BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

FLYING J. INC.,
Petitioner,

vs.

MARION COUNTY,
Respondent,

and

TRAVELCENTERS OF AMERICA
and LEATHERS FUELS,
Intervenors-Respondent.

LUBA No. 2003-192

FINAL OPINION
AND ORDER

Appeal from Marion County.

G. Frank Hammond, Portland, filed the petition for review and argued on behalf of the petitioner. With him on the brief were Richard G. Lorenz and Cable, Huston, Benedict, Haagensen and Lloyd, LLP.

Jane Ellen Stonecipher, County Counsel, Salem, filed a response brief and argued on behalf of respondent.

Phillip E. Grillo, Portland, filed a joint response brief and argued on behalf of intervenor-respondent TravelCenters of America. With him on the brief were Kelly S. Hossaini and Miller Nash, LLP. William K. Kabeiseman, Portland, filed a joint response brief and argued on behalf of intervenor-respondent Leathers Fuels. With him on the brief were Edward J. Sullivan and Garvey Schubert Barer, PC.

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

REVERSED 03/03/2005

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

Opinion by Davies.

NATURE OF THE DECISION

Petitioner appeals a stipulation made by the county in a circuit court mandamus proceeding.

FACTS

We summarized the facts of this case in two motions to dismiss that were previously denied. In denying the county's motion to dismiss, we described the chronological history of this case:

> "This appeal involves a long-running dispute between petitioner, intervenors and the county about the level of development allowed on 29 acres owned by petitioner that are located immediately west of the Fargo Interchange on I-5. *See e.g.*, *Flying J Inc. v. Marion County*, 38 Or LUBA 149, *aff'd* 170 Or App 568, 13 P3d 516 (2000); *Leathers v. Marion County*, 31 Or LUBA 220, *aff'd in part and rev'd and remanded in part* 144 Or App 123, 925 P2d 148 (1996). To provide context for this latest dispute, we provide the following historical summary.
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> > "**1981** As part of the county's initial acknowledgement process, the county adopts an exception to Goal 3 for property located around the Fargo Interchange and zones that property Interchange Development (ID) to allow development of a truck stop and other travellers' accommodations. In addition to other property not at issue in this appeal, two acres located at the intersection of Ehler and Bents Roads are included within the exception area and are zoned ID.
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> > "**1987** County adopts Ordinance 777. Ordinance 777 approves a partition application for 87 acres located to the west and south of the two acres to permit the creation of a 70-acre parcel and a 17-acre parcel. Ordinance 777 rezones the newly created 17-acre parcel from Exclusive Farm Use (EFU) to ID. Ordinance 777 also requires that the 17 acres be combined with the two acre parcel previously zoned ID. The 70-acre remainder parcel retains the EFU zoning.
> >
> > "**1988** County adopts Ordinance 784. Ordinance 784 approves a lot line adjustment between the 70-acre parcel and the adjoining 17-acre parcel approved by Ordinance 777. The 10-acre area joined with the 17 acre parcel is rezoned ID.
> >
> > "**1989** County adopts Ordinance 826. Ordinance 826 repeals the ID zoning designation for the 27 acres approved by Ordinances 777 and

784, and applies the ID-LU zoning designation to the 27 acres. Ordinance 826 also requires the owners to combine the 27 acres with the two-acre parcel previously zoned ID. Ordinance 826 acknowledges that once the parcels are combined, 27 acres would be zoned ID-LU, and the two acres would retain the ID zoning.

"2001 County adopts Ordinance 1132. Ordinance 1132 adopts a community plan for the Fargo Interchange and adopts land use regulations to conform with administrative rules pertaining to rural communities. Ordinance 1162 includes findings that state 'that the Limited Use Overlay Zone and restrictions applied to the Flying J property within the Fargo Interchange Community Plan area through prior land use actions shall remain in effect for the property.' Ordinance 1132, 2. Nevertheless, Ordinance 1132 includes as an exhibit a zoning map that depicts the two acres within the ID-LU zoning designation." ___ Or LUBA ___ (LUBA No. 2003-192, Order, March 19, 2004) 1-3 (footnote omitted).

We explained in the omitted footnote that the ID-LU zoning designation provides fewer outright permitted uses than does the ID zone and requires notice and an opportunity for interested parties to object to proposed uses that are not permitted outright. In an order denying intervenors' motion to dismiss, we set out the following additional facts:

" * * * the parties have been engaged in a lengthy legal battle involving the proper zoning of two acres of a 29-acre parcel west of the Fargo Interchange on I-5. Petitioner contends that two of the 29 acres are zoned Interchange Development (ID), while the county and intervenors contend the entire 29-acre parcel is zoned Interchange Development/Limited Use (ID-LU).

"As part of periodic review, the county adopted Ordinance 1132, which adopted a community plan for the area and land use regulations to conform with administrative rules pertaining to rural communities. That 2001 ordinance included as an exhibit a map that shows the entire 29 acres within the ID-LU zoning designation. However, the text of the ordinance states: 'the Limited Use Overlay Zone and restrictions applied to the Flying J property within the Fargo Interchange Community Plan area through prior land use actions shall remain in effect for the property.' Apparently, none of those prior land use actions zoned the 2 acres ID-LU.

"In the subsequent Land Conservation and Development Commission (LCDC) periodic review of Ordinance 1132, petitioner filed an objection, arguing that the two acres were not zoned ID-LU, but it withdrew that objection before LCDC issued its final order. LCDC adopted an order on June 21, 2002 that included the following finding:

> "'Marion County's submittal indicates that a Limited Use Overlay Zone was applied by the county to include the entire 29 acre Flying J property, including the 2 acres. This is a local land use decision, and according to Marion County is required because the development proposed as part of the 'reasons' exception included the entire 29 acres as a single development. The county's decision to apply the limited use overlay zone to the 2 acres is consistent with the statewide planning goals. There is no basis to support this claim by Flying J. This exception is not sustained." Intervenor's Motion to Dismiss, Exh. 3.'

"More than a year later, intervenor initiated a mandamus proceeding in an attempt to require respondent to provide notice and hearings prior to issuing building permits to petitioner for a service station on the 2-acre parcel. On October 29, 2003, county counsel filed a factual stipulation in a circuit court mandamus proceeding. That stipulation, which led to dismissal of the circuit court mandamus action, is the subject of this appeal. It states, in pertinent part:

> "'1. [T]he Marion County official zoning map was amended through [Ordinance 1132] and, as a result, the official zoning map now reflects that the county's Interchange District-Limited Use Overlay Zone ('ID-LU') applies to the entire 29-acre Flying J property, including the [two] acres that had previously been zoned [Interchange District (ID)].'
>
> "'2. In accordance with ORS 197.763, or as otherwise provided by law, the county will provide notice and an opportunity for hearing prior to approval of any permits for development on any portion of the Flying J property located within the ID-LU zone." Stipulation by Defendant Marion County, 1-2.'" 47 Or LUBA 637-39 (2004).

This appeal followed.

MOTION TO FILE REPLY BRIEF

Petitioner moves to file a 10-page reply brief. There is no opposition to the motion, and it is granted.

FIRST ASSIGNMENT OF ERROR

The above-quoted facts describe the long and tortured history of this case. Although the numerous motions to dismiss, motions to strike, and record objections have involved many complex issues, the key legal question finally presented on the merits of the case is

1 relatively simple. This case essentially boils down to the proper interpretation of an
2 ambiguous ordinance, Ordinance 1132, in which the text appears not to change the ID zoning
3 of the 2.2 acres but the attached map depicts the 2.2 acres rezoned to ID-LU.[1] The resolution
4 of that legal question also resolves this case.[2]

5 As quoted above, Ordinance 1132 states that the "Board [of County Commissioners]
6 finds that the Limited Use Overlay Zone and restrictions applied to the Flying J property
7 within the Fargo Interchange Community Plan area through prior land use actions shall
8 remain in effect for the property." Although intervenors go to great lengths to show that the
9 2.2 acres actually were rezoned at some prior point, we are not persuaded. Intervenors have
10 pointed us to no decision or action by the county, other than Ordinance 1132, that even
11 arguably rezoned the 2.2 acres to ID-LU.[3] Intervenors' case, therefore, turns on the proper
12 interpretation of that ordinance.

13 The ordinance is ambiguous. If one looks at the text, the answer is simple: the 2.2
14 acres are zoned ID. If one looks at the map, the answer is equally simple: the 2.2 acres are
15 zoned ID-LU. The county entered into a stipulation that constituted an interpretation of that
16 ambiguous ordinance and concluded that Ordinance 1132 rezoned the 2.2 acres to ID-LU.[4]

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[1] Although in our previous orders we described the area in question as two acres for brevity, it actually comprises 2.2 acres.

[2] Intervenors repeatedly criticize our prior rulings and reassert their previous arguments, and in fact base many of their arguments on the unstated assumption that our prior rulings were wrong. We are not persuaded by intervenors' arguments and see no reason to disturb our previous rulings. In those prior orders we found that the stipulation was a land use decision because it required interpretation or the exercise of policy or legal judgment. We reject intervenors' arguments based on our alleged prior mistakes without further discussion. Intervenors' arguments based on failure to exhaust local remedies and mootness are also rejected without further discussion.

[3] As discussed later in this opinion, we disagree with intervenors that the LCDC order finally decided the proper zoning of the 2.2 acres.

[4] We note that LUBA has jurisdiction to review what are essentially declaratory rulings of a local government as to the meaning and effect of their own ordinances. No application was at issue in the mandamus proceeding below. All that was at issue was what the county should do if an application were filed. We are not prevented from this review, as is the Court of Appeals, because we are not bound by the prerequisite of a justiciable controversy. *1000 Friends of Oregon v. Clackamas County*, 194 Or App 212, 94 P3d 160 (2004) (although local governments and LUBA may render advisory opinions, the Court of Appeals may not).

Before addressing the merits of that interpretation, we turn to intervenors' argument that petitioner cannot appeal that interpretation to LUBA because it is barred by issue preclusion.

A. Issue Preclusion

As explained earlier in this opinion, petitioner filed an objection during periodic review of Ordinance 1132. LCDC's final report on that work task summarized petitioner's objection as follows:

> "The discussion of the Flying J property fails to take into account some of the history of how the exception was applied to the property. A two (2)-acre portion of the Flying J property should not be subject to the limited use overlay zone." Record 625.

Although petitioner withdrew its objection regarding the zoning of the 2.2 acres, LCDC adopted an order that included the following finding:

> "Marion County's submittal indicates that a Limited Use Overlay Zone was applied by the county to include the entire 29 acre Flying J property, including the 2 acres. This is a local land use decision, and according to Marion County is required because the development proposed as part of the 'reasons' exception included the entire 29 acres as a single development. The county's decision to apply the limited use overlay zone to the 2 acres is consistent with the statewide planning goals. There is no basis to support this claim by Flying J. This exception is not sustained." *Id.*

According to intervenors, the LCDC order was a decision that was binding on petitioner, and petitioner is therefore barred from contesting the issue before LUBA. Issue preclusion bars relitigation of an issue in subsequent proceedings where the issue has been determined by a valid and final determination in a prior proceeding. *Nelson v. Emerald People's Utility Dist.*, 318 Or 99, 103, 862 P2d 1293 (1993). A prior decision on an issue may preclude relitigation of that issue if the following five requirements are met: (1) the issue in the two proceedings is identical; (2) the issue was actually litigated and was essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded had a full and fair opportunity to be heard on that issue; (4) the party sought to be precluded was a

1 party or was in privity with a party to the prior proceeding; and (5) the prior proceeding was
2 the type of proceeding to which preclusive effect will be given. *Id.* at 104.

3 Issue preclusion does not apply in the present case for a number of reasons. Under
4 the first criterion in *Nelson*, the issue in the two proceedings must be identical. Although at
5 first blush LCDC's order appears to address the same issue that is presented here, the issues
6 are not identical. The issue in the present case is the proper interpretation of Ordinance 1132.
7 LCDC's order says nothing about the ambiguity in Ordinance 1132, nor does it make any
8 attempt to interpret the ordinance. The above-quoted language from LCDC's order merely
9 demonstrates that LCDC assumed that Ordinance 1132 or some other action by the county
10 zoned the 2.2 acres ID-LU.[5] However, the order did not attempt to resolve the interpretation
11 of an ambiguous ordinance to determine whether the property was, in fact, zoned ID-LU.
12 Therefore, the first *Nelson* criterion is not satisfied.

13 Under the second *Nelson* criterion, the issue must have been actually litigated and
14 essential to a final decision on the merits in the prior proceeding. Petitioner withdrew its
15 objection prior to LCDC's order so it is questionable whether the issue was "actually
16 litigated." More importantly, the periodic review challenge concerned the rural community
17 designation of the entire Fargo Interchange area. The zoning of the 2.2 acres was an
18 unimportant part of LCDC's review. Even if we assume LCDC had authority to review the
19 issue of the 2.2 acres' zoning and actually did so, any resolution of that issue was not
20 essential to a final decision on the merits of the LCDC order. Therefore, the second *Nelson*
21 criterion is not satisfied.[6]

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[5] This would appear to be an incorrect assumption as for over three years from the time of LCDC's order the county treated the 2.2 acres as though it were zoned ID and it was shown on the official zoning map zoned ID.

[6] Because petitioner withdrew its objection, it is also questionable whether there was a full and fair opportunity to be heard on the matter, the third *Nelson* criterion.

Because intervenors have not demonstrated that all of the *Nelson* criteria are satisfied, we need not consider whether LCDC's proceedings on periodic review are the type of proceedings to which preclusive effect should be given. For all of the above reasons, issue preclusion does not apply in this case. We turn, now, to petitioner's challenge to the county's interpretation of Ordinance 1132.

B. County's Interpretation of Ordinance 1132

Initially, intervenors argue that the county's interpretation is entitled to deference under ORS 197.829(1) and *Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003). Although we would reach the same conclusion under a more deferential standard of review, the county is only entitled to deference when it is the governing body that adopts the interpretation. *Gage v. City of Portland*, 133 Or App 346, 349-50, 891 P2d 1331 (1995). In this case, it was county counsel who made the interpretation. It is immaterial that she was acting under the authority of the board of county commissioners. Planning commissions, hearings officers, and planning officials also act under the authority of their respective governing bodies, but their interpretations of the governing bodies' local land use laws are not entitled to deference. Similarly, county counsel's interpretation is not entitled to deference. *Id*. We therefore review the stipulation for legal error.

Ordinance 1132 adopted an unincorporated rural community plan for the Fargo Interchange and implementing regulations to conform to the provisions of OAR 660, Division 22 (Unincorporated Communities Rule). Ordinance 1132, Section 1. Record 7. The ordinance includes findings that the proposed community plan complies with the Unincorporated Communities Rule and applicable statewide planning goals. *Id*. The findings then go on to state, as quoted twice earlier in this opinion, that the existing limited use overlay zone and restrictions applied "through prior land use actions shall remain in effect for the property." The attached map is entitled "Fargo Interchange Community Plan" and appears to be a map included in the community plan adopted by Ordinance 1132. The

1 parties point us to nothing in the text of the community plan itself, the comprehensive plan,
2 or Ordinance 1132 that suggests that the county intended to change the existing zoning as
3 depicted on the map when it adopted Ordinance 1132. On the contrary, the text of the
4 ordinance itself clearly demonstrates an intent *not* to change the existing zoning on the 2.2
5 acres. The map, which is contrary to the text of the ordinance, does not control over that
6 clear language. The county erred in entering into the stipulation that concluded otherwise.

7 Under OAR 661-010-0071(1)(c), we will reverse a local government's decision that
8 violates a provision of applicable law and is prohibited as a matter of law. We have held that
9 the county's interpretation is wrong as a matter of law. Therefore, the county's decision is
10 reversed.[7]

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[7] Because we sustain petitioner's first assignment of error and reverse the county's decision, it is unnecessary to consider petitioner's remaining assignments of error.