BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

OREGON CONCRETE AND AGGREGATE
PRODUCERS ASSOCIATION,
Petitioner,

vs.

CITY MOSIER,
Respondent.

LUBA No. 2002-166

FINAL OPINION
AND ORDER

Appeal from City of Mosier.

Todd Sadlo, Portland, filed the petition for review and argued on behalf of petitioner.

Daniel Kearns, Portland, filed the response brief and argued on behalf of respondent. With him on the brief was Reeve Kearns PC.

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

REMANDED 05/01/2003

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals Ordinance No. 136, which adopts legislative amendments to the City of Mosier Zoning Ordinance (MZO).

FACTS

A. The Quarries

Petitioner Oregon Concrete and Aggregate Producers Association is a statewide organization made up of "concrete, sand and gravel producers." Petition for Review 3. One of petitioner's members is Hood River Sand, Gravel and Redi-Mix, Inc. (HRSG&R). HRSG&R owns and operates a quarry that is located outside Mosier city limits, but inside the city's urban growth boundary (UGB).[1] The part of HRSG&R's quarry that is inside the city's UGB but outside the city's municipal limits is designated Industrial in the city's Comprehensive Plan and is subject to the city's Industrial zone.[2]

The Oregon Department of Transportation (ODOT) owns and operates a quarry that is located close to the HRSG&R quarry. Historically, both HRSG&R and ODOT have used what the parties refer to as a "haul road" that travels through a residentially zoned portion of the city to remove gravel from both quarries. ODOT owns the haul road and the approximately two acres of residentially zoned city property that it crosses to reach the nearby state highway that passes through the City of Mosier.

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[1] The parties apparently dispute whether a small part of this quarry is located inside city limits. Based on the current record we cannot resolve this dispute, but this factual uncertainty has no bearing on our decision.

[2] The area inside the city's UGB but outside the city's municipal boundary is referred to as the "urban growth area." The City of Mosier and Wasco County have entered an Urban Growth Area Joint Management Agreement, which applies to the urban growth area. Under that agreement, the city's comprehensive plan map and zoning map designations apply to property in the urban growth area. The county makes land use decisions for the urban growth area, but applies the city's substantive comprehensive plan and zoning requirements. The city's comprehensive plan map designates the entire urban growth area as "Industrial." City of Mosier Comprehensive Plan 37. We note that although both parties apparently agree that the urban area is zoned industrial, the City of Mosier Zoning map does not appear to apply a zoning designation to that area. City of Mosier Zoning Map (Response Brief App 24).

B. The Zoning History and Enforcement Actions

The city adopted the MZO in 1978, and it has been acknowledged by the Land Conservation and Development Commission (LCDC). Under the original MZO, aggregate mining in the industrial zone was a conditional use. In 1992, Wasco County granted HRSG&R conditional use approval to operate an aggregate mining operation in the urban growth area. In 1996, the county amended the MZO to prohibit "[a]ggregate resource extraction and processing sites" in the city's Industrial zone.[3] MZO 3.5(3). That prohibition has been carried forward in subsequent MZO amendments, including Ordinance No. 136.

Following the 1996 MZO amendment, the city initiated a local zoning enforcement action against the ODOT quarry. As previously noted, the portion of the haul road that is located within city limits is residentially zoned.[4] One part of the city's legal theory in its zoning enforcement action against ODOT was that the R-10 zone prohibits use of the haul road by trucks from ODOT's quarry. The city reached this conclusion via an interpretation of the MZO. The R-10 zone does not expressly allow aggregate resource extraction as a permitted or conditional use, and it does not expressly prohibit such activity. The city council interpreted the R-10 zone to prohibit aggregate resource extraction. The city council went further and interpreted the R-10 zone also to prohibit accessory uses to aggregate resource extraction, including use of the haul road by trucks for access to and from the ODOT quarry. On appeal to LUBA, we applied the deferential standard review that is required under ORS 197.829(1) and *Huntzinger v. Washington County*, 141 Or App 257, 261, 917 P2d 1051 (1996), and we rejected ODOT's argument that the city's interpretation of the R-10 zone to prohibit use of the haul road by quarry truck traffic was "clearly wrong." *ODOT v. City of Mosier*, 41 Or LUBA 73, 86 (2001).

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[3] The city contends that from that date forward "[HRSG&R]'s and ODOT's quarry operations were, at best, nonconforming [uses]." Respondent's Brief 6.

[4] The city has two residential zones, R-5 and R-10. The haul road passes through the R-10 zone.

The city also initiated an enforcement action against HRSG&R in Wasco County Circuit Court. The circuit court has granted the city's request for a preliminary injunction to enjoin HRSG&R's use of the haul road. The circuit court proceeding apparently is continuing to trial on HRSG&R's counter claims and has not yet resulted in a final judgment.[5]

C. The Local Proceedings Leading to the Challenged Ordinance

The city adopted a comprehensive revision of the MZO in 2001. At the end of 2001 the city initiated further revisions to the MZO. On September 18, 2002, as required by ORS 197.610, the city provided notice to the Department of Land Conservation and Development (DLCD) of its plan to adopt the MZO amendments.[6] Record 185. That September 18, 2002 notice stated that the initial public hearing would be held on November 7, 2002. In fact, the initial public hearing was held on November 6, 2002, and no public hearing was held on November 7, 2002. The minutes of the November 6, 2002 hearing indicate "[t]he hearing was closed." Record 95.[7] However, the city attorney was directed to "update the ordinances and [make them] available for public review at City Hall after November 10." Record 95-96. The minutes go on to state that the updated ordinances "will be considered for adoption at the November 20, 2002 Council meeting." Record 96.

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[5] The city attaches two circuit court orders from the circuit court enforcement proceeding to its brief and requests that we take official notice of those orders. Petitioner does not object to the request, and we take official notice of those orders.

[6] ORS 197.610(1) provides:

> "A proposal to amend a local government acknowledged comprehensive plan or land use regulation or to adopt a new land use regulation shall be forwarded to the Director of [DLCD] at least 45 days before the first evidentiary hearing on adoption. The proposal forwarded shall contain the text and any supplemental information that the local government believes is necessary to inform the director as to the effect of the proposal. The notice shall include the date set for the first evidentiary hearing. The director shall notify persons who have requested notice that the proposal is pending."

[7] The city contends that the November 6, 2002 hearing was not in fact closed, but rather continued to November 20, 2002.

Following the November 6, 2002 hearing, the city attorney prepared further revisions to the proposed MZO amendments. A new regulation, MZO 3.16, was included in those revisions.[8] The record includes two letters that were submitted to the city after the November 6, 2002 hearing, in opposition to the proposed MZO amendments, particularly MZO 3.16.[9]

The minutes of the November 20, 2002 city council hearing indicate that the letters referenced in note 9 "were read into the record." Record 99. The minutes simply indicate that there was "[d]iscussion of letters received" and that the "[c]ouncil concurred to keep [MZO] 3.16 in the ordinance."[10] *Id*. The city adopted the MZO amendments, including MZO 3.16, on November 20, 2002.[11] This appeal followed.

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[8] MZO 3.16 is at the heart of this appeal. It is set out below:

> "**3.16 – Access for non-residential uses on adjacent parcels.** Access for non-residential uses that are lawfully established on adjacent parcels may be allowed as a conditional use in either of the city's residential zones subject to the limitations of this section. Any use eligible for approval under this provision shall be limited to vehicular traffic associated with the normal activities of a lawful use on an adjacent parcel where the traffic is compatible and consistent with the residential uses. The situation envisioned by this authorization is where a non-residentially zoned parcel lacks direct and unrestricted vehicular access to the public right of way without passing through residentially zoned land. Uses not eligible for such a permit and which could not be served by routing traffic through a residential zone include any use that generates traffic that is not compatible and consistent with uses allowed in the residential zones. *Uses not eligible for this permit include heavy industrial uses, aggregate resource extraction, rock hauling and related truck traffic because the traffic generated by these activities is not compatible or consistent with residential uses*. The city has full authority to impose any conditions required to ensure that traffic allowed as a use under this section is compatible and consistent with the uses allowed in the residential zones. In the event the city determines that the request cannot be conditioned to insure compatibility and consistency with uses allowed in the residential zones, the city shall deny the request." Record 27 (bold and underline emphasis in original; italics added).

[9] One of those letters, dated November 20, 2002, is from petitioner. Record 77-78. Another letter, dated November 19, 2002, is from a representative of HRSG&R. Record 79-94.

[10] The minutes do not indicate the city's response to the concerns expressed in petitioner's and HRSG&R's letters, assuming those concerns were considered. Some of those concerns are at the heart of the first, second and third assignments of error, which we discuss below.

[11] The city also adopted revisions to its land development ordinance that are not at issue in this appeal.

WAIVER

Respondent contends that petitioner cannot raise the issues presented in the first and fourth assignments of error because they were not raised below, as required ORS 197.763(1) and 197.835(3). We reject respondent's waiver argument. The raise it or waive it provisions of ORS 197.763(1) and 197.835(3) only apply in appeals of quasi-judicial land use decisions. Ordnance 136 adopts legislative amendments to the MZO and is a legislative decision. The raise it or waive it provisions of ORS 197.763(1) and 197.835(3) do not apply to the challenged decision.

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR

A. Introduction

There are problems with the record in this appeal. The challenged decision adopts no findings that explain why the city adopted MZO 3.16 or how that provision may implicate the statewide planning goals or the City of Mosier Comprehensive Plan (MCP). The minutes of city council hearings in this matter that are included in the record do not explain why the city adopted MZO 3.16. The tapes of the city council hearings are inaudible and provide no assistance in determining why the city adopted MZO 3.16. In its brief, the city offers a detailed explanation for why it adopted MZO 3.16 and why it believes MZO 3.16 is consistent with the statewide planning goals, but petitioner contends that the record in this appeal does not include any evidence that supports that explanation.

1. City Recorder's Statement

In an attempt to provide a more complete explanation of what occurred during the local proceedings below, and to provide evidence that would support what the city argues in its brief are the city's reasons for adopting MZO 3.16, the city attaches to its brief a statement signed by the city recorder. Respondent's Brief App 14-19. The city contends that the city recorder's statement can be considered, even though the statement is not part of the record, because the "statement does not constitute extra-record evidence, but simply

describes the process that occurred." Respondent's Brief 7 n 3. Alternatively, the city moves that LUBA consider the extra-record city recorders statement pursuant to OAR 661-010-0045.[12] Petitioner objects to our consideration of the city recorder's statement.

We cannot consider the city recorder's statement. The statement clearly includes evidence that is not included in the record. The city's argument to the contrary notwithstanding, the reason the city is offering the statement is to establish facts that the record in this appeal does not establish. The city has not demonstrated that any of the grounds that OAR 661-010-0045(1) provides for considering extra-record evidence apply to the city recorder's statement, and we do not see that any of those grounds apply here. The city's request that we consider the city recorder's statement is denied.

2. Official Notice Requests

LUBA routinely takes official notice of local government enactments. *Sunburst II Homeowners v. City of West Linn*, 18 Or LUBA 695, *aff'd* 101 Or App 458, 790 P2d 1213 *rev den* 310 Or 243 (1990). Petitioner and respondent ask that we take official notice of a number of documents. We address those requests before turning to petitioner's assignments of error.

Petitioner requests that we take official notice of a total of eight documents. The first two documents are Ordinance No. 108 and Ordinance No. 116. Ordinance No. 108 amends the city's comprehensive plan map and shows the disputed haul road. Ordinance No. 108

[12] Under that rule, LUBA may consider evidence that is not included in the record in certain limited circumstances:

> "Grounds for Motion to Take Evidence Not in the Record: [LUBA] may, upon written motion, take evidence not in the record in the case of disputed factual allegations in the parties' briefs concerning unconstitutionality of the decision, standing, *ex parte* contacts, actions for the purpose of avoiding the requirements of ORS 215.427 or 227.178, or other procedural irregularities not shown in the record and which, if proved, would warrant reversal or remand of the decision. [LUBA] may also upon motion or at its direction take evidence to resolve disputes regarding the content of the record, requests for stays, attorney fees, or actual damages under ORS 197.845."

includes findings that refer to HRSG&R's quarry as "an existing aggregate resource site." Those requests concern official city enactments, and the requests are granted.[13]

Petitioner also requests that we take official notice of three more documents: (1) a 1993 Wasco County Court order that granted a conditional use permit to HRSG&R for an aggregate mining operation on its property in the urban growth area; (2) a staff report that was adopted by that 1993 order as findings; and (3) a 1995 Wasco County Court order that was adopted following LUBA's remand of the 1993 order. Those documents are quasi-judicial land use decisions rather than government enactments that are subject to official notice. For that reason, petitioner's requests that we take official notice of those documents are denied.

Petitioner further asks that we take official notice of the "Urban Growth Area Joint Management Agreement," which was noted earlier in this opinion. That agreement is an agreement between the city and county regarding land use planning decision making in the urban growth area. As such, the agreement is an enactment that is properly the subject of official notice. This request is granted.

Finally, petitioner requests that we take official notice of the first page of an access agreement between ODOT and HRSG&R, a legal description and two maps. Petitioner argues these are "official acts," that are officially noticeable under OEC Rule 202 and ORS 40.090(2). We do not agree. The request is denied.

Respondent requests that we take official notice of city Ordinance No. 122. Ordinance No. 122 adopts a number of amendments to the MZO, including the 1996 amendment noted earlier that amended the city's Industrial zone to prohibit surface mining. The request is granted.

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[13] Respondent disputes the relevance of those ordinances. Ultimately, most of the documents for which the parties seek official notice are of limited or no assistance in resolving the parties' factual and legal disputes. However, we determine whether these ordinances are proper subjects for official notice by LUBA, without regard to whether they ultimately are relevant.

B. Petitioner's Arguments

Post-acknowledgment amendments of the MZO, must be consistent with the statewide planning goals and the city's acknowledged comprehensive plan. ORS 197.175(2); 197.835(7). In its first assignment of error, petitioner argues that Ordinance No. 136 violates the Statewide Planning Goal 2 (Land Use Planning), because the challenged zoning ordinance amendments are not supported by an "adequate factual base." As we explained in the *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372, 377-78, *aff'd* 130 Or App 406, 882 P2d 1130 (1994), the Goal 2 requirement for an adequate factual base is not met unless a legislative land use decision is supported by substantial evidence, *i.e*., evidence a reasonable person would believe.

The city correctly argues that the Goal 2 requirement for an adequate factual base does not exist in a vacuum. In alleging a Goal 2 factual base inadequacy at LUBA, a petitioner must establish that some applicable statewide planning goal or other criterion imposes obligations that are of such a nature that a factual base is required to determine if the zoning ordinance amendment is consistent with the goal or other criterion.

However, do not understand the first assignment of error to allege a bare factual base requirement. Rather, we read petitioner's first assignment of error together with its second and third assignments of error. In its second and third assignments of error, petitioner alleges that the record in this matter is not sufficient to establish that MZO 3.16 is consistent with the city's obligations under Statewide Planning Goals 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces) and 9 (Economic Development) and a MCP Overall Policy "to recognize and protect existing development and those related investments [that] have been made in the community."[14] MCP 40.

[14] Petitioner argues that MZO 3.16 prohibits use of the only currently available access to the HRSG&R quarry and ODOT quarry and the challenged decision and the supporting record offer no explanation for how that action is consistent with the city's obligation under Goal 5 to protect inventoried Goal 5 aggregate resource sites. As far as we can tell, access to all of the city's Industrial-zoned land, including the Industrial-zoned

C. The City's Response to Petitioner's Arguments

The city's response to the first three assignment of error has two critical parts. First, the city argues that MZO 3.16 does not alter the previously existing status quo regarding use of the R-10 zoned haul road. To the contrary, the city argues that prior to adoption of the challenged ordinance, the city had already interpreted the MZO to prohibit quarry-related traffic in the R-10 zone. The city argues in its brief that MZO 3.16 simply makes it clear that certain nonresidential traffic may be granted conditional use approval to use public rights of way in the city's residential zones.[15] While MZO 3.16 does not extend that same opportunity to quarry-related traffic, we understand the city to argue that because MZO 3.16 simply extends rights that did not clearly exist before, the cited statewide planning goals and comprehensive plan provisions could not be violated by MZO 3.16.

Second, the city argues that petitioner is simply wrong about the status of the HRSG&R quarry and other quarries in the urban growth area under the city's comprehensive plan. The city contends that those sites are located outside the city's municipal limits, are not included on any industrial lands inventory, and are not included on any city Goal 5 inventory of aggregate sites.

D. Conclusion

There are significant problems with both parts of the city's response to these assignments of error. Prior to Ordinance No. 136, the MZO did not expressly prohibit quarry-related traffic. It is true that as part of the city enforcement action that ultimately led

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urban growth area, requires crossing residentially zoned city land. We understand petitioner to argue that before subjecting nonresidential use access to conditional use review and prohibiting such access altogether for the HRSG&R and ODOT quarries, the county must explain how such action is consistent with its obligations under Goal 9 to assure an adequate supply of sites that are suitable for industrial uses and under the MCP to protect existing development.

[15] The city argues that MZO 3.16 was adopted in response to a comment that an unnamed attorney for HRSG&R made at some point during litigation between the city and HRSG&R that under the city's interpretation of the MZO, only traffic that is residential in nature may utilize public rights of way in the city's residential zone. Petitioner objects that there is no evidence in the record that is sufficient to establish that this was in fact the city's motivation for adopting MZO 3.16.

to our decision in *ODOT v. City of Mosie*r, the city council interpreted the MZO to impose such a restriction to the residentially zoned portion of the haul road. On appeal, LUBA applied the deferential standard of review that it is required to apply under ORS 197.829(1) and affirmed that interpretation. *ODOT v. City of Mosier*, 41 Or LUBA at 86. However, our decision in *ODOT v. City of Mosier* makes it reasonably clear that prior to adoption of Ordinance No. 136 and MZO 3.16, the MZO did not expressly and unambiguously prohibit quarry-related traffic on public rights of way in the city's residential zones. Stated differently, it would not necessarily be inconsistent with our decision in *ODOT v. City of Mosier* for a future city council to exercise its interpretive discretion and reach a contrary conclusion that quarry-related traffic is *not* prohibited on residentially zoned public rights of way in the city. After adoption of Ordinance No. 136, the MZO expressly imposes that prohibition, and a new city council interpretation of the MZO to the contrary would appear to be foreclosed unless MZO 3.16 is repealed or revised.

The city's characterization of the Ordinance No. 136 as only *granting* rights that did not exist before is not accurate. Ordinance No. 136 grants no rights to the urban growth area quarries and appears to resolve any lingering ambiguity to make it clear that those quarries have no right to use the haul road or other roads across residentially zoned land. In addition, Ordinance No. 136 adds a requirement that all nonresidential uses, which would include light industrial uses allowed in the city's urban growth area, obtain a conditional use permit before using residentially zoned roads for access. This requirement did not expressly exist before Ordinance No. 136 was adopted.[16]

[16] In its brief, the city takes the position that "the genesis of [MZO] 3.16 was a conversation with the attorney for HRSG&R, who stated his belief that only residential traffic could pass through the City's residential zone." Respondent's Brief 7-8. The city goes on in its brief to state that the city council had never made any such pronouncement, but had only prosecuted enforcements actions against HRSG&R and ODOT for hauling rock over the residentially zoned haul road." Respondent's Brief 8. Although we are not sure we entirely understand the city's position with regard to nonresidential use of residentially zoned land for access, it appears that the city takes the position that such access was not regulated prior to adoption of MZO 3.16.

With regard to the city's position concerning the status of the urban growth area quarries, based on the record before us, we are unable to agree with the city's representations that those quarries and the industrially zoned urban growth area are not protected under Goals 5 and 9 and the city's comprehensive plan. The city fails to appreciate that, although the urban growth area is outside the city's municipal boundaries, the urban growth area is (1) inside the city's urban growth boundary, and (2) subject to city comprehensive plan and zoning regulations rather than county comprehensive plan and zoning regulations. In short, the fact that the urban growth area is presently outside the city's municipal boundaries has little or no bearing on whether the urban growth area and the quarries located in that area will be included in the city in the future and (1) whether the city has taken steps to inventory and protect Goal 5 sites in that area, (2) whether the city may be relying on the urban growth area to comply with Goal 9, and (3) whether the cited MCP Overall Policy applies to protect existing uses such as the quarries in the urban growth area. Indeed, the Urban Growth Area Joint Management Agreement seems to anticipate that the city might adopt precisely these kinds of measures.

Admittedly, the record and past appeals to LUBA make it fairly clear that the city and the disputed quarries have had and continue to have their differences. In addition, the fact that the city amended its Industrial zone in 1996 to expressly prohibit aggregate mining would seem to suggest strongly that the city is doing little to protect the existing urban growth area quarries to comply with Goal 9. However, the cited MCP Overall Policy certainly can be read to obligate the city to take appropriate action to protect those quarries as "existing development" that represent "investments [that] have been made in the community." Amending the MZO to prohibit use of the only currently available road access to those quarries certainly could be viewed as inconsistent with such an obligation.

The uncertainty of the status of the ODOT and HRSG&R quarries under Goal 5 is more pronounced. Certainly it is far from clear that those quarries have been included on an

inventory for protection under Goal 5, and if there is anything that is an adopted city program to protect those quarries it has not been identified or called to our attention. Nevertheless, the November 19, 2002 objection letter submitted by HRSG&R includes the minutes of an April 13, 1988 city council hearing on proposed periodic review comprehensive plan changes. Those minutes state in part:

> "Will Carey explained the periodic review process and the main aspects of the changes to the City Zoning Ordinances and Comprehensive Plan. In Goal 5, Resources, three gravel resource sites are located within the Urban Growth Boundary and will be added." Record 83.

The city's final local review order includes discussion under Factor Two, which is entitled "NEW OR AMENDED GOALS OR RULES ADOPTED SINCE THE DATE OF ACKNOWLEDGMENT." Under "GOAL 5 * * * OAR [660-016-0000]," the final local review order includes the following findings under "Mineral and Aggregate Resources:"

> "There are three gravel resource sites within the City's Urban Growth Boundary: (1) on the southern edge of the Boundary, (2) the [ODOT] site on the western end of the Boundary, and (3) an adjoining private site on the western end of the Boundary (Jarl)."[17] Record 89.

Petitioner contends that the above is sufficient to establish that the urban growth area quarries have been included on the city's Goal 5 inventory of significant aggregate resource sites and the city's unexplained decision in adopting MZO 3.16 to preclude access over the haul road to those sites must be remanded for an adequate explanation.

The above-quoted periodic review findings are directed at OAR chapter 660, division 16, which was LCDC's first Goal 5 implementing rule and was adopted after the city's comprehensive plan was first acknowledged. OAR 660-016-0000 is the section of the rule that governs "Inventory of Goal 5 Resources." OAR 660-016-0000(5) provides the city with three options: (1) "Do not include on Inventory," (2) "Delay the Goal 5 Process," or (3) "Include on the Plan Inventory." While the city may well be correct that the city did not

[17] We understand that the Jarl site is the HRSG&R quarry site.

intend to include the noted quarry sites as Goal 5 protected sites as part of periodic review in 1988, a contrary position is also possible. Such a contrary conclusion would normally lead to a search for the city's adopted program to protect those resources. As noted earlier, if such a program exists, no party has called it to our attention.[18]

Given (1) the lack of findings responding to the Goal 5, Goal 9 and MCP Overall Policy issues raised in the November 19, 2002 and November 20, 2002 letters and the first, second and third assignments of error, (2) the lack of any evidence in the record that clearly resolves those issues one way or another, and (3) the ambiguity of the city's comprehensive plan itself, we sustain the first three assignments of error and remand Ordinance No. 136 to the city so that it can adopt findings that respond to those issues.[19]

The first, second and third assignments of error are sustained.

FOURTH ASSIGNMENT OF ERROR

Petitioner's fourth assignment of error is predicated on its position that the city's motivation in adopting MZO 3.16 was to preclude future use of the haul road by HRSG&R and ODOT. Given that narrow focus, petitioner argues that it was error for the city to adopt Ordinance No. 136 without providing the procedural safeguards that are required for quasi-judicial land use decisions under ORS 197.763. Petitioner contends that the city's failure to

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[18] As petitioner points out, "the above list appears to be the only list of aggregate resources in the city's plan, and appears to be the city's only 'plan inventory' adopted to conform with OAR 660-16 *et. seq*. That the city has not done a particularly thorough job of complying with Goal 5 should not be a reason for allowing it, in the course of these proceedings, to argue the meaning of vague plan provisions and inventories—it should have done so in the course of adopting Ordinance No. 136, and especially section 3.16. Having failed to do so, there is no substantial evidence or factual base for the city's attorney doing so in the course of this appeal." Petition for Review 18 n 23.

[19] To be clear, our decision regarding the first three assignments of error is not based on any general requirement for detailed findings to support a legislative amendment of an acknowledged zoning ordinance. There is no such general requirement. However, as the Court of Appeals has noted that even legislative land use decisions must be accompanied with either sufficient findings or material in the record for LUBA to determine that the amendment complies with applicable criteria. *Citizens Against Irresponsible Growth v. Metro*, 179 Or App 12, 16 n 6, 38 P3d 956 (2002) ("there must be enough in the way of findings or accessible material in the record of [a] legislative act to show that applicable criteria were applied and that required considerations were indeed considered").

extend such quasi-judicial decision making procedural safeguards prejudiced its substantial rights.

We address the city's notice error under the fifth assignment of error below and conclude that its erroneous identification of the date of the initial evidentiary hearing requires remand. However, petitioner's premise under the fourth assignment of error is untenable. Whatever the city's motivation for adopting MZO 3.16, Ordinance No. 136 includes much more than MZO 3.16 and revises a number of different sections of the MZO. The ordinance is clearly a legislative decision rather than a quasi-judicial decision. We have previously rejected arguments, albeit in a somewhat different context, that individual parts of a legislative enactment should be separately viewed as quasi-judicial land use decisions. *D.S. Parklane Development, Inc. v. Metro*, 35 Or LUBA 516, 654-655 (1999), *aff'd as modified* 165 Or App 1, 994 P2d 1205 (2000). Petitioner's arguments here provide no reason to require that the city must process this matter as a legislative/quasi-judicial hybrid so that petitioner would have the additional procedural safeguards that ORS 197.763(1) extends to parties in quasi-judicial land use proceedings.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

The city sent individual notice by mail to affected property owners, including HRSG&R and ODOT, that stated the correct date of the initial public hearing, November 6, 2002. However, as noted earlier, ORS 197.610(1) requires that the city provide notice to DLCD of proposed amendments to its acknowledged zoning ordinance. That statute also requires that the city's notice to DLCD "shall include the date set for the first evidentiary hearing." The notice that the city provided to DLCD erroneously specified that the date for the initial evidentiary hearing was November 7, 2002, which was one day *after* the actual initial hearing on November 6, 2002. That notice also did not include the text of what ultimately was adopted as MZO 3.16, because that language was drafted after the November

6, 2002 initial pubic hearing. Petitioner argues that the city's errors in the notice to DLCD are substantive errors that independently require remand. *Oregon City Leasing, Inc. v. Columbia County*, 121 Or App 173, 854 P2d 495 (1993).

Turning first to the city's failure to include the text of MZO 3.16 with its notice to DLCD under ORS 197.610(1), that failure was not error. There is no dispute that the city provided DLCD notice after it adopted Ordinance No. 136, as required by ORS 197.615(1), although the record does not include a copy of that notice. The statutes expressly recognize the reality that proposed legislative post-acknowledgement amendments may be revised during the course of local proceedings. That is what happened here. ORS 197.620(2) provides a remedy where an adopted post-acknowledgment amendment deviates substantially from the text that was provided to DLCD in its notice of initial hearing under ORS 197.610(1). Under ORS 197.620(2), the director of DLCD and "any other person" may appeal the final decision without regard to whether the director or other person appeared during the local proceedings that led to the post-acknowledgment amendment. The fact that MZO 3.16 was drafted after the city provided notice to DLCD under ORS 197.610(1) provides no independent basis for remand in this appeal.

The city's error in specifying the date of the initial evidentiary hearing is much more problematic. The Court of Appeals' decision in *Oregon City Leasing, Inc.* can be read to say that any deviation whatsoever from the requirements of ORS 197.610(1) for prior notice of hearing or from the requirements of ORS 197.615(1) for notice of the adopted decision is a substantive error that requires remand, without regard to whether the petitioner at LUBA's participatory rights were prejudiced:

> "We do not agree that the failure to comply with ORS 197.610(1) and ORS 197.615(1), if compliance was required, is only a procedural error. We also do not agree that the proper focus of the inquiry is on whether the failure to give notice to the director affected the participatory rights *of this petitioner*. ORS 197.610 *et seq* contain procedures for assuring that amendments to acknowledged local land use legislation and enactments of new legislation comply with the statewide planning goals. That is a substantive matter. We

> remand for LUBA to consider the issue further. Specifically, it should determine whether ORS 197.610 and ORS 197.615 apply to the ordinance, *and what disposition follows if the statutes were violated*." 121 Or App at 177 (footnote omitted; emphasis added).

We recently have held that because *Oregon City Leasing, Inc.* involved a complete failure by the county to provide the notices required by ORS 197.610(1) and 197.615(1) it is not necessary to read that case to hold that even inconsequential deviations from the requirements of ORS 197.610(1) must result in remand:

> "In *Oregon City Leasing, Inc.* * * *, the Court of Appeals held that a total failure to provide notice to DLCD as required by ORS 197.610(1) is a substantive error rather than a procedural error. The court's opinion left unanswered the question of whether partial or substantial compliance with ORS 197.610(1) would necessarily require the same result, *i.e.*, whether any deviation from the requirements of ORS 197.610(1) is a substantive error that will result in remand, without regard to whether the deviation results in prejudice to a party's substantial rights. In *Donnell v. Union County*, 40 Or LUBA 455, 459-60 n 2 (2001), where the county provided DLCD with 19 days' notice rather than the required 45 days, we questioned the correctness of several LUBA decisions that seemed to answer that question in the affirmative.
>
> "We now hold that not every deviation from the requirements of ORS 197.610(1) or its implementing rule is a 'substantive' error that must result in remand. We see no reason to analyze the error alleged in the present case, if it is error, as other than a procedural error. Accordingly, we have no basis to remand the decision under this assignment of error, *unless petitioners demonstrate that the error caused prejudice to their substantial rights*. Petitioners make no effort to demonstrate that the city's specification of map changes on the DLCD form, assuming it constitutes error, prejudiced their substantial rights, and we do not see that such a demonstration could be made in this case." *Stallkamp v. City of King City*, 43 Or LUBA 333, 351-352 (2002), *aff'd* 186 Or App 742, __ P3d __ (2003) (emphasis added).

We adhere to our holding in *Stallkamp*, that "not every deviation from the requirements of ORS 197.610(1) or its implementing rule is a 'substantive' error that must result in remand." However, we now attempt to clarify what kind or degree of deviation from the requirements of ORS 197.610 warrants remand, regardless of whether the petitioners before LUBA have demonstrated that the deviation prejudiced *their* substantial rights.

The Court of Appeals concern in *Oregon City Leasing, Inc.* was with a potential failure of the larger statutory scheme at ORS 197.610 to 197.625, which is intended to expand notice and participatory options for DLCD and a broader audience that may not receive local notice and instead rely on notice from DLCD of proposed post-acknowledgment plan and land use regulation amendments. The ORS 197.610(1) requirement for secondary notice by DLCD and the broader participation that such secondary notice may stimulate in any given post-acknowledgment proceeding is to ensure that proposed post-acknowledgment amendment proposals receive appropriate scrutiny to ensure that the acknowledged comprehensive plan and land use regulations are not amended in ways that violate the statewide planning goals. The legislature apparently made this broader notice and potential for participation by DLCD and others the *quid pro quo* for ORS 197.625. ORS 197.625 deems post-acknowledgment amendments to be consistent with the statewide planning goals as a matter of law, if the amendment is not appealed or is affirmed on appeal. Viewed in that context, possible prejudice to DLCD and to the persons who are entitled to notice from DLCD under ORS 197.610(1), who may not be parties in an appeal to LUBA, is also relevant in determining whether a city's errors in its ORS 197.610(1) notice to DLCD warrant remand. In our view, whether such errors warrant remand depends upon whether the errors are of the kind or degree that calls into question whether the ORS 197.610 to 197.625 process nevertheless performed its function. If so, whether the particular petitioners before LUBA can demonstrate prejudice to their substantial rights is not dispositive.

In this case, petitioner is located in Salem and asserts that it relies on notices from DLCD to make local appearances on behalf if its members. No doubt there are other organizations that similarly rely on notice of proposed post-acknowledgment amendments from DLCD. We simply cannot be sure that petitioner and other potential petitioners who received erroneous notice of the date of the local hearing have not been prejudiced by the city's erroneous notice of the date of the initial hearing. Although petitioner submitted a

letter on November 19, 2002 that was received by the city prior to its hearing on November 20, 2002, and that November 19, 2002 letter was read into the record; we do not believe it is appropriate to assume that this belated opportunity to participate via a two-page letter was sufficient to avoid prejudice to petitioner. Further, we cannot know if others who may have appeared on November 7, 2002, after the November 6, 2002 hearing was over, learned of the November 20, 2002 hearing. In short, we cannot be sure that the city's error in specifying that the initial evidentiary hearing would be held on November 7, 2002 was a harmless error that did not result in a failure of the statutory scheme set out at ORS 197.610 to 197.625. Accordingly, remand is required so that the city may correct the error in its notice to DLCD under ORS 197.610(1).[20]

The fifth assignment of error is sustained.

The city's decision is remanded.

[20] It is obviously not possible to now give 45 days notice before the first evidentiary hearing on November 6, 2002. However, it is possible to hold another evidentiary hearing and provide another notice of hearing to DLCD 45 days before that hearing is held.