBA at 398-99, we held that the failure of the county commissioners to place on the record the substance of their site observations and to provide the parties an opportunity to rebut this evidence was a procedural error that prejudiced the petitioners' substantial rights. However, McNamara itself and the cases upon which it relies, including Angel v. City of Portland, 21 Or LUBA 1, 8 (1991), Jessel v. Lincoln County, 14 Or LUBA 376, 381 (1986); and Friends of Benton Cty v. Benton Cty, 3 Or LUBA 165, 173 (1981), all address quasi-judicial hearings. Petitioners provide no reviewable argument that there is an obligation at legislative hearings to disclose the substance of site observations and to provide an opportunity for rebuttal.

The fourth assignment of error is denied.

The county's decision is remanded.