BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

LARRY OKRAY and KRISTIN OKRAY,
Petitioners,

vs.

CITY OF COTTAGE GROVE,
Respondent,

and

RUSSELL LEACH and LORI LEACH,
Intervenors-Respondent.

LUBA No. 2004-060

FINAL OPINION
AND ORDER

Appeal from City of Cottage Grove.

Douglas M. DuPriest, Eugene, filed the petition for review and argued on behalf of petitioners. With him on the brief was Hutchinson, Cox, Coons, DuPriest, Orr & Sherlock, PC.

Gary R. Ackley, Cottage Grove, filed a response brief and argued on behalf of respondent. With him on the brief was Ackley, Melendy & Kelly, LLP.

Bill Kloos, Eugene, filed a response brief and argued on behalf of intervenors-respondent. With him on the brief was the Law Office of Bill Kloos, PC.

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

REMANDED 08/02/2004

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners challenge a city ordinance adopting a new zoning district entitled Parks and Recreation (PR).

MOTION TO INTERVENE

Russell Leach and Lori Leach move to intervene on the side of the respondent. There is no opposition to the motion and it is allowed.

FACTS

The challenged decision is Ordinance 2896, adopted as part of a package of related plan and code amendments. Ordinance 2896 adopts the new PR zone, which implements the Parks, Recreation and Open Space element of the comprehensive plan and the existing master parks plan. The same package of related amendments also included (1) Resolution 1486, which lists the PR zone as an implementing zoning district for the Public/Quasi-Public plan designation and a newly adopted Parks & Open Space plan designation; and (2) Ordinance 2897, which adopts a new Mixed Use Master Plan (MUM) zoning combining district. Petitioners appeal only Ordinance 2896, and do not appeal either Resolution 1486 or Ordinance 2897.

The PR zone allows a number of permitted uses, conditional uses and conditional uses that also require MUM approval. Among the conditional uses that require MUM approval are "public or private racetracks or speedways."[1] The PR zone also provides that "all uses existing on the

[1] A provision of Ordinance 2896, codified at Cottage Grove Zoning Ordinance (CCZO) 18.17.040, provides as follows:

> "Buildings and Uses permitted conditionally subject to a Mixed Use Master Plan. The following uses are permitted in the PR district subject to the provisions of Chapter 18.33 MUM Mixed Use Master Plan Combining District:
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> "A. Community Parks;
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> "B. Natural Resource areas;
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> "C. Interpretative centers greater than 1/2 acre in size;

property on the effective date of annexation shall be allowed to continue operation provided the property owner submits an application for a mixed use master plan approval."[2] Neither Ordinance 2896 nor any of the other related ordinances or resolutions apply the PR zone to any property in the city.

INTRODUCTION

The current dispute is only the latest incarnation of the ongoing battle between intervenors, who own and operate the Cottage Grove Speedway, and their neighbors, who include petitioners. In *Leach v. Lane County*, 45 Or LUBA 580 (2003), we affirmed in part and remanded in part a county decision that determined the type and level of speedway activities that qualified as a nonconforming use under the Lane County Code. Subsequent to the county's decision on review in *Leach*, the city annexed the speedway, which has a city comprehensive plan designation of Public/Quasi-Public, one of the comprehensive plan designations the PR zone implements. Even though the PR zone has not been applied to the speedway property, or to any other property, petitioners argue (and the city and intervenors do not dispute) that at least some of the PR zone provisions were drafted with the speedway in mind. Much of petitioners' argument in this appeal presumes that the city will apply the PR zone to the speedway property in a future decision, and that

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"D. *Public or private racetracks or speedways*;

"E. Public or private recreation facilities, including golf, swimming, tennis and country clubs;

"F. Public or private organized sports fields not on school district property, fairgrounds or arenas." (Emphasis added).

[2] Another provision of Ordinance 2896, codified as CGZO 18.17.50, provides:

"MUM Mixed Use Master Plan requirements at time of rezoning. When a parcel or development is zoned under this title, *all uses existing on the property on the effective date of annexation shall be allowed to continue operation provided the property owner submits an application for a mixed use master plan approval*. The application shall be initiated within six (6) months of zoning ordinance adoption under this title and the City Council shall act promptly, consistent with the time limits in ORS 227.178, to make a final decision on the application. *The pre-existing uses allowed under this section shall be allowed to continue to operate until such time as the MUM is approved, including resolution of all appeals*." (Emphasis added.)

intervenors will then file a MUM application to continue operation of the speedway. As discussed below, petitioners argue in the first assignment of error that as applied to the speedway property, the PR zone will violate various state and local requirements, because it will allow existing uses that are inconsistent with applicable land use laws to continue until the city approves the MUM application.[3]

The city and intervenors respond that to the extent petitioners challenge the anticipated future decision rezoning the speedway property to PR or the anticipated MUM decision approving continued operation of the speedway, that challenge does not provide a basis to reverse or remand Ordinance 2896. We generally agree. Because Ordinance 2896 does not apply the PR zone to any property in the city, arguments that application of the zone to a particular property might violate particular state or local standards that apply to that property are not properly before us, and cannot be meaningfully reviewed. In our view, such arguments are properly presented in an appeal of a decision that rezones that particular property, when such a rezoning decision is adopted.

Where, as here, a petitioner appeals an ordinance that (1) adopts a new zone potentially applicable to a number of properties but (2) does not actually apply that new zone to any property, the only challenges we can meaningfully review are *facial* challenges to the new zone, *i.e.*, arguments that the new zone is facially inconsistent with controlling legal standards such as comprehensive plan provisions, statutes, administrative rules or statewide planning goals. To advance such a facial challenge, the petitioner must demonstrate that the new zone is categorically incapable of being applied consistently with controlling legal standards. *See Rogue Valley Assoc.*

[3] Intervenors noted at oral argument that it is possible, indeed likely given the arguments that petitioners make in this appeal, that intervenors will file a *joint* application for a zone change to PR and a MUM application, so that both applications proceed together and there will in fact be no post-zoning application of CGZO 18.17.50, which petitioners challenge under the first assignment of error. CGZO 18.70.50 only applies *after* property is zoned PR to authorize continued operation of existing use while a MUM is submitted and approved. If a zone change to PR and a MUM application for the speedway are considered and approved together, CGZO 18.70.50 would not apply to the speedway, and CGZO 18.70.50 would not authorized continued operation of the speedway while the rezoning and MUM applications were prepared and submitted and remained pending before the city.

of Realtors v. City of Ashland, 158 Or App 1, 4, 970 P2d 685 (1999) (challenge to legislative zoning ordinance amendments is a facial challenge that, to succeed, must demonstrate that the amendments are categorically incapable of being applied consistent with statutory requirements for clear and objective regulations). While the line between a facial challenge and as-applied challenge is not always clear, we attempt to limit our resolution of petitioners' arguments to those that constitute facial claims to the PR zone, and do not reach those arguments that are properly presented when the PR zone is applied to specific properties.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that, as written, CGZO 18.17.50 allows all uses existing on property at the time of annexation to continue after that property is zoned PR, even if those uses are unlawful or inconsistent with applicable comprehensive plan provisions, statutes, rules or statewide planning goals.

According to petitioners, the language of CGZO 18.17.50 was suggested by intervenors, and is designed to allow the speedway operation as it existed on the date of annexation to continue, notwithstanding that the speedway operation as it then existed was not allowed under the county's zoning ordinance and exceeded the scope and intensity of a lawful nonconforming use, as adjudicated in *Leach*. Further, petitioners argue, the speedway property is located entirely within the Willamette Greenway, and operation of CGZO 18.17.50 with respect to the speedway property would therefore be inconsistent with Statewide Planning Goal 15 (Willamette Greenway), state statues, and comprehensive plan and zoning ordinance standards designed to protect the Willamette Greenway. Petitioners also assert that the Coast Fork of the Willamette River adjacent to the speedway property is a significant Goal 5 resource, and therefore that CGZO 18.17.50 must be consistent with Goal 5 and the Goal 5 rule.

As noted, most of petitioners' arguments anticipate a future city decision to apply the PR zone to the speedway property, and are properly presented in an as-applied challenge to such a decision. However, that decision is not before us in this appeal. The only aspect of petitioners'

arguments under this assignment of error that can be seen as a facial challenge to the PR zone provisions is the argument that CGZO 18.17.50 is flawed because it purportedly authorizes, at least temporarily, a *blanket amnesty* for any existing use that violates applicable land use laws, such as the city's comprehensive plan, statutes, and statewide planning goals and administrative rules. We understand petitioners to argue that an ordinance that purports to provide amnesty against enforcement of otherwise controlling comprehensive plan provisions, statutes, goals and rules is necessarily inconsistent with such laws, whatever the specific laws involved or the particulars of the property or use to which that ordinance is applied. Under this view, petitioners' arguments with reference to the speedway property and the laws that govern that property are merely examples of how CGZO 18.17.50 will operate in all circumstances to which it is applied.

CGZO 18.17.50 does not *expressly* state that it allows existing uses to continue in violation of otherwise applicable land use laws. However, it is reasonably clear that that is exactly the intent and the intended effect. Uses existing on the date of annexation that are lawful or in compliance with applicable land use laws do not need CGZO 18.17.50 in order to continue. For example, under the city nonconforming use code provisions a use not otherwise allowed in a particular zone may continue as a lawful nonconforming use if, generally speaking, the use existed on the date the pertinent zoning was applied and it has not since been abandoned, interrupted or altered. Such an existing use requires no particular authorization to continue. Only those existing uses that are unlawful or in violation of applicable land use laws could possibly require application of CGZO 18.17.50 in order to continue. In the context of a facial challenge to a legislative enactment, the question is whether the terms of the enactment are *categorically incapable* of being applied consistently with applicable law. *Rogue Valley Assoc. of Realtors*, 158 Or App at 4. Here, it appears that under every conceivable instance in which CGZO 18.17.50 could be applied and given effect, it will authorize existing uses to continue in violation of applicable land use laws. Petitioner's arguments to that effect are properly viewed and resolved as a facial challenge to CGZO 18.17.50, not an as-applied challenge.

Neither the city nor intervenors identify any authority that allows the city to adopt a land use regulation that legalizes uses that are in violation of otherwise applicable land use laws, such as comprehensive plan provisions, statues, statewide planning goals and administrative rules. The city cannot do what CGZO 18.17.50 purports to allow the city to do.

The first assignment of error is sustained.

SECOND ASSIGNMENT OF ERROR

Petitioners contend that allowing "public or private racetracks or speedways" as uses permitted conditionally with MUM approval in the PR zone is inconsistent with (1) the Public/Quasi-Public comprehensive plan designation that the PR zone implements, and (2) language in the Urban Design chapter of the city comprehensive plan.[4] According to petitioners, a private racetrack is neither a public nor a quasi-public use, and the city fails to explain how a private recreational use is consistent with that plan designation. Further, petitioners argue that a racetrack has extreme adverse impacts on neighboring property and therefore "lack[s] sensitivity to natural features and/or neighborhood character," and fails to provide a compatible "mixture" of uses, pursuant to the cited Urban Design objectives.

Although petitioners obviously disagree with the city that racetracks and speedways should be allowed in such designations, they have not explained how such allowance violates the comprehensive plan. The plan provisions cited to us are the type of general planning provisions that exist in most comprehensive plans. We do not see anything in those provisions that would categorically prohibit racetracks or speedways from being placed in the plan and zoning

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[4] The Urban Design objectives petitioners cite to provide in pertinent part:

> "(2) Discourage those development proposals which lack sensitivity to natural features and/or neighborhood character.
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> "(3) Encourage the use of the planned development technique to create developments which contain a mixture of dwelling unit types, open space and recreation areas and neighborhood and professional commercial services." Cottage Grove Comprehensive Plan at 29.

designations that the city has adopted. A policy disagreement with the city does not provide a basis for reversal or remand.

The second assignment of error is denied.

Our resolution of the first assignment of error requires, at a minimum, that Ordinance 2896 be remanded to the city for readoption in a form consistent with this opinion. Although petitioners request that the challenged decision be reversed, petitioners have not established that reversal rather than remand is necessary or appropriate. Accordingly, the city's decision is remanded.