BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

MERLE BROWN,
GWENDOLYN FARNSWORTH,
and JAMES JUST,
Petitioners,

vs.

LANE COUNTY,
Respondent,

and

DARREN KRONBERGER,
Intervenor-Respondent.

LUBA No. 2005-104

FINAL OPINION
AND ORDER

Appeal from Lane County.

Jannett Wilson, Eugene, filed the petition for review and argued on behalf of petitioners.

No appearance by Lane County.

Michael E. Farthing, Eugene, filed the response brief and argued on behalf of intervenor-respondent.

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

REMANDED 05/05/2006

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

Petitioners appeal a county decision that grants a zoning map change for four parcels from Non-Impacted Forest Land to Impacted Forest Land.

MOTION TO INTERVENE

Darren Kronberger (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion and it is granted.

FACTS

The subject property consists of four adjacent lots comprising approximately 84 acres located in unincorporated Lane County near the communities of Trent and Dexter. The property was part of a larger parcel that was originally zoned Impacted Forest Land (F-2) in 1984. The subject property, however, along with other properties, was subsequently rezoned to Non-Impacted Forest Land (F-1). Intervenor submitted an application to change the zoning of the property to F-2 under the county's Errors or Omissions Policy of the Rural Comprehensive Plan (RCP). The planning commission recommended denial of the application. The board of commissioners approved the application. This appeal followed.

FIRST ASSIGNMENT OF ERROR

RCP Goal 2 concerns "Land Use Planning" generally. Goal 2, Policy 27(a) sets out a number of circumstances that may establish that there have been "Errors or Omissions" that provide a basis for correcting the existing zoning of property. RCP Goal 2, Policy 27(a)(ii) permits the county to rezone property from F-1 to F-2 in circumstances where (1) the maps that the county relied on when the property was zoned F-1 did not show legal lots within or adjacent to the property alleged to be improperly zoned F-1, and (2) had legal lots been

accurately displayed on the maps that were originally used, Goal 4 policies would have dictated F-2 zoning for the property at issue at that time.[1]

Under the county's interpretation of the errors or omissions policy, if any of the eight subsections of RCP Goal 2, Policy 27(a) apply then the county turns to determining the proper zoning for the property. In the present case, the county found that subsection (a)(ii) was satisfied and proceeded to determine the proper zoning classification under the Goal 4 policies. *See* n 6 *infra*. In applying the Goal 4 policies, however, the county applied those policies to the current parcelization pattern rather than the pattern that existed at the time the property was zoned F-1. Petitioners argue that the county misconstrued the applicable law by analyzing the existing parcelization pattern.

In *Just v. Lane County*, 50 Or LUBA 399 (2005), we recently addressed this precise issue. We held "* * * Goal 2, Policy 27(a)(ii) requires the county to apply the Goal 4 policies to a correct view of parcelization as it existed [when the property was originally

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[1] RCP Goal 2, Policy 27 provides, as pertinent:

> "Errors or Omissions. Lane County will * * * process applications to correct identified errors or omissions in the [RCP] and Zoning Plots resulting from the [RCP] or Zoning Plots not recognizing lawfully existing (in terms of the zoning) uses or from inconsistencies between the [RCP] and Zoning Plots. * * *
>
> "a. Circumstances qualifying for consideration by the Board of Commissioners under the Errors or Omission Policy may include one or more of the following:
>
> "* * * * *
>
> "ii. Failure to zone a property [F-2], where maps used by staff to designate the property [F-1] did not display actual existing legal lots adjacent to or within the subject property, and had the actual parcelization pattern been available to County staff, the Goal 4 policies would have dictated the F-2 zone.
>
> "* * * * *
>
> "vii. Correction of an inconsistency between the text of an order or ordinance adopted by the Board of Commissioners and an Official Plan or Zoning diagram."

zoned F-1], not to parcelization as it may exist today." *Id*. at 411.[2] Because the county analyzed the existing parcelization pattern rather than the parcelization pattern in 1984 when the property was zoned F-1, the county misconstrued RCP Goal 2, Policy 27(a)(ii).

Intervenor argues that even if the county misconstrued Policy 27(a)(ii), the challenged decision should be affirmed based on Policy 27(a)(vii), which allows the county to correct an inconsistency between a zoning ordinance's text and a zoning map. *See* n 1. Although intervenor acknowledges that there are no findings addressing this subsection, he argues that there is evidence that "clearly supports" the decision, and the decision should be affirmed under ORS 197.835(11)(b).[3] According to intervenor, the county originally zoned many properties, including the subject property, F-2. Due to concerns from DLCD a number of large properties were rezoned to F-1. Record 832. The subject property is depicted as rezoned F-1 on the zoning map from the ordinance rezoning properties to F-1. Record 833. An exhibit to that ordinance contains a computer-generated list of tax lots rezoned to F-1 that does not include the subject property. Record 834. While there may be an inconsistency between the text of the ordinance and the zoning map, the county's decision to zone the property F-2 is based entirely on Policy 27(a)(ii).[4] The county did not approve the zoning change under Policy 27(a)(vii).

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[2] Our decision in *Just* had not been issued when the county made its decision in the present case.

[3] ORS 197.835(11)(b) provides:

> "Whenever the findings are defective because of failure to recite adequate facts or legal conclusions or failure to adequately identify the standards or their relation to the facts, but the parties identify relevant evidence in the record *which clearly supports the decision* or a part of the decision, the board shall affirm the decision or the part of the decision supported by the record and remand the remainder to the local government, with direction indicating appropriate remedial action." (Emphasis added.)

[4] The county's decision explains in a footnote that because only one basis is needed to reach the question of proper zoning, it does not reach the question of an inconsistency between the text of the ordinance and the zoning map, pursuant to Policy 27(a)(vii). Record 15.

It is unclear to us whether ORS 197.835(11)(b) is available to affirm a decision based on an alternative theory or approval standard that was not considered by the local government. ORS 197.835(11)(b) provides that a decision that includes findings that are deficient in one or more of several ways may be affirmed if there is relevant evidence in the record which clearly supports the decision the local government made. In this case, the county based its decision to correct the zoning on Policy 27(a)(ii); it explicitly declined to base its decision, even in part, on Policy 27(a)(vii). This is not a circumstance where the county's findings are defective because they fail to "recite adequate facts or legal conclusions" or fail to "identify the standards or their relation to the facts." Rather, the findings addressing Policy 27(a)(vii) are completely nonexistent. For whatever reason, the county chose not to base its decision on Policy 27(a)(vii), and chose instead to rely solely on Policy 27(a)(ii).

We need not decide whether ORS 197.835(11)(b) authorizes LUBA to a affirm a decision based on an alternative theory or approval standard that was not considered by the local government. Even if it did, ORS 197.835(11)(b) does not provide a basis to affirm the challenged decision based on compliance with Policy 27(a)(vii). The parties offer conflicting interpretations of Policy 27(a)(vii), and it is unclear to us how the alleged conflict between the text of an ordinance and an official planning or zoning map should be resolved under that policy. No matter how clear the evidence of an ordinance text/plan or zoning map conflict, the county must provide its own interpretation of Policy 27(a)(vii) in the first instance.[5] Accordingly, intervenor cannot rely on ORS 197.835(11)(b) as a basis to affirm the county's decision.

The first assignment of error is sustained.

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[5] While ORS 197.829(2) authorizes LUBA to provide its own interpretation where a local government fails to provide an interpretation, in this case, where the county chose not to rely on Policy 27(a)(vii) as a basis for its decision, we believe it is appropriate for the county to provide that interpretation in the first instance.

SECOND ASSIGNMENT OF ERROR

Under the county's interpretation of its code, once it is determined that one of the eight subsections of RCP Goal 2, Policy 27(a) is met, then the county must determine whether F-1 or F-2 zoning is appropriate pursuant to RCP Goal 4, Policy 15.[6] Policy 15 requires the county to consider the characteristics of the property, and in particular, the size and development of various "ownerships." In *Just*, we explained that although Policy 15 used the term "ownership" rather than more commonly understood terms such as "lot," "parcel," or "tract," the RCP does not provide any definition of "ownership." The petitioner

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[6] RCP Goal 4, Policy 15 provides:

> "Lands designated within the Rural [Plan] as forest land shall be zoned [F-1] or [F-2]. A decision to apply one of the above zones * * * shall be based upon:
>
> "a. A conclusion that characteristics of the land correspond more closely to the characteristics of the proposed zoning than the characteristics of the other forest zone. The zoning characteristics referred to are specified below in subsection b and c. This conclusion shall be supported by a statement of reasons explaining why the facts support the conclusion.
>
> "b. Non-impacted Forest Land Zone [F-1] Characteristics:
>
> "(1) Predominantly *ownerships* not developed by residences or nonforest uses.
>
> "(2) Predominantly contiguous, *ownerships* of 80 acres or larger in size.
>
> "(3) Predominantly *ownerships* contiguous to other lands utilized for commercial forest or commercial farm uses.
>
> "(4) Accessed by arterial roads or roads intended primarily for forest management. Primarily under commercial forest management.
>
> "c. Impacted Forest Land Zone [F-2] Characteristics:
>
> "(1) Predominantly *ownerships* developed by residences or nonforest uses.
>
> "(2) Predominantly *ownerships* 80 acres or less in size.
>
> "(3) *Ownerships* generally contiguous to tracts containing less th[a]n 80 acres and residences and/or adjacent to developed or committed areas for which an exception has been taken in the Rural Comprehensive Plan.
>
> "(4) Provided with a level of public facilities and services, and roads, intended primarily for direct services to rural residences." (Emphases added.)

in *Just* argued that "ownership" meant "tract", while the county argued that "ownership" meant "legal lots or parcels." We held that:

> "* * * because the county's decision never expressly recognizes the ambiguity that is presented by the use of the undefined term 'ownerships' in RCP Goal 4, Policy 15(b) and (c), we believe remand for the county to adopt the needed interpretation is the appropriate course." *Id*. at 409.

As noted, the decision challenged in this appeal was adopted before our opinion in *Just* was issued. The county, therefore, did not attempt to answer the ambiguity presented by the use of the undefined term "ownership" in Policy 15. Petitioners argue that the challenged decision suffers from the same problems as the decision in *Just* and must be remanded for the same reasons. Intervenor responds that the challenged decision goes into much greater detail than the decision in *Just* and provides a reasonable interpretation of Policy 15.

While the challenged decision is more detailed than the decision in *Just*, it does not provide an express interpretation of "ownerships." Intervenor argues, however, that implicit interpretations of "ownerships" can be deduced from the decision that explain any ambiguity.[7] According to the county, sometimes "ownerships" means the subject property; sometimes it means the surrounding properties. According to intervenor this approach is reasonable because "the [county] did not believe a single definition of 'ownership' is appropriate or possible." Response Brief 13. Intervenor also argues that "[t]here is nothing inherently wrong or unreasonable in deciding that 'ownerships' means something different for each characteristic." *Id*. at 15.

First, we fundamentally disagree with intervenor's contention that there is nothing unreasonable in interpreting the term "ownerships" to have a different meaning for each characteristic set forth in Policy 15. *See Racing Com. v. Multnomah Kennel Club*, 242 Or 572, 586, 411 P2d 65 (1966) (use of the same term throughout a statute indicates that the

[7] We use the plural "interpretations" because the county appears to interpret "ownerships" in different ways throughout the decision.

term has the same meaning throughout the statute). To the extent intervenor intends to argue that certain modifiers of the term may change the meaning of the term in a particular context, such an express interpretation, if consistent with the text and context of the plan, might survive the deferential review pursuant to ORS 197.829(1).[8] *See also Church v. Grant County*, 187 Or App 518, 69 P3d 759 (2003); *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). However, the county did not make such an interpretation, either explicit or implicit.[9] The county is presumably considering the meaning of the term "ownerships" pursuant to the remand in *Just*. As this appeal must be remanded in any event because the county erroneously applied the Policy 15 analysis to the current parcelization pattern, the county should reconsider this case pursuant to whatever express interpretation of "ownerships" the county adopts in *Just*.

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

Goal 4, Policy 15(b)(2) and (3) and 15(c)(3) require consideration of contiguous ownerships. *See* n 6. In addition to misconstruing the term "ownerships," petitioners argue that once the county began considering such contiguous areas, the county further erred by considering lands to the east of a railroad right-of-way to be contiguous.

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[8] ORS 197.829(1) provides:

> "(a) Is inconsistent with the express language of the comprehensive plan or land use regulation;
>
> (b) Is inconsistent with the purpose for the comprehensive plan or land use regulation;
>
> (c) Is inconsistent with the underlying policy that provides the basis for the comprehensive plan or land use regulation; or
>
> (d) Is contrary to a state statute, land use goal or rule that the comprehensive plan provision or land use regulation implements."

[9] We also question the county's apparent belief that the different meanings of "ownerships" allows it to analyze a different area for each characteristic. If there is a basis in the text of the plan supporting this belief, the county must adopt explanatory findings on remand.

Lane Code 16.090 defines "contiguous" to mean:

> "Having at least one common boundary line greater than eight feet in length. Tracts of land under the same ownership and which are intervened by a street (local access, public, County, State or Federal street) shall not be considered contiguous."

Intervenor argues that the definitions in the Lane Code do not apply to the RCP, but we agree with petitioners that by its own terms Policy 27 invokes the "procedures and requirements" of Lane Code Chapter 16, including its definitions.[10] The Lane Code definition of "contiguous" includes the term "ownership." Goal 4, Policy 15 also uses the terms "ownerships" and "contiguous" with various modifiers throughout the policy. As we have discussed, the meaning of the term "ownerships" is ambiguous. Because we must remand the decision for the county to interpret "ownerships" in the context of Policy 27 the county will necessarily be required to explain the meaning of the term "contiguous." Accordingly, it would be premature to reach this assignment of error.[11]

We do not reach the third assignment of error.

The county's decision is remanded.

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[10] RCP Goal 2, Policy 27 provides:

> "* * * Changes to correct errors or omissions shall comply with the procedures and requirements of Lane Code * * * Chapter 16 * * *."

[11] We note, however, that Policy 15(c)(3) uses the phrase "generally contiguous" which is not necessarily the same as "contiguous." Furthermore, Lane Code 16.090 only refers to intervening streets; it does not mention railroad right-of-ways. Petitioners rely on *Lovinger v. Lane County*, ___ Or LUBA ___ (LUBA No. 2005-098, January 12, 2006) *appeal pending*. In *Lovinger*, we merely held that where two parcels are divided by a fee interest in a strip of land owned by the county for use as a public roadway, the two parcels are not contiguous. It is not clear in this case, whether the railroad right-of-way at issue is an easement or is owned in fee. In any event, we need not determine the relevance of *Lovinger* here, because as we explained above, the county must explain the meaning of "contiguous" when it provides its interpretation of Policy 15.