

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 MERLE BROWN and
5 GWENDOLYN FARNSWORTH,
6 *Petitioners,*

7
8 vs.

9
10 LANE COUNTY,
11 *Respondent,*

12
13 and

14
15 DARREN KRONBERGER,
16 *Intervenor-Respondent.*

17
18 LUBA No. 2006-237

19
20 FINAL OPINION
21 AND ORDER

22
23 Appeal from Lane County.

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25 Jannett Wilson, Eugene, filed the petition for review and argued on behalf of
26 petitioners. With her on the brief was the Goal One Coalition.

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28 No appearance by Lane County.

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

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

35
36 REVERSED

05/18/2007

37
38 You are entitled to judicial review of this Order. Judicial review is governed by the
39 provisions of ORS 197.850.

NATURE OF THE DECISION

Petitioners appeal the county’s adoption of an ordinance rezoning property from a restrictive forest zone to a less restrictive forest zone.

MOTION TO INTERVENE

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

FACTS

This appeal follows our earlier decision in *Brown v. Lane County*, 51 Or LUBA 689 (2006) (*Brown I*), in which we remanded the county’s adoption of an ordinance rezoning intervenor’s property from F-1 (Nonimpacted Forest Land) to F-2 (Impacted Forest Land) under the county’s “Conformity Determination Process,” formerly called “Errors or Omissions.” See Lane County Rural Comprehensive Plan (RCP) Goal 2, Policy 27 (Errors and Omissions Policy); Record 16. In *Brown I*, we explained:

“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.” *Id.* at 690.

The county’s decision in *Brown I* involved a determination under Errors and Omissions Policy 27(a)(ii) (Subsection 2) that the property should be rezoned based on an error in the parcelization pattern. 51 Or LUBA at 691. We remanded the county’s decision because the county analyzed the existing parcelization pattern, rather than the parcelization pattern in 1984 when the property was zoned F-1. *Id.* (citing *Just v. Lane County*, 50 Or LUBA 399 (2005)).

1 On remand, rather than analyzing the parcelization pattern as it existed in 1984 under
2 Subsection 2, the county adopted supplemental findings and determined that the subject
3 property qualified for rezoning from F-2 to F-1 under Errors and Omissions Policy 27(a)(vii)
4 (Subsection 7).¹ This appeal followed.

5 **FIRST ASSIGNMENT OF ERROR**

6 Petitioners challenge the county’s reliance on Subsection 7 in approving a zone
7 change for the subject property from F-1 to F-2. Subsection 7 allows the county to correct
8 identified errors resulting from “* * * an inconsistency between the text of an order or
9 ordinance adopted by the Board of Commissioners and an Official Plan or Zoning Diagram.”

10 See n 1. The county found in relevant part:

11 “The Subject Property was originally zoned F-2 by Ordinance No. PA 884,
12 effective February 29, 1984. * * * A later ordinance (PA 891, enacted
13 September 12, 1984) contains conflicting maps and text. The ordinance text
14 states as follows:

15 “The following parcels are redesignated and rezoned as set
16 forth on the interim Plan Designation and Zoning Maps
17 attached as Exhibit ‘A,’ and further delineated in attached
18 Exhibit ‘C.’”

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:

“* * * * *

“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.”

1 “Exhibit ‘C’ to PA 891 is a typed list of specific * * * tax lots rezoned by the
2 ordinance. Under the category of F-1 to F-2 [sic, should be F-2 to F-1] it lists
3 tax lots 1400 and 1600, but not Tax Lot 400 which included the area that is
4 the subject of this application. *The text, including Exhibit ‘C,’ is directly*
5 *inconsistent with the eventual Official Zoning Map, which indicates F-1*
6 *zoning for all three tax lots. The map exhibit to Ordinance PA 891, upon*
7 *which the Official Zoning Map was based, portrays the same area as*
8 *originally zoned F-2 by Ordinance No. PA 884. Thus, the text and map are*
9 *inconsistent and can only be resolved by action of the Planning Commission*
10 *and Board to determine the correct zoning.” Record 20 (emphasis added).*

11 The record includes a portion of Exhibit A to Ordinance PA 891, consisting of the
12 “interim Plan Designation and Zoning Map[]” of the subject property. That map labels three
13 tax lots - Tax Lots 400, 1400, and 1600 - as “F-1,” in bold handwriting. The record also
14 includes a portion of Exhibit C to Ordinance PA 891, consisting of a list of properties
15 rezoned by Ordinance PA 891. Tax Lots 1400 and 1600 are listed on page 8 of Exhibit C,
16 but Tax Lot 400 does not appear anywhere in the list.

17 The county found that because Exhibit C did not include Tax Lot 400 on the list of
18 properties being rezoned by Ordinance PA 891, “[t]he text, including Exhibit ‘C,’ is directly
19 inconsistent with the eventual Official Zoning Map, which indicates F-1 zoning for all three
20 tax lots.* * *” Intervenor urges us to affirm the county’s decision.

21 At the outset, we note that although Exhibit A is a map, it is essentially part of the
22 text of Ordinance PA 891, in the same way that the list found in Exhibit C to the ordinance is
23 part of the text of that ordinance. We disagree with the county and intervenor that the
24 exclusion of Tax Lot 400 from Exhibit C created “* * * an inconsistency *between the text of*
25 ** * * [the] ordinance adopted by the Board of Commissioners and [the] Official Plan Map*
26 *and Zoning Diagram.”* While the exclusion of Tax Lot 400 from Exhibit C creates some
27 confusion regarding which properties the county intended to rezone on September 12, 1984,
28 at most, the failure to list Tax Lot 400 on Exhibit C created an ambiguity or inconsistency
29 *within the text of the September 12, 1984 ordinance itself,* rather than an inconsistency
30 between the text of the ordinance and the Official Zoning Map. That there is an ambiguity in

1 the ordinance does not necessarily mean that there is an inconsistency between the text of
2 that ordinance and the Official Zoning Diagram, if the ambiguity can be resolved.

3 In addition to the language quoted above, Ordinance PA 891 contains the following
4 sentence:

5 “While not a part of this Ordinance, we adopt the findings in support of this
6 Ordinance as set forth on attached Exhibit ‘B’.” *Brown I* Record 720.

7 At oral argument, we requested that the parties provide us with a copy of Exhibit B
8 referenced in Ordinance PA 891, and the county later provided us with a copy. Exhibit B
9 contains findings and a rezoning recommendation for Tax Lot 400, as well as separate
10 findings and a rezoning recommendation for Tax Lots 1400 and 1600 together. Both sets of
11 findings recommend that all three tax lots should be zoned “F-1.” Those findings are
12 consistent with the map attached as Exhibit A to Ordinance PA 891 that rezoned Tax Lot 400
13 to F-1, as well as the eventual Official Zoning Map. To the extent that Ordinance PA 891
14 contained an ambiguity created by one exhibit that included Tax Lot 400, and a second
15 exhibit that did not, we think the findings set forth in Exhibit B to the ordinance clearly
16 resolve that ambiguity.²

17 The county erred in finding an inconsistency between the text of Ordinance PA 891
18 and the Official Zoning Diagram that reflects the rezoning accomplished by Ordinance PA
19 891.

20 Petitioners’ first assignment of error is sustained.

21 **SECOND AND THIRD ASSIGNMENTS OF ERROR**

22 After the county determined that the text of Ordinance PA 891 was inconsistent with
23 the Official Zoning Diagram, the county proceeded to take what it called the “second step” of
24 a “two step process designed to conform the zoning to actual current uses,” by determining

² We note that the record indicates that as far back as 1988, the county was aware of errors in the list attached as Exhibit C to Ordinance PA 891. *Brown I* Record 733.

1 the correct zoning for the property under RCP Goal 4, Policies 1, 2 and 15. In their second
2 assignment of error, petitioners argue that the county’s determination of the “correct” zoning
3 of the subject property under RCP Goal 4, Policies 1, 2 and 15 was not required or permitted
4 by the language of the Errors and Omissions Policy Subsection 7. In their third assignment
5 of error, petitioners argue that the county erred in interpreting the terms “ownerships” and
6 “contiguous” as they are used in RCP Goal 4, Policy 15. Because we reject the county’s
7 conclusion that an inconsistency exists between the text of Ordinance PA 891 and the
8 Official Zoning Diagram, we need not reach the issue of whether the county properly
9 engaged in a process to determine the “correct” zoning for Conformity Determinations where
10 the county relies on Errors and Omissions Policy Subsection 7.

11 The county’s decision is reversed.