

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

3
4 PORT OF HOOD RIVER,
5 *Petitioner,*

6
7 vs.

8
9 CITY OF HOOD RIVER,
10 *Respondent,*

11
12 and

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14 CITIZENS FOR RESPONSIBLE WATERFRONT
15 DEVELOPMENT, WALTER BURKHARDT,
16 SUSAN FROEHLICH and LARS BERGSTROM,
17 *Intervenors-Respondent.*

18
19 LUBA No. 2003-196

20
21 and

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23 LUHR JENSEN & SONS, INC.,
24 *Petitioner,*

25
26 vs.

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28 CITY OF HOOD RIVER,
29 *Respondent,*

30
31 and

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33 CITIZENS FOR RESPONSIBLE WATERFRONT
34 DEVELOPMENT, WALTER BURKHARDT,
35 SUSAN FROEHLICH and LARS BERGSTROM,
36 *Intervenors-Respondent.*

37
38 LUBA No. 2003-199

39
40 FINAL OPINION
41 AND ORDER

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43 Appeal from City of Hood River.

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2 Gary Firestone, Portland, filed the petition for review and argued on behalf of petitioner,
3 Port of Hood River. With him on the brief was Timothy V. Ramis, Ramis, Crew, Corrigan and
4 Bachrach LLP, Jerry J. Jaques, B. Gil Sharp, Karen Ostrye, and Jaques Sharp Sherrerd &
5 FitzSimmons.

6
7 David J. Hunnicutt, Portland, filed the petition for review and argued on behalf of the
8 petitioner, Luhr Jensens and Sons, Inc. With him on the brief was Oregonians In Action Legal
9 Center.

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11 No Appearance by City of Hood River.

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13 R. Scott Jerger, Portland, filed the response brief and argued on behalf of intervenor-
14 respondent.

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

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18 REVERSED 05/25/2004

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

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2 **NATURE OF THE DECISION**

3 Petitioners appeal Ordinance 14-16, a ballot measure approved by city voters that
4 establishes a city policy to preserve property owned by petitioner Port of Hood River as a public
5 park.

6 **FACTS**

7 In the summer of 2003, the named intervenors-respondent (intervenors) submitted seven
8 initiative petitions to the city for review. Each petition concerned the use of the city waterfront. The
9 city certified that six petitions complied with procedural constitutional requirements. After the city
10 attorney drafted ballot captions, intervenors, as chief petitioners, elected to proceed with the first
11 petition, bearing the title “Columbia River Waterfront Parks Planning Policy,” and the city approved
12 that petition for signature gathering.¹ Intervenors obtained sufficient signatures to qualify the initiative
13 for the ballot. At a July 28, 2003, work session, the city council declined to adopt the proposed

¹ The pertinent caption approved by the city attorney, and the language that apparently went before the voters, states:

“City of Hood River Ordinance to Set Waterfront Planning Policy

“CAPTION: COLUMBIA RIVER WATERFRONT PARKS PLANNING POLICY

QUESTION: Shall City policy require part of the Columbia River waterfront to be preserved for public parks?

“SUMMARY: This initiative would make it City policy to preserve a portion of the City’s Columbia River waterfront for public park purposes. ‘Public parks’ would be defined as ‘an open or enclosed tract of land set apart and devoted for the purposes of recreation, ornament, light, and air for the general public.’ The portion of the Columbia River waterfront designated for preservation includes all Port of Hood River property along the Columbia River from and including the property known as the ‘Hook’ to the property known as the ‘Boat Basin’ and from the Columbia River water’s edge to the centerline of Portway Avenue, and from the Boat Basin to the center of the northbound lane of the North Second Street Esplanade as they were located on January 1, 2003. Existing structures and infrastructures would be allowed to remain so long as the existing operations continue. A ‘yes’ vote would add a planning policy to preserve the designated portion of the waterfront for public park purposes. A ‘no’ vote would add no new planning policies.” Record 29.

1 initiative, and it was accordingly placed on the November 4, 2003 ballot as Measure 14-16. The
2 city voters approved Measure 14-16 by a margin of 67 percent.

3 Section 3 of Ordinance 14-16 establishes a city policy to “preserve for public parks” a
4 specified portion of the city waterfront.² The land within the subject area is owned by petitioner
5 Port of Hood River, and developed with several industrial buildings. Petitioner Luhr Jensen Inc.
6 leases land within the subject area to operate a fishing lure manufacturing business. The subject area
7 is currently zoned for industrial, light industrial and general commercial uses. Section 4 of Ordinance
8 14-16 allows “any existing structures and infrastructures” in the subject to area to “remain for as
9 long as current operations continue.”

10 On November 24, 2003, the city elections officials certified the results of the November 4,
11 2003 election. This appeal followed.

12 **MOTION TO DISMISS**

13 Intervenors move to dismiss these appeals, arguing that Ordinance 14-16 is neither a “land
14 use decision” as defined by ORS 197.015(10) nor a significant impact land use decision as

² The text of Ordinance 14-16 states, in relevant part:

“WHEREAS, the people of the City of Hood River find that the Columbia River Waterfront is needed for public use as park space, including waterfront recreation, and to protect the waterfront from uses inconsistent with public use and waterfront recreation, the people of the City of Hood River ordain as follows:

“Section 1: ‘Columbia River Waterfront’ means: [describing real property]. ‘Portion of Columbia River Waterfront’ means: [describing real property].

“Section 2: The definition of ‘Public parks’ as used within this ordinance is described in Hood River Zoning Code Section 17.01.060 as of January 1, 2003.

“Section 3: It shall be the policy of the City of Hood River to preserve for public parks the Portion of Columbia River Waterfront, as described in Section 1 of this ordinance.

“Section 4: As part of this waterfront planning policy, any existing structures and infrastructures on the developed Portion of the Columbia River Waterfront, as described in Section 1 of this ordinance, may be allowed to remain for as long as current operations continue.”

1 described in *City of Pendleton v. Kerns*, 294 Or 126, 653 P2d 992 (1982), and therefore
2 Ordinance 14-16 is not subject to LUBA’s exclusive jurisdiction over land use decisions.³

3 According to intervenors, Ordinance 14-16 is not a *final* decision of any kind, but rather an
4 advisory expression of the voters’ opinion with respect to future use of the city waterfront. The
5 intent and only effect of Ordinance 14-16, intervenors argue, is to provide essentially a straw poll,
6 policy guidance for future city council decisions regarding the proper zoning and use of the
7 waterfront. Intervenors note that, following passage of Ordinance 14-16, the city council initiated a
8 process to revise the city’s zoning ordinance with respect to the waterfront area, in order to honor
9 the voters’ expressed will. Record 5. Intervenors argue that any zoning ordinance amendments that
10 result from that process will constitute the *final* and therefore appealable decision with respect to
11 future use of the waterfront. Because Ordinance 14-16 is not a final decision of any kind,
12 intervenors contend, it is not a land use decision as defined by ORS 197.015(10). *Hemstreet v.*
13 *Seaside Improvement Comm.*, 16 Or LUBA 748, 752, *aff’d* 93 Or App 73, 761 P2d 533
14 (1988); *CBH Company v. City of Tualatin*, 16 Or LUBA 399, 405 n 7 (1988) (land use
15 decisions as defined by ORS 197.015(10)(a) must be “final” decisions).

16 Even if Ordinance 14-16 is a final decision, intervenors argue, it does not adopt, amend or
17 apply any statewide planning goal, comprehensive plan provision or land use regulation, and
18 therefore does not fall within the statutory definition of land use decision.
19 legislature.

³ ORS 197.015(10)(a)(A) defines “land use decision” to include:

“A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

- “(i) The goals;
- “(ii) A comprehensive plan provision;
- “(iii) A land use regulation; or
- “(iv) A new land use regulation[.]”

1 In construing measures enacted through initiative, the court attempts to discern the intent of
2 the voters. *Ecumenical Ministries v. Oregon State Lottery Comm'n*, 318 Or 551, 559, 871
3 P2d 106 (1994). The best evidence of the voters' intent is the text and context of the law itself. *Id.*
4 While the chief petitioners of Ordinance 14-16 may have intended it to be the equivalent of a straw
5 poll on the future of the waterfront, we agree with petitioners that the text and context of Ordinance
6 14-16 indicate an intent to establish a binding policy to preserve a portion of the waterfront as a
7 "public park," as that term is defined in the city zoning ordinance. The negative implication of
8 allowing existing uses to remain "as long as current operations continue" is that new uses otherwise
9 allowed in the industrial, light industrial and commercial zones are no longer allowed. In effect,
10 Ordinance 14-16 rezones the subject area to allow only "public parks," and renders the existing
11 industrial uses nonconforming uses. There is nothing in the text or context of Ordinance 14-16
12 suggesting that voters intended it to function as a mere straw poll or as guidance for future city
13 council actions.⁴ That the city council subsequently responded to Ordinance 14-16 and intends to
14 provide for use of the waterfront as a public park does not detract from the finality or intended legal
15 effect of Ordinance 14-16.

16 Intervenor is correct that Ordinance 14-16 does not expressly adopt, amend or apply
17 any statewide planning goal, comprehensive plan provision or land use regulation. However, as we
18 recently explained in a similar case involving enactment of land use legislation by initiative, where the
19 enacted legislation modifies or nullifies the application of the local government's land use regulations,
20 it "concerns * * * the application" of those land use regulations, and is thus a "land use decision" as
21 defined by ORS 197.015(10)(a)(A). *Sievers v. Hood River County*, ___ Or LUBA ___ (LUBA

⁴ Petitioner Port of Hood River argues that, even if the voters intended Ordinance 14-16 to be a straw poll or advisory expression of opinion, such use would be an improper exercise of the Article IV, section 1(5) initiative powers. As discussed further below, state constitutional initiative powers are limited to "legislative" matters. Petitioner argues that the initiative powers are thus limited to actual legislation—proposed enactments of law or constitutional amendments—and do not include matters that do not propose "legislation." Our conclusion that the city voters intended Ordinance 14-16 to have the force of law makes it unnecessary to address petitioner's argument.

1 No. 2003-200, March 29, 2004), slip op 9 (county initiative that allow voters to nullify application
2 of county permit approvals under county land use regulations “concerns” the application of those
3 land use regulations, for purposes of ORS 197.015(10)(a)(A)). As discussed, the apparent intent
4 and effect of Ordinance 14-16 is to preserve a portion of the Port’s property for a public park,
5 which it does by essentially prohibiting new industrial and commercial uses otherwise allowed under
6 the current comprehensive plan and zoning designations, and allowing existing uses to continue only
7 as non-conforming uses. Adoption of such an ordinance with that effect, whether adopted by the
8 city council or the city voters, “concerns * * * the application” of the city’s land use regulations.
9 Therefore, Ordinance 14-16 is a statutory land use decision subject to our exclusive jurisdiction.⁵

10 Intervenor’s motion to dismiss is denied.

11 **STANDING**

12 Intervenor contends that neither petitioner has standing to appeal to LUBA under
13 ORS 197.830(2), because neither petitioner “appeared” before the local government.⁶ In addition,
14 intervenor argues that because Ordinance 14-16 is merely advisory and does not impose any
15 impediments to use or development of petitioners’ property, Ordinance 14-16 does not “adversely
16 affect” petitioners within the meaning of ORS 197.830(3).⁷

⁵ Our conclusion with respect to ORS 197.015(10) makes it unnecessary to determine whether the challenged decision is a “significant impact” land use decision, or to rule on petitioners’ contingent motion to transfer this appeal to circuit court.

⁶ ORS 197.830(2) provides:

“Except as provided in ORS 197.620 (1) and (2), a person may petition the board for review of a land use decision or limited land use decision if the person:

- “(a) Filed a notice of intent to appeal the decision as provided in subsection (1) of this section; and
- “(b) Appeared before the local government, special district or state agency orally or in writing.”

⁷ ORS 197.830(3) provides, in relevant part:

1 As discussed, Ordinance 14-16 is not advisory; its terms effectively limit existing and future
2 development of petitioners' property. Petitioners have demonstrated that they are adversely
3 affected by Ordinance 14-16, and therefore have standing to appeal under ORS 197.830(3).

4 **FIRST ASSIGNMENT OF ERROR (PORT OF HOOD RIVER)**

5 **FIRST ASSIGNMENT OF ERROR (LUHR JENSEN, INC)**

6 As petitioners explain, the initiative powers reserved to the people under Oregon
7 Constitution Article IV, section 1(5) are limited to "legislative" matters, and do not include
8 "administrative" matters.⁸ *Heritage Enterprises, Inc. v. City of Corvallis*, 300 Or 168, 172, 708
9 P2d 601 (1985); *Dan Gile and Assoc., Inc. v. McIver*, 113 Or App 1, 5, 831 P2d 1024 (1992)
10 (*Dan Gile*). A legislative matter generally involves adoption of "laws of general applicability and
11 permanent nature," while administrative matters generally involve decisions implemented by general
12 rules. See *Foster v. Clark*, 309 Or 464, 472, 790 P2d 1 (1990) (a initiative restoring the original

"If a local government makes a land use decision without providing a hearing, except as provided under ORS 215.416 (11) or 227.175 (10), * * * a person adversely affected by the decision may appeal the decision to the board under this section:

- "(a) Within 21 days of actual notice where notice is required; or
- "(b) Within 21 days of the date a person knew or should have known of the decision where no notice is required."

⁸ Article IV, section (1) provides, in relevant part:

- "(1) The legislative power of the state, except for the initiative and referendum powers reserved to the people, is vested in a Legislative Assembly, consisting of a Senate and a House of Representatives.
- "(2)(a) The people reserve to themselves the initiative power, which is to propose laws and amendments to the Constitution and enact or reject them at an election independently of the Legislative Assembly.
- ***
- "(5) The initiative and referendum powers reserved to the people by subsections (2) and (3) of this section are further reserved to the qualified voters of each municipality and district as to all local, special and municipal legislation of every character in or for their municipality or district. The manner of exercising those powers shall be provided by general laws, but cities may provide the manner of exercising those powers as to their municipal legislation. * * *"

1 name to a city street is “administrative” in nature because it effectively overruled an earlier city
2 council decision renaming the street under a legislative scheme for naming streets). As *Foster*
3 illustrates, an initiative or referendum that is directed at or has the effect of overturning a previous
4 administrative decision is itself administrative in nature and thus beyond the Article IV, section 1(5)
5 powers reserved to the electorate. See also *Dan Gile* (a referendum to overturn a decision
6 approving a zone change for a 24-acre parcel exceeds Article IV, section 1(5) powers and is
7 inconsistent with procedural and substantive requirements of statutes governing zone change
8 decisions).

9 Here, petitioners argue that the essential nature and effect of Ordinance 14-16 is to overturn
10 or modify the zoning regulations applicable to a single property in unified ownership. According to
11 petitioners, a zone change with the scope and effect of Ordinance 14-16 would almost certainly
12 qualify as a quasi-judicial land use decision, for purposes of the legislative/quasi-judicial distinction
13 described in *Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 601 P2d
14 769 (1979), and its progeny. Petitioners recognize that the legislative/administrative distinction
15 under Article IV, section 1(5) is not necessarily the same as the legislative/quasi-judicial distinction
16 described in *Strawberry Hill 4 Wheelers*. However, we understand petitioners to argue that there
17 is sufficient overlap between the two that determining whether Ordinance 14-16 would be deemed
18 legislative or quasi-judicial under *Strawberry Hill 4 Wheelers*, if adopted in some other manner
19 than the initiative, is useful in determining whether Ordinance 14-16 is legislative or administrative,
20 for purposes of Article IV, section 1(5).

21 Intervenors do not respond to the merits of any of petitioners’ assignments of error, other
22 than to repeat their argument that Ordinance 14-16 is advisory and without any legal effect, and thus
23 is not properly viewed as either an administrative or quasi-judicial land use decision of any kind.

24 We agree with petitioners that Ordinance 14-16 does not adopt “municipal legislation”
25 within the meaning of Article IV, section 1(5), and that instead it improperly adopts an
26 “administrative” decision by means of the initiative process. Ordinance 14-16 does not adopt a

1 general set of laws or a broadly applicable scheme for administrative decision making. It effectively
2 rezones a single property in single-ownership, negating the existing official zoning designations for
3 that property. As the Court of Appeals observed in *Dan Giles*, an ordinance that rezones a single
4 property in unified ownership is an adjudicative decision under the governing statutes, and such a
5 decision is unquestionably “administrative” in character, for purposes of Article IV, section 1(5).
6 *Dan Gile*, 113 Or App at 5. Given our understanding of the nature and effect of Ordinance 14-16,
7 the same conclusion is unavoidable here.

8 The first assignment of error (Port of Hood River) and first assignment of error (Luhr
9 Jensen, Inc.) are sustained.

10 **REMAINING ASSIGNMENTS OF ERROR**

11 Our conclusion under the first assignments of error that Ordinance 14-16 exceeds the
12 powers reserved to the voters under Article IV, section 1(5) requires reversal of the challenged
13 decision. *See* OAR 661-010-0071(1)(b) and (c) (LUBA shall reverse a land use decision that is
14 unconstitutional or that is prohibited as a matter of law). Accordingly, there is no point in resolving
15 the remaining assignments of error.

16 Ordinance 14-16 is reversed.