BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROMIE A. RHODES,
Petitioner,

vs.

CITY OF TALENT,
Respondent,

and

OREGON DEPARTMENT
OF TRANSPORTATION,
Intervenor-Respondent.

LUBA No. 2004-076

FINAL OPINION
AND ORDER

Appeal from City of Talent.

Stephen Mountainspring, Roseburg, filed the petition for review and argued on behalf of petitioner. With him on the brief was Dole, Coalwell, Clark, Mountainspring, Mornarich and Aitken, PC.

William A. Mansfield, Medford, filed a joint response brief and argued on behalf of respondent.

Kathryn A. Lincoln, Assistant Attorney General, Salem, filed a joint response brief and argued on behalf of intervenor-respondent.

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

REMANDED 09/27/2004

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 a city decision to enter a cooperative improvement agreement with the Oregon Department of Transportation (ODOT) for reconstruction of a portion of State Highway 99 (OR 99) within the City of Talent.

MOTION TO INTERVENE

ODOT moves to intervene on the side of respondent in this appeal. There is no opposition to the motion, and it is allowed.

FACTS

On April 21, 2004, the city council adopted a resolution that authorized the mayor and city council president to enter a cooperative improvement agreement (hereafter Agreement) with ODOT. On that same date, the mayor and city council president signed the Agreement.[1] The Agreement authorizes certain improvements to OR 99 that would affect petitioner's property.[2] The first of the "Terms of Agreement" provides the following explanation of the purpose of the Agreement:

> "For the purpose of providing acceptable traffic patterns on public highways, ODOT and City agree to improve the portion of OR 99 from milepoint 13.86 to 15.34 to include: the addition of bike lanes, sidewalks, curb and gutter, drainage system, landscaping, construct a center turn lane and raised median islands, installing traffic signals at the intersections of Colver Road at OR 99 and Rapp Road at OR 99, modify existing traffic signalization at the intersection of Valley View Road at OR 99 and realign Suncrest Road, hereinafter referred to as 'ODOT Project'. * * *" Record 36.[3]

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[1] The Deputy Director of the Highway Division signed the agreement on behalf of the state on May 13, 2004. Record 42.

[2] A map showing the general location of the project appears at page 50 of the record. More detailed project plans showing proposed improvements appear at record 148-52.

[3] The disputed Agreement also sets out city and ODOT responsibilities for constructing certain waterline improvements that the city wishes to construct at the same time the highway improvements are constructed.

A city obligation under the Agreement that is at the center of this dispute states that the city adopts the AMP that is attached to the Agreement.[4] The Access Management Plan (AMP) that is attached to the Agreement appears at pages 43-162 of the Record.

OR 99 generally runs north and south through the City of Talent. West Valley View Road intersects OR 99 near the middle of the project area. That intersection is one of the intersections that is to be improved by the project. It appears from the record, and from petitioner's arguments, that petitioner owns property at the southwest corner of that intersection. Record 150. Petitioner currently has direct, two-way access onto both West Valley View Road and OR 99 so that traffic traveling north or south on OR 99 and traffic traveling east or west on West Valley View Road have direct access to and egress from petitioner's property using the existing accesses onto those roads. The disputed project will take a portion of petitioner's property for intersection widening. Although petitioner will retain two-way access and egress on West Valley View Road, that access/egress will be relocated some distance west, away from the intersection. Petitioners current access onto OR 99 will be relocated slightly, reduced in size and limited to a right in/right out access so that traffic traveling northbound on OR 99 will no longer have direct access to petitioner's property and traffic leaving petitioner's property will not be able to turn left to travel north on OR 99. Channelization of traffic along OR 99 at the West Valley View Road intersection will be accomplished in part by constructing a raised median along the center of the OR 99 approaches to the intersection. This raised median would preclude northbound traffic from turning west to enter petitioner's property from OR 99.

MOTION TO DISMISS

As relevant here, LUBA has jurisdiction to review local government land use decisions.[5] As defined by ORS 197.015(10)(a), "[a] final decision or determination made by a local government *

[4] City obligation number 8 provides that the "[c]ity approves the Access Management Plan which is marked Exhibit B, attached hereto and by this reference made part hereof." Record 37.

[5] As relevant, ORS 197.825(1) provides:

* * that concerns the adoption, amendment or application of * * * [a] comprehensive plan provision; [a] land use regulation; or [a] new land use regulation" is a land use decision.

ODOT and the city (collectively respondents) move to dismiss this appeal, alleging that the challenged decision does not qualify as a land use decision under the relevant statutes. Respondents also argue that the challenged decision does not qualify as a "significant impacts test" land use decision. *City of Pendleton v. Kerns*, 294 Or 126, 133-34, 653 P2d 992 (1982). Because we agree with petitioner that the challenged decision is a land use decision as defined by ORS 197.015(10)(a), we need not consider whether it also qualifies as a land use decision under the significant impacts test.

In support of their motion to dismiss, respondents present the following argument:

> "The Agreement allocates the financing responsibilities of each party; authorizes ODOT to go onto City property; specifies responsibility for right of way purchase and relocation; designates the City as responsible for on-going maintenance; states that ODOT shall do most of the engineering and construction supervision, and *requires ODOT to develop an Access Management Plan (AMP) for the City to approve.* The Agreement further states that ODOT will construct the improvements listed above with state funds. As part of the project the City plans to construct waterline improvements in the right of way, at the City's cost. *None of these improvements involves the adoption, amendment or application of the goals, a comprehensive plan provision, or land use regulation. Although there may be construction permits required before some of the work is started, no land use decision was made when the City Coun[ci]l authorized execution of the Agreement*." Motion to Dismiss for Lack of Jurisdiction 3 (record citations omitted; emphases added).

With the exception of the emphasized language above, respondents accurately describe the key features of the Agreement. However, respondents' statement that the Agreement obligates ODOT to develop an AMP in the future is misleading, because, as we have already noted, ODOT has already prepared an AMP, the Agreement states that the city adopts the AMP and the adopted AMP is attached to the Agreement as an exhibit. *See* n 4. In addition, for the reasons explained

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> "[T]he Land Use Board of Appeals shall have exclusive jurisdiction to review any land use decision * * * of a local government * * * in the manner provided in ORS 197.830 to 197.845."

below, respondents are simply wrong in their position that city's approval of the Agreement and AMP did not constitute a land use decision.

The answer to respondents' jurisdictional challenge is provided by ODOT's administrative rules. OAR 734-051-0155 describes the role that AMPs serve, how they are prepared, what they must include and how they are adopted. OAR 734-051-0155(4) provides:

> "(4) Access Management Plans and Access Management Plans for Interchanges comply with all of the following:
>
> "(a) Are prepared for a logical segment of the state highway and include sufficient area to address highway operation and safety issues and development of adjoining properties including local access and circulation.
>
> "(b) Describe the roadway network, right-of-way, access control, and land parcels in the analysis area.
>
> "(c) Are developed in coordination with local governments and property owners in the affected area.
>
> "(d) *Are consistent with any applicable adopted Transportation System Plan, Local Comprehensive Plan*, Corridor Plan, or Special Transportation Area or Urban Business Area designation, or amendments to the Transportation System Plan *unless the jurisdiction is exempt from transportation system planning requirements under OAR 660-012-0055*.
>
> "(e) Are consistent with the 1999 Oregon Highway Plan.
>
> "(f) Contain short, medium, and long-range actions to improve operations and safety and preserve the functional integrity of the highway system.
>
> "(g) Consider whether improvements to local street networks are feasible.
>
> "(h) Promote safe and efficient operation of the state highway consistent with the highway classification and the highway segment designation.
>
> "(i) Consider the use of the adjoining property consistent with the comprehensive plan designation and zoning of the area.

"(j) Provide a comprehensive, area-wide solution for local access and circulation that minimizes use of the state highway for local access and circulation.

"(k) Are approved by the Department through an intergovernmental agreement *and adopted by the local government, and adopted into a Transportation System Plan unless the jurisdiction is exempt from transportation system planning requirements under OAR 660-012-0055*.

"(l) Are used for evaluation of development proposals.

"(m) May be used in conjunction with mitigation measures." (Emphases added.)

The city has adopted a transportation system plan (TSP) as part of the Talent Comprehensive Plan (TCP). Respondents contend the TSP authorizes the proposed improvements.[6] However, OAR 734-051-0155(4)(d) expressly requires that the improvements described in the AMP must be consistent with the city TSP, and it is undisputed that the city adopted no findings explaining why it believes that the AMP is consistent with the TSP. Neither did the city adopt the AMP into its TSP, as OAR 734-051-0155(4)(k) requires.[7] Respondents suggest that the city could still adopt the AMP as part of the TSP at some unspecified time in the future. If the challenged decision made it clear that the city did not adopt the AMP until the city's TSP is amended to include the AMP, then we would likely agree that the challenged decision is not the city's land use decision in this matter. But no party cites anything in the Agreement or the AMP that obligates the city to adopt the AMP as part of the TSP or precludes ODOT from proceeding with developing final engineering plans and constructing the improvements described in the AMP in

[6] Petitioner contends that certain specific improvements that are called for in the AMP are inconsistent with the city's TSP. For the reasons explained later in this decision, we do not reach the merits of petitioner's arguments that these AMP improvements are inconsistent with the TSP.

[7] ODOT's administrative rule concerning project delivery imposes the same TSP consistency requirement and the same requirement that an AMP be adopted into the TSP, that OAR 734-051-0155(4)(d) and (k) do. OAR 734-051-0285(7)(e) and (l).

advance of a city decision to amend the TSP to include the AMP.[8] While the city is obligated under ODOT's rules to adopt the AMP into its TSP, it has adopted the AMP without amending its TSP to do so.

Finally, we briefly note and reject respondents' suggestion that the Agreement and AMP fall within the ORS 197.015(10)(b)(D) exemption to the ORS 197.015(10)(a) definition of land use decision.[9] The most straightforward response to that suggestion is that neither the Agreement nor the AMP are accurately described as a decision that "determines final engineering design, construction, operation, maintenance, repair or preservation of a transportation facility which is otherwise authorized by and consistent with the comprehensive plan and land use regulations." In fact, the Agreement seems to direct that ODOT engage in activities in the future that might qualify as such exempt decisions.[10] It may be that, once the city has adopted the AMP as part of its TSP, future city or ODOT actions to implement the project described in the AMP will qualify as the type of actions that are exempted from LUBA's review jurisdiction by ORS 197.015(10)(b)(D) because those actions are the kinds of actions described in ORS 197.015(10)(b)(D) and they are

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[8] Indeed, the respondents' brief expressly does not take the position that the city, having adopted the AMP in the challenged decision will now proceed to amend its TSP to include the AMP:

> "It should be clear by now that the City is not claiming to have adopted the [AMP] as part of its [TSP]. If and when it decides to do that, it will go through the amendment process required by ORS 197.610-197.625." Repondents' Brief 20.

[9] ORS 197.015(10)(b)(D) excludes the following type of decision from the ORS 197.015(10)(a) definition of land use decision:

> "[A decision w]hich determines final engineering design, construction, operation, maintenance, repair or preservation of a transportation facility which is otherwise authorized by and consistent with the comprehensive plan and land use regulations[.]"

[10] One of ODOT's obligations under the Agreement is as follows:

> "ODOT, or its consultant, shall conduct the necessary field surveys, soils/geotechnical investigations, identify and obtain any necessary permits, identify and relocate or cause to be relocated any conflicting utility facilities, and perform all preliminary engineering and design work required to produce final plans, preliminary/final specifications and cost estimates for the ODOT Project. Final plans, specifications and cost estimates prepared by [the] City, or its consultant, for the City Project shall be incorporated." Record 38.

"authorized by and consistent with" the city's TSP. But the city has not yet established that the project described in the AMP is "authorized by and consistent with" the city's TSP.

Because OAR 734-051-0155(4)(d) requires that AMPs must be consistent with the city's TSP and because OAR 734-051-0155(4)(k) requires that the AMP be "adopted into" the city's TSP, the city's adoption of the AMP "concerns the adoption, amendment or application of * * * [a] comprehensive plan provision" within the meaning of ORS 197.015(10)(a) and, for that reason, is a land use decision subject to LUBA jurisdiction.

Before turning to petitioner's assignment of error, we note that we would almost certainly conclude that the challenged decision is a land use decision, even if OAR 734-051-0155(4)(k) did not expressly require that the AMP be adopted as part of the city's TSP. At the very least, the challenged decision is both a contract and a city decision to authorize construction of transportation facility improvements. It may well be that those improvements are already envisioned by and consistent with the TSP, as respondents argue. However, the TSP is more general and does not provide the kind of detail that the AMP does in describing the project. Neither the Agreement nor the AMP make any attempt to establish that the project envisioned by the Agreement and AMP is consistent with the TSP. Without expressing any position on the merits of petitioner's arguments, we are unable to agree with respondents that the consistency of the proposed project with the TSP can be determined without a decision by the city, with supporting findings that explain why the project is consistent with the TSP. Such a decision will be required to apply the TSP and will be a land use decision even if it were not required by OAR 734-051-0155(4)(k) to be adopted as an amendment to the TSP.

SEVENTH ASSIGNMENT OF ERROR

Petitioner's seventh assignment of error is as follows:

"The city's decision amended its TSP, a component of its comprehensive plan. The city did not comply with the notice requirements of ORS 197.610 – 197.625." Petition for Review 34.[11]

While it is more accurate to say the city should have adopted the AMP as part of its TSP, and in doing so have followed the required statutory procedures for a post-acknowledgment plan amendment, petitioner's assignment of error is adequate to state a basis for remand. As we have already explained, the city must adopt the AMP as part of its TSP. Because the TSP is part of the city's acknowledged comprehensive plan, the post-acknowledgment plan amendment procedures will need to be followed.

The seventh assignment of error is sustained.

SIXTH ASSIGNMENT OF ERROR

Petitioner's sixth assignment of error is set out below:

"The decision rezoned the property of petitioner and others. The city did not comply with ORS 227.186."[12] Petition for Review 33.

Petitioner argues the AMP will "limit land uses" by denying, modifying and consolidating existing access. Reading the word "limits" in ORS 227.186(9)(b) broadly, petitioner contends that the

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[11] The cited statutes set out the notice and other requirements for adopting amendments to acknowledged comprehensive plans and land use regulations.

[12] As relevant, ORS 227.186 provides:

"(4) At least 20 days but not more than 40 days before the date of the first hearing on an ordinance that proposes to rezone property, a city shall cause a written individual notice of a land use change to be mailed to the owner of each lot or parcel of property that the ordinance proposes to rezone.

"* * * * *

"(9) For purposes of this section, property is rezoned when the city:

"(a) Changes the base zoning classification of the property; or

"(b) Adopts or amends an ordinance in a manner that limits or prohibits land uses previously allowed in the affected zone."

AMP "rezones" his property. Petitioner contends that the record does not establish that the city provided the notice required by ORS 227.186(4).

Petitioner's broad reading of ORS 227.186(9)(b) is textually possible. However, if that broad reading of the statute is correct, it significantly broadens the generally understood meaning of rezoning. Given the apparently remedial nature of ORS 227.186, it is certainly possible that the legislature intended that extremely broad meaning of rezoning. Read in its broadest sense, it might be possible to argue that almost any change in the way land uses are regulated would constitute a new "limit" and therefore constitute rezoning under ORS 227.186(9)(b). No party has provided any legislative history that might shed some light on the legislature's intended meaning.

We have not yet been required to interpret ORS 227.186(9)(b). The city's decision in this appeal must be remanded in any event. On remand the city will be in a position to determine whether it wishes to provide the notice required by ORS 227.186(4), without regard to whether it is legally required to do so and thereby render the issue moot. Given the arguable ambiguity in the statute, the lack of any legislative history to assist us in interpreting the statute, and the lack of any necessity to resolve the interpretive question in this appeal, we do not reach petitioner's sixth assignment of error.[13]

EIGHTH ASSIGNMNT OF ERROR

Petitioner alleges "[t]he city failed to make adequate findings." Petition for Review 34. We agree that the city failed to adopt adequate findings. Those findings are necessary in this case, even if the city's decision is properly characterized as a legislative decision, because we are simply unable to determine, without some assistance from the city in the form of findings, whether the project envisioned in the AMP is consistent with the TSP. *See 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

[13] Although we could seek out that legislative history ourselves or ask the parties to submit that legislative history and additional briefing, the parties have already granted additional time beyond the statutory deadline for our final opinion in this matter under ORS 197.830(14). Because we need not answer the interpretive question to resolve this appeal, we do not believe an additional delay in issuing our final opinion is warranted.

or accessible material in the record of the legislative act to show that applicable criteria were applied and that required considerations were indeed considered").

However, petitioner's argument under this assignment of error is that findings were required because "the city's decision was at least in part a quasi-judicial decision." Petition for Review 34. Petitioner contends the challenged decision is accurately characterized as a quasi-judicial decision because it satisfies the three-part test enumerated by the Oregon Supreme Court in *Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 601 P2d 769 (1979).[14] As is almost always the case, the second of those tests is satisfied here. But neither of the other tests is satisfied. We do not see that the process was bound to result in a decision. Neither is the action directed at a "closely circumscribed factual situation or a relatively small number of persons." To the contrary, a relatively large number of separate properties are impacted and a relatively large area is affected. Record 143-45; 148-52.

The eighth assignment of error is denied.

FIRST THROUGH FIFTH ASSIGNMENTS OF ERROR

Petitioner alleges (1) the proposed improvements are not an allowed use under the Talent Zoning Ordinance (first assignment of error); (2) the challenged decision and project violate three TSP provisions (second assignment of error); (3) the project violates four statewide planning goals (third assignment of error); (4) the decision is inconsistent with the transportation planning rule (fourth assignment of error); and (5) the AMP violates ODOT rules concerning reasonable access and ODOT rules governing AMPs (fifth assignment of error);

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[14] *Strawberry Hill 4 Wheelers* sets out a three-part test for determining whether a particular decision is legislative or quasi-judicial. We summarized that test in *Valerio v. Union County*, 33 Or LUBA 604, 607 (1997) as:

> "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?" (Internal quotes omitted).

For the following reasons, we do not reach the remaining assignments of error. Assignments of error one and two both concern the proper interpretation of city land use legislation. The challenged decision does not address these interpretive questions and any city findings on remand will be entitled to deference under ORS 197.829(1), in the event of a subsequent appeal. If the city agrees that the TSP is inconsistent in any of the ways that petitioner alleges in the second assignment of error, those inconsistencies would likely be corrected when the AMP is adopted as part of the TSP.

With regard to petitioner's statewide planning goal violations, because the city must amend its TSP on remand, it will be required to consider whether the proposal complies with the statewide planning goals in any event. While the city will not be entitled to any particular deference in its consideration of the statewide planning goal issues petitioner raises, our review of the goal issues presented in the third assignment of error will almost certainly be assisted by awaiting those findings.

Finally, the fourth and fifth assignments of error raise issues concerning the correct interpretation of the transportation planning rule and ODOT's rules governing reasonable access and AMPs. Because ODOT is a party in this appeal, it will likely be in a position to assist the county in responding to the issues presented in those assignments of error when the TSP is amended to include the AMP.

We do not reach petitioner's first through fifth assignments of error.

Because we sustain the seventh assignment of error, the city's decision is remanded so that the city can adopt the AMP as part of its TSP and adopt any findings that it determines are needed to (1) explain that amendment and (2) respond to the issues raised in petitioner's first six assignments of error.

The city's decision is remanded.