BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DAVE SULLIVAN
Petitioner,

vs.

POLK COUNTY,
Respondent.

LUBA No. 2005-024

FINAL OPINION
AND ORDER

Appeal from Polk County.

Dave Sullivan, Albany, filed the petition for review and argued on his own behalf.

David Doyle, Dallas, Polk County Legal Counsel, filed the response brief and argued on behalf of respondent.

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

REMANDED 06/30/2005

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

Petitioner appeals an ordinance incorporating a portion of a 20-acre parcel of land within a rural unincorporated community, and rezoning the portion from exclusive farm use (EFU) to Acreage Residential 5-Acre Minimum (AR5).

FACTS

The subject property is a five to seven-acre portion of tax lot 205, a 20-acre parcel. Prior to 1989, tax lot 205 was part of a 234-acre parcel zoned EFU. The parent parcel adjoined tax lot 204, which was developed with the Ostrom timber mill and zoned Heavy Industrial (IH). The Ostrom mill site was (and still is) the center of an unincorporated community known as Pedee.

In 1989, the owner of the mill sought to expand the mill operation onto the adjoining 20-acre portion. The owner of the parent parcel and the owner of the timber mill filed a joint application to rezone the subject 20 acres from EFU to IH and to redesignate the 20 acres from Agriculture to Rural Community Center, which required an exception to Statewide Planning Goal 3 (Agricultural Lands). The application also sought approval for a lot line adjustment to add the 20-acre portion of the parent parcel to tax lot 204. The county approved the application in Ordinance 89-7, including a condition that limited uses on the 20-acre portion to uses "closely associated with the existing mill and the wood products industry." Record 155. Petitioner acquired the remainder of the parent parcel shortly after the adoption of Ordinance 89-7. The mill expansion contemplated by the 1989 decision never occurred, however, and by 1993 the mill had ceased operation and its equipment and buildings were sold as salvage.

Sometime prior to 1998, the county planning department converted the county's paper zoning map to a digital information system. In that process, the planning department erroneously depicted a portion of tax lot 205, approximately five to seven acres, with EFU zoning, and the remainder with the IH zoning imposed by the 1989 decision.

The McKinneys acquired tax lot 205 in 1999, and subsequently applied to the county for a permit to construct a single family dwelling on the IH-zoned portion. The county approved the dwelling. In 1999 and 2000, the county reviewed the planning and zoning for all ten of its rural communities. The result was Ordinance 00-05, which amended the comprehensive plan map and zoning map for the county's rural communities, including Pedee. The amended maps incorporated the 13 to 15-acre IH-zoned portion of tax lot 205 into the Pedee community boundary, and amended the plan and zoning designations for that incorporated portion from Rural Community Center to Unincorporated Community Residential, and IH to AR5. The amended maps depicted the five to seven-acre portion of tax lot 205 outside the Pedee community with a plan designation of Agriculture and an EFU zoning designation. Ordinance 00-05 also included a table of plan and zoning amendments, with entries indicating that 15 acres of tax lot 205 were re-designated and rezoned.

In 2004, the McKinneys requested that the county review the zoning of tax lot 205, arguing that the county's intent in adopting Ordinance 00-5 was to bring the entire 20-acre property within the Pedee boundary and rezone it to AR5. If extended to the entire 20 acres, AR5 zoning would allow several additional dwellings to be constructed on tax lot 205. The county agreed to rezone the entire property AR5 and bring it within the Pedee boundary. The county treated the proposed amendments as a legislative "map correction" to the plan and zoning maps, and therefore did not provide individual written notice of hearing to nearby property owners, as required for quasi-judicial plan or zoning map amendments. The county published legal notice in the Dallas Itemizer-Observer, but the notice erroneously stated that the map correction concerned the unincorporated community of Suver Junction. The county planning commission held a hearing on December 7, 2004, at which no citizen appeared, and recommended approval. The county board of commissioners held a hearing December 22, 2004, at which no citizen appeared, and voted to approve the proposed amendments. On December 29, 2004, the board of commissioners adopted Ordinance 04-17, which includes all of tax lot 205 in the Pedee community boundary, amends the plan designation and

zoning for the five to seven acre-portion formerly outside the boundary, and amends the tables adopted with Ordinance 00-05 to reflect that 20 acres, not 15 acres, of tax lot 205 are redesignated and rezoned. Although not required to under the procedures governing legislative amendments, the county sent notice of the decision to adjoining property owners, including petitioner. This appeal followed.

ASSIGNMENT OF ERROR

Petitioner contends that the challenged decision is not accurately viewed as either a legislative decision or as a "map correction." According to petitioner, the challenged decision is in fact a quasi-judicial decision, and therefore the county erred in failing to provide individual written notice of the hearings to nearby property owners, including petitioner, pursuant to Polk County Zoning Ordinance (PCZO) 111.340 and 111.350.[1]

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[1] PCZO 111.340 and 111.350 provide, in relevant part:

> "**111.340. NOTICE OF PUBLIC HEARING; CONTENT.** Upon the fixing of the time of public hearing on all matters before the appropriate hearing body, the Director shall give notice as set forth in this chapter. The notice shall:
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> "(A) Explain the nature of the application and the proposed use or uses which could be authorized;
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> "(B) List the applicable criteria from the ordinance and the plan that apply to the application at issue;
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> "(C) Set forth the street address or other easily understood geographical reference to the subject property;
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> "(D) State the date, time and location of the hearing;
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> "(E) State that failure of an issue to be raised in a hearing, in person or in writing, or failure to provide sufficient specificity to afford the hearings body an opportunity to respond to the issue, precludes appeal to the Land Use Board of Appeals on that issue;
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> "(F) State that a copy of the application, all documents and evidence relied upon by the applicant, and applicable criteria, are available for inspection at no cost and will be provided at reasonable cost;
>
> "(G) State that a copy of the staff report will be available for inspection at no cost at least seven days prior to the hearing, and will be provided at a reasonable cost; and

The challenged decision recites that it is the result of a "legislative proceeding" but does not explain why. Record 9. The county's brief also makes no attempt to explain why the challenged decision is properly viewed as a legislative rather than quasi-judicial decision. As those terms are used in land use parlance, the challenged decision appears to us to be a quasi-judicial decision. *See Strawberry Hill 4 Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 602-03, 601 P2d 769 (1979) (describing three factors distinguishing quasi-judicial from legislative decisions). The three *Strawberry Hill 4 Wheelers* factors may be summarized as follows:

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?

The more definitely the questions are answered in the negative, the more likely the decision under consideration is a legislative land use decision. *Valerio v. Union County*, 33 Or LUBA 604, 607 (1997). Each of the factors must be weighed, and no single factor is determinative. *Estate of Gold v. City of Portland*, 87 Or App 45, 740 P2d 812 (1987).

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include a general explanation of the requirements for submission of testimony and the procedure for conduct of hearings."

"**111.350. MAILING OF NOTICE; NOTIFICATION AREA; FAILURE TO RECEIVE NOTICE.**

"(A) Notices of public hearing to be held by the hearing body**,** notice of an application to be processed as a Type B procedure pursuant to Section 111.240 (B), or notice of any action taken on an application by the Planning Director or Hearings Officer shall be mailed to the applicant and to owners of record on the most recent property tax assessment roll where such property is located:

"(1) Within 100 feet of the property which is the subject of the notice, where the subject property is wholly or partly within an urban growth boundary;

"(2) Within 250 feet of the property which is the subject of the notice, where the subject property is outside an urban growth boundary and not within a farm or forest zone; or

"(3) Within 750 feet of the property which is the subject of the notice, where the subject property is within a farm or forest zone.

"* * * * *"

Here, all three factors point toward a quasi-judicial character. The process the county followed appears to be bound to result in a decision. *See* PCZO 115.040(C) (providing that the board of commissioners shall hold a public hearing on a proposed legislative plan amendment and that "[a]ny denial of a proposed plan amendment shall be by order").[2] PCZO 115.050 and 115.060 set forth specific criteria for both non-legislative and legislative plan amendments. Finally, there can be no possible dispute that plan and zone amendments affecting only a small portion of a 20-acre parcel in single ownership is "directed at a closely circumscribed factual situation or a relatively small number of persons."

Further, the county's comprehensive plan defines "legislative act" as "[a]n act of a governing body which applies generally to persons and property within the jurisdiction of the governing body." Polk County Comprehensive Plan (PCCP), Appendix C, 109. The challenged decision could not possibly be a "legislative act" under that definition. Similarly, the county's code defines a "non-legislative comprehensive plan amendment" in relevant part as a plan amendment "initiated by the affected property owners" that includes "a change to the land use designation for one or more properties." PCZO 115.020(A). A "legislative comprehensive plan amendment" is defined simply

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[2] PCZO 115.040 provides, in relevant part:

"**115.040. PROCEDURES FOR LEGISLATIVE PLAN AMENDMENTS**.

"(A) Legislative amendments may be initiated by the Board of Commissioners or Planning Commission. An interested party may request that the Planning Commission or Board initiate a legislative amendment. Legislative amendments shall only be initiated by the Board or Planning Commission after findings are made that the proposed change is in the public interest and will be of general public benefit. * * *

"(B) After a legislative amendment has been initiated, the Planning Commission shall hold a public hearing as prescribed in Chapter 111 on the complete petition for plan amendment. After concluding this hearing, the Planning Commission shall submit a recommendation to the Board of Commissioners.

"(C) The Board of Commissioners shall hold a public hearing on the proposed plan amendment as provided in Chapter 111. Final decision by the Board of Commissioners shall not be effective until 21 days after mailing of the decision. * * *Any plan amendment or reclassification of property shall be by ordinance which shall be passed by the Board of Commissioners. Any denial of a proposed plan amendment shall be by order."

as any comprehensive plan amendments "other than non-legislative amendments" that are "initiated by the Board of Commissioners or the Planning Commission." PCZO 115.020(B). Nothing in the record indicates that the board of commissioners or the planning commission initiated the proposed plan and zoning map amendments. Certainly there is no indication in the record that either the board or the planning commission first adopted findings that the "proposed change is in the public interest and will be of general public benefit," preliminary to initiating the plan amendment process, as PCZO 115.040(A) appears to require.[3] Based on the record before us, it seems clear that the county's action was initiated by the request of the owners of tax lot 205, who provided 50 pages of documentation that the record table of contents characterizes as coming from "the applicant."

For these reasons we agree with petitioner that the challenged decision is properly viewed as quasi-judicial rather than legislative in character. Accordingly, petitioner is correct that the county erred in failing to follow the procedures set out in the county's code and in statute for quasi-judicial hearings, including providing individual written notice of the hearings to petitioner.

As noted, the county's brief does not seriously dispute that the decision is quasi-judicial under the *Strawberry Hill 4 Wheelers* factors and the county's ordinances. However, the county argues that petitioner has no "standing" to challenge the county's decision, because PCZO 111.120 authorizes the board of commissioners to adopt all or part of a new zoning map by resolution, and that such adoption may "correct drafting or other errors or omissions in the prior official zoning map."[4] We understand the county to argue that because the county *could have* adopted a new,

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[3] The county's final decision addresses the criteria for legislative plan amendments at PCZO 115.060(C), which requires a finding that "the proposed change is in the public interest and will be of general public benefit." That language is identical to that required under PCZO 115.040(A) to initiate a legislative amendment. The county's decision finds compliance with PCZO 115.060(C), identifying the "public benefit" as providing "the property owner and other area property owners" with "accurate documentation" of the correct planning and zoning for the subject property. Record 20. Although that finding is directed at PCZO 115.060(C) rather than the PCZO 115.040(A) standard for initiating a legislative amendment, petitioner notes the irony in justifying a legislative amendment based on a "public benefit" in providing "accurate documentation" to a specific property owner and his neighbors, while at the same time using a legislative process that provides no notice to the property owner or affected neighbors.

[4] PCZO 111.120 provides, in full:

corrected zoning map under PCZO 111.120 by resolution, *i.e.*, without providing quasi-judicial notice of hearings to petitioner, then the county's error in approving the proposed plan and zoning map amendments under PCZO 115 without providing such notice is at most harmless error.[5]

PCZO 111.120 does not assist the county. First, the county did not adopt a new zoning map under PCZO 111.120. That it theoretically *might have* done so is not a basis to conclude that the county's procedural errors in adopting the decision it *did* adopt are harmless. Second, PCZO 111.120 allows only adoption of a new zoning map, under specified circumstances. Even assuming PCZO 111.120 would allow the county to "correct" the zoning of the subject property from EFU or IH to AR5, it does not authorize the county to amend the comprehensive plan map designation, or to amend the text of the tables to Ordinance 00-05, which are apparently background documents to the Unincorporated Communities Report at Appendix G of the PCCP. Third, in a clause omitted from the quotation of PCZO 111.120 in the county's brief, the code provision makes it clear that "no such correction shall have the effect of amending the ordinance * * *." For the reasons that follow, we agree with petitioner that the proposed plan and zoning amendments are not properly viewed as simple "map corrections."

As petitioner notes, the predicate for a "map correction" is a mismatch between the official zoning map and one or more underlying ordinances. The "correction" must presumably conform the zoning map to the ordinances that have adopted plan and zoning changes. Here, there are only two

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> "**111.120. REPLACEMENT OF OFFICIAL ZONING MAP.** In the event the official zoning map becomes damaged, destroyed, lost or difficult to interpret because of the nature and number of changes and additions, or when it is necessary or desirable for some other reason, the Board of Commissioners, upon recommendation of the Planning Commission, may adopt all or part of a new zoning map by resolution, and such map shall supersede the prior official zoning map. The superseded map shall be filed for reference purposes for at least one (1) year. *The new official map may correct drafting or other errors or omission in the prior official zoning map, but no such correction shall have the effect of amending the ordinance or any subsequent amendment thereof.* The replacement map or each page in the case of individual sheets or pages shall be certified by the Board of Commissioners and County Clerk that 'this official zoning map supersedes and replaces the official zoning map (date of map being replaced) as part of the Polk County Zoning Ordinance.'" (Emphasis added.)

[5] The county couches its brief argument under PZCO 111.120 as a challenge to petitioner's "standing" and suggests that we dis miss the appeal. We can make no sense of that argument in those terms.

relevant ordinances: (1) Ordinance 89-7, which changed the plan designation for the 20-acre tax lot 205 from Agriculture to Rural Community Center, and changed the zoning from EFU to IH; and (2) Ordinance 00-05, which changed the plan designation for a 13 to 15-acre portion of tax lot 205 from Rural Community Center to Unincorporated Community Residential, and changed the zoning of that portion from IH to AR-5. Ordinance 00-05 did not disturb the plan or zoning designation for the remainder of tax lot 205, and did not extend the Pedee community boundaries to include that remainder. The county may well have intended to do so, or would have formed the intent to do so if it had appreciated at the time that the split zoning depicted on the official zoning map did not accurately reflect Ordinance 89-7. However, the fact remains that Ordinance 00-05 did not make those changes, and therefore the county cannot employ PCZO 111.120 to "correct" the plan and zoning maps to reflect amendments that no ordinance has ever authorized.

In short, while the county might be able to "correct" the zoning map under PCZO 111.120 to remove the incorrect EFU designation on the five to seven-acre portion of tax lot 205 and replace it with the IH designation imposed by Ordinance 89-7, we see no basis under that code provision to change the zoning of that portion to AR5, much less to make plan map and ordinance text changes. To do so would "have the effect of amending the ordinance" and therefore cannot be accomplished under PCZO 111.120.

The assignment of error is sustained.

The county's decision is remanded.