BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DAVID DeBELL,
Petitioner,

vs.

DOUGLAS COUNTY,
Respondent,

and

TODD B. BALLOU, LISA M. BALLOU,
THOMAS J. MAURER and TAMMY E. LENZ-MAURER,
Intervenors-Respondent.

LUBA No. 2001-033

FINAL OPINION
AND ORDER

Appeal from Douglas County.

Bill Kloos, Eugene, represented petitioner.

Paul Meyer, Roseburg, represented respondent.

James R. Dole, Grants Pass, represented intervenors-respondent.

BRIGGS, Board Chair; BASSHAM, Board Member; HOLSTUN, Board Member, participated in the decision.

DISMISSED 04/18/2001

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

Opinion by Briggs.

NATURE OF THE DECISION

Petitioner appeals a decision by the county approving an amendment to the county comprehensive plan to designate a significant aggregate site.

FACTS

The subject property is located in the northeast quarter of Township 26 N., Range 3 W., W.M., Section 9. Intervenors-respondent (intervenors) own the subject property and mine basalt on a parcel immediately to the east of the subject property. In October 1999, intervenors approached the county to discuss expanding their gravel operations to the west. In reviewing the plan maps and the description of significant aggregate resources contained in the county's comprehensive plan, a discrepancy was discovered between the section number listed in the comprehensive plan and the section number listed in the "Mineral Sites Inventory," a supplemental document to the comprehensive plan. The comprehensive plan listed the site as being located in Township 26 N., Range 3 W., Section 4, and the Mineral Sites Inventory listed the site as being located in Township 26 N., Range 3 W., Section 9. Based on other written descriptions of the site, and an aerial photograph, the county concluded that the correct reference was to Section 9.

As a result, the county adopted an amendment to the comprehensive plan on December 22, 1999, whereby the reference to the subject property in the comprehensive plan was changed to reflect the section number that corresponded with the Mineral Sites Inventory. The amendment was adopted in an ordinance that included a number of unrelated housekeeping and general policy amendments to the comprehensive plan.

In the fall of 2000, intervenors applied for a conditional use permit to mine the subject property. At a hearing on the conditional use permit application held on November 30, 2000, some discussion occurred between county staff and other participants in the hearing as to whether the comprehensive plan correctly identified the parcel. During the

November 30, 2000 hearing, the county attorney explained that there had been an amendment to the comprehensive plan in 1999 to correspond with the section listed in the Mineral Sites Inventory and, therefore, the reference to Section 9 in the staff report was correct.

On February 7, 2001, petitioner filed a notice of intent to appeal the county's 1999 comprehensive plan amendment.

MOTION TO DISMISS

The county moves to dismiss this appeal, arguing that petitioner failed to timely file a notice of intent to appeal.[1] According to the county, petitioner appeared at the November 30, 2000 hearing, where county staff and others, including petitioner's lawyer, appeared and testified regarding the challenged amendment to the comprehensive plan. In an affidavit from a county planner, the planner stated that he saw petitioner at the hearing. The affidavit also attaches a copy of a sign-in sheet for the hearing, where petitioner signed up to testify before the planning commission regarding the conditional use permit application.[2] The county argues that petitioner's February 7, 2001 appeal to LUBA is untimely, because it was filed more than 21 days after petitioner learned of the challenged decision during the November 30, 2000 hearing.

In an opposing affidavit, petitioner concedes he was present at the November 30, 2000 hearing, and that he signed a roster indicating that he intended to testify regarding the conditional use permit application. However, he disputes that he obtained actual notice at the hearing that the county made a decision in December 1999 to amend the county's comprehensive plan to change the section reference for the site from section 4 to section 9.

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[1]Intervenors join in the motion.

[2]The county's motion to dismiss also argues that the challenged decision falls under one of the exceptions to the statutory definition of "land use decision" and, therefore, we do not have jurisdiction over this appeal. We need not and do not reach that argument.

Both the county's motion to dismiss and petitioner's response to the motion are premised on the idea that the 1999 decision made by the county was a quasi-judicial decision for which petitioner is entitled to notice under ORS 197.763(2)(a)(C) because he resides within 500 feet of the subject property. Because he was not given notice of the hearing, petitioner argues he has 21 days from the date he obtained knowledge of the 1999 decision to file a notice of intent to appeal to LUBA. ORS 197.830(3).[3] For the following reasons, we disagree with the parties that the December 1999 decision was a quasi-judicial decision, and that ORS 197.830(3) provides the applicable deadline for an appeal to LUBA.

The December 1999 decision by the county adopted changes to the comprehensive plan and other supporting documents to clarify and streamline review processes, as well as to correct typographical and other clerical errors. For example, the ordinance deletes an industrial reserve designation set out in the comprehensive plan, adds policies to the plan regarding unincorporated rural communities and amends policies of the cultural and historic resources inventory. It also amends maps within the plan regarding the designation of various properties. Thus, the county's decision can be described as a collection of discrete decisions, some of which, viewed individually, could be described as quasi-judicial. In such cases, whether the decision is properly viewed as legislative or quasi-judicial depends on its character as a whole, not the character of the constituent parts. *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516, 655 (1999), *aff'd as modified* 165 Or App 1, 994 P2d 1205

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[3]ORS 197.830(3) provides, in relevant part, that:

> "If a local government makes a land use decision without providing a hearing * * * or the local government makes a land use decision that is different from the proposal described in the of hearing to such a degree that the notice of the proposed action did not reasonably describe the local government's final actions, a person adversely affected by the decision may appeal the decision to [LUBA]:
>
> "(a) Within 21 days of actual notice where notice is required.
>
> "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

(2000); *Leonard v. Union County*, 24 Or LUBA 362, 368 (1992). Therefore, we review the entire ordinance according to the test set out in *Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 601 P2d 769 (1979). The *Strawberry Hill 4 Wheelers* test for determining whether a decision is legislative in nature requires consideration of three factors:

> "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?'" *Valerio v. Union County*, 33 Or LUBA 604, 607 (1997) (applying the considerations enumerated in *Strawberry Hill 4 Wheelers*).

The more definitely the questions are answered in the negative, the more likely the decision under consideration is a legislative land use decision. *Id*.

Under the first test, the process was not bound to result in a decision within any particular time frame. The amendments could have been postponed indefinitely, or not adopted at all. Second, at least parts of the decision did not apply preexisting criteria to concrete facts. As we stated above, much of the ordinance involved amendments to policies or changes to maps and inventories to update plan provisions. Finally, the decision involved everything from adding sites being considered for the National Register of Historic Places to eliminating a zoning designation. Generally speaking, the ordinance is not "directed at a closely circumscribed factual situation or a relatively small number of persons." *Id.* Therefore, the ordinance is a "legislative" decision.

The notice provisions of ORS 197.763(2) apply only to quasi-judicial decisions, and petitioner does not identify any statutory provision that requires that the county provide individual written notice to him of legislative decisions or hearings on such decisions. The challenged decision was adopted pursuant to ORS 197.610 through 197.625, after the county conducted a hearing. Under such circumstances, ORS 197.830(3) provides the applicable deadline to file a notice of intent to appeal. *See Orenco Neighborhood v. City of Hillsboro*,

135 Or App 428, 432, 899 P2d 720 (1995) (failure to provide notice of a hearing under local code provisions does not toll the time to appeal an amendment adopted pursuant to ORS 197.610 through 197.625.)

ORS 197.830(9) provides, in relevant part:

> "A notice of intent to appeal a land use decision * * * shall be filed not later than 21 days after the date the decision sought to be reviewed becomes final. A notice of intent to appeal plan and land use regulation amendments processed pursuant to ORS 197.610 to 197.625 shall be filed not later than 21 days after notice of the decision sought to be reviewed is mailed or otherwise submitted to parties entitled to notice under ORS 197.615. * * *"[4]

According to the record, the county mailed a copy of the adopted ordinance to the Department of Land Conservation and Development pursuant to ORS 197.615(1) on December 27, 1999, five days after the county board of commissioners adopted its decision. Petitioner does not argue that he is entitled to notice of the county's decision pursuant to ORS 197.615(2). *See* n 4. Because petitioner did not file his notice of intent to appeal within 21 days of the date the ordinance was mailed to the parties entitled to notice under ORS 197.615, petitioner's appeal is not timely.

This appeal is dismissed.

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[4]ORS 197.615 provides, in relevant part:

> "(1) A local government that amends an acknowledged comprehensive plan or land use regulation * * * shall mail or otherwise submit to the Director of the Department of Land Conservation and Development a copy of the adopted text of the comprehensive plan provision or land use regulation together with the findings adopted by the local government. The text and findings must be mailed or otherwise delivered not later than five working days after the final decision by the governing body. * * *
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> "(2)(a) On the same day that the text and findings are mailed or delivered, the local government also shall mail or otherwise submit notice to persons who:
>
> (A) Participated in the proceedings leading to the adoption of the amendment to the comprehensive plan or land use regulation * * *; [or]
>
> (B) Requested of the local government in writing that they be given such notice."