BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

DON GRUENER, PAUL BIGBY,
AMY BIGBY and BARB HALL,
Petitioners,

vs.

KLAMATH COUNTY,
Respondent,

and

DENNIS DIXON,
Intervenor-Respondent.

LUBA No. 2008-084

FINAL OPINION
AND ORDER

Appeal from Klamath County.

Michael L. Spencer, Klamath Falls, filed the petition for review and argued on behalf of petitioners.

No appearance by Klamath County.

Mark S. Bartholomew, Medford, filed the response brief and argued on behalf of intervenor-respondent. With him on the brief was Hornecker, Cowling, Hassen & Heysell, LLP.

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

RYAN, Board Member, did not participate in the decision.

AFFIRMED 10/20/2008

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

Petitioners appeal a county decision that amends the comprehensive plan and zoning map designations for a 77-acre parcel.

REPLY BRIEF

Petitioners move for permission to file a reply brief to respond to new issues raised in the intervenor-respondent's brief. OAR 661-010-0039. The motion is granted.

FACTS

On September 21, 2007 intervenor submitted an application seeking approval for a post-acknowledgment plan amendment (PAPA) to amend the comprehensive plan map to apply a Significant Resource Overlay (SRO) designation and to amend the zoning map designation from Exclusive Farm Use (EFU) to SRO. Record 998. Intervenor sought those approvals to conduct an aggregate mining operation the subject property.

The initial evidentiary hearing on that application was held before the planning commission and board of county commissioners on November 27, 2007.[1] On January 8, 2008, the applicant amended that application to request that the property be zoned Non-Resource (NR), rather than SRO. At the conclusion of the February 26, 2008 public hearing before the planning commission and board of county commissioners, the planning commission recommended approval of the requested map amendments. Thereafter, the board of county commissioners conducted a third public hearing on April 21, 2008, at which intervenor presented additional evidence regarding the quality of the rock present on the site and the public need for the requested comprehensive plan and zoning map amendments. On

[1] Both the November 27, 2007 and the February 26, 2008 public hearings in this matter were held before both the planning commission and the board of county commissioners. The April 21, 2008 public hearing was before the board of county commissioners only.

May 12, 2008, the board of county commissioners issued its final order approving the application and this appeal followed.

INTRODUCTION

A. OAR 660-023-0180

Petitioner's eight assignments of error all concern county standards that govern comprehensive plan map and zoning map amendments generally and a standard that applies to NR zoning map designations in particular. Throughout its brief, intervenor argues that the county's decision to approve the disputed application must be affirmed, even if the county's findings regarding these county standards are missing, defective or unsupported by substantial evidence. Intervenor contends that all of the county standards that form the basis of petitioners' assignments of error are preempted by OAR 660-023-0180(9).

The challenged decision is a PAPA to authorize mining of a significant aggregate resource under Statewide Planning Goal 5 (Natural Resources, Scenic and Historic Areas, and Open Spaces). Such decisions are subject to OAR 660-023-0180(2)(c) and 660-023-0180(9).[2] In *Eugene Sand and Gravel, Inc. v. Lane County*, 44 Or LUBA 50, 96, *aff'd in part and rev'd and remanded in part*, 189 Or App 21, 74 P3d 1085 (2003), we concluded that county comprehensive plan amendment criteria similar to the criteria at issue in this appeal were preempted by OAR 660-023-0180. Our decision in *Eugene Sand and Gravel*

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[2] OAR 660-023-0180(2)(c) provides in relevant part:

> "Local governments shall follow the requirements of [OAR 660-023-0180(5) or (6)] in deciding whether to authorize the mining of a significant aggregate resource site[.]"

OAR 660-023-0180(5) and (6) set out criteria that govern whether aggregate resources must be considered significant and whether mining should be permitted. OAR 660-023-0180(9) provides:

> "Local governments shall amend the comprehensive plan and land use regulations to include procedures and requirements consistent with this rule for the consideration of PAPAs concerning aggregate resources. Until such local regulations are adopted, the procedures and requirements of this rule shall be directly applied to local government consideration of a PAPA concerning mining authorization[.]"

relied on our earlier decision in *Morse Bros., Inc. v. Columbia County*, 37 Or LUBA 85, 89 (1999), *aff'd* 165 Or App 512, 996 P2d 1023 (2000), which held that a prior version of OAR 660-023-0180 had "the legal effect of preempting county comprehensive plan and land use regulation provisions that would otherwise apply to a post-acknowledgment plan amendment * * *."

Intervenor appears to be correct that our decision in *Eugene Sand and Gravel* would require that we affirm the county's decision even if the county's findings regarding generally applicable comprehensive plan and zoning map criteria are inadequate or unsupported by the evidentiary record. Petitioners argue our decision in *Eugene Sand and Gravel* was wrongly decided and should be reconsidered and reversed. For the reasons explained below, we reject petitioners' evidentiary challenge and challenges to the county's findings. We therefore sustain the county's decision on that basis and do not revisit our decision in *Eugene Sand and Gravel*.

B. Findings

Under LUBA's rules, the petition for review must "[c]ontain a copy of the challenged decision, including any adopted findings of fact and conclusions of law." OAR 661-010-0030(4)(e). The Board of County Commissioner's three-page May 12, 2008 decision is attached to the petition for review. If that May 12, 2008 decision is a complete copy of the challenged decision and findings of fact and conclusions of law, the county's decision would have to be remanded because it does not include findings addressing OAR 660-023-0180 or Articles 47 and 48 of the Klamath County Land Development Code (KCLDC) or other relevant approval criteria. However, intervenor takes the position that the May 12, 2008 decision incorporates findings that appear elsewhere in the record.

Identification of the challenged decision and all findings adopted in support of the decision is the fundamental first step in a LUBA appeal. Where a respondent or intervenor respondent believe a petitioner has failed to attach all the supporting findings as required by

OAR 661-010-0030(4)(e), respondent or intervenor should attach those findings to their brief and explain why those findings were adopted in support of the decision on review. Intervenor did not attach the findings that intervenor believes the board of county commissioner's incorporated into its decision, as an appendix to its brief. Intervenor's failure to do so made our preparation for oral argument in this case more difficult and complicates our resolution of petitioners' assignments of error.

Intervenor relies on the following language in the May 12, 2008 decision, to argue that the board of county commissioners adopted findings located elsewhere in the record to support its decision:

> "[O]n February 26, 2008, *the Klamath County Planning Commission adopted as its own the Findings of Fact and conclusions of law as provided by the applicant and contained in the Staff Report*, and concluded that the application was in conformance with the provisions of Articles 47 and 48 of the Klamath County Land Development Code, and forwarded a recommendation of approval * * * to the Board of County Commissioners[.]
>
> "* * * * *
>
> "[O]n April 21, 2008, the Board of County Commissioners, *based upon given testimony and consideration of the Findings of Fact as adopted by the Klamath County Planning Commission* and recommendation for approval, APPROVED [the application] based upon compelling evidence in the whole record that the property was comprised of soils that were not suitable for farm or forest use, and did not require a Goal 3 or 4 exception; further, that the application was consistent with OAR 660-023-0180 and Articles 47 and 48 of the Klamath County Comprehensive Plan and Land Development Code." Record 6.

The test that LUBA applies to determine whether a decision maker's attempt to incorporate findings is sufficient was set out in *Gonzalez v. Lane County*, 24 Or LUBA 251, 259 (1992):

> "[I]f a local government decision maker chooses to incorporate all or portions of another document by reference into its findings, it must clearly (1) indicate its intent to do so, and (2) identify the document or portions of the document so incorporated. A local government decision will satisfy these requirements if a reasonable person reading the decision would realize that another document is incorporated into the findings and, based on the decision itself,

> would be able both to identify and to request the opportunity to review the specific document thus incorporated." (Footnote omitted.)

In a February 20, 2008 memorandum, the planning director forwarded to the board of county commissioners and planning commission "Amended Findings of Fact," which had been prepared by the applicant. Record 342-85. Although it is a reasonably close question, we conclude that the paragraphs from the May 12, 2008 board of county commissioners' decision quoted above are sufficient to incorporate those findings, which appear at Record 344-85, as findings that support the board of county commissioners' decision.

Our resolution of this issue is a close question for two reasons. First, the February 20, 2008 memorandum is not really a staff report and in fact states that the planning department had not had time to prepare a new staff report following the applicant's most recent submittals. Record 342. Therefore, the May 12, 2008 decision inaccurately describes the findings attached to the February 20, 2008 memorandum as being "contained in the Staff Report."

Second, although the May 12, 2008 decision states that the planning commission adopted the referenced findings at the conclusion of its February 26, 2008 hearing, the planning commission apparently did not do so. Nevertheless, it is reasonably clear that the February 20, 2008 memorandum and attached findings are what the board of county commissioners was referring to in the above-quoted paragraphs. The board of commissioner's mistaken belief that the transmittal memorandum was a staff report and that the planning commission had adopted those findings does not negate the reasonably clear indication in the second of the above-quoted paragraphs from the May 12, 2008 decision that the board of commissioners' decision was "based upon" those "Findings of Fact." Record 6.

At oral argument, intervenor argued that the above-quoted paragraphs in the May 12, 2008 decision were sufficient to adopt a number of other documents as supporting findings. The above-quoted findings in the May 12, 2008 decision are barely sufficient to adopt the findings that appear at Record 344-85. They are insufficient to adopt any other documents

that may have previously been provided to the county. Stated differently, we believe a reasonable person would have been put on notice by the two paragraphs in the May 12, 2008 decision that the board of county commissioners was not relying entirely on its three-page May 12, 2008 decision, which included no findings addressing OAR 660-023-0180 or Articles 47 and 48 of the KCLDC. Instead, a reasonable person would have been put on notice that the board of county commissioners intended to adopt the findings that were provided to the board of county commissioners and planning commission several days before the February 26, 2008 public hearing in this matter. However, a reasonable person would not have been put on notice that the board of county commissioners was adopting any other documents as findings to support its May 12, 2008 decision.

FIRST ASSIGNMENT OF ERROR

The purpose of the NR zone is set out at KCLDC 56.010:

> "The purpose of this zone designation is to implement the non-resource land use designation of the Comprehensive Plan. These are lands that have been found to have a low Forest Site Class value, are predominantly SCS Soil Capability Class VII and VIII, *are not identified as important fish and wildlife habitat*, are not necessary for watershed protection or recreational use, are not irrigated or irrigable, or are not necessary to permit farm or forest practices to be undertaken on adjacent or nearby lands." (Emphasis added.)

Petitioners argue that the board of county commissioners' decision "does not contain any findings relating to whether or not the subject property is identified as important fish and wildlife habitat." Petition for Review 5. Intervenor argues the following finding is adequate to establish that the subject site has not been identified as important fish and wildlife habitat:

> "There is no delineated fish habitat nor existing deer and elk wintering range issues." Record 367.

The above-quoted finding does not appear to have been adopted to address KCLDC 56.010 specifically. However, petitioners neither identify any Klamath County Comprehensive Plan or KCLDC provisions that they believe identify the subject property as important fish or wildlife habitat nor make any attempt to challenge the adequacy of the

above-quoted finding to establish that the subject property is not identified as important fish and wildlife habitat. Given those failures on petitioners' part, we deny the first assignment of error.

SECOND ASSIGNMENT OF ERROR

KCLDC 47.030(B)(5) requires that a zoning map amendment must be "supported by specific studies or other factual information, which documents the need for the change." KCLDC 48.030(B)(1) similarly requires that a comprehensive plan map amendment must be "supported by specific studies or other factual information, which documents the public need for the change[.]" Petitioners argue the record does not include substantial evidence that there is a public need for the requested comprehensive plan and zoning map amendments:

> "The requirement that an applicant for a zone change show that there is a need for the change has long been part of Oregon Law.
>
> > "'In proving that the change is in conformance with the comprehensive plan in this case, the proof, at a minimum, should show (1) there is a public need for a change of the kind in question, and (2) that need will be best served by changing the classification of the particular piece of property in question as compared with other available property.'
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> "*Fasano v. [Washington Co. Comm.*, 264 Or 574, 581, 507 P2d 23 (1973)]." Petition for Review 5-6.

Notwithstanding petitioners' citation to and reliance on *Fasano*, "public need" is no longer a generally applicable criterion in quasi-judicial comprehensive plan and zoning map amendments. *Neuberger v. City of Portland*, 288 Or 155, 170, 603 P2d 771 (1979). As we explained in *Hubenthal v. City of Woodburn*, 39 Or LUBA 20, 35-36 (2000):

> "The city's 'public need' standards are likely relics from *Fasano* * * *, which imposed similar standards as generally applicable requirements for all quasi-judicial zoning map amendments. *Burlington Northern v. Jefferson County*, 13 Or LUBA 274, 279 n 3 (1985). However, the *Fasano* 'public need' standards are no longer generally applicable land use criteria, and they apply only where a local government's comprehensive plan or land use regulations impose them. *Neuberger v. City of Portland*, 288 Or 155, 170, 603 P2d 771 (1979), *rehearing den* 288 Or 585 (1980); *Friends of Cedar Mill v. Washington County*, 28 Or LUBA 477, 485 (1995). Of course, here, the city's

> zoning ordinance does impose a 'public need' standard. Importantly, however, the city's 'public need' criteria are now purely requirements of local law and, where the city council expressly or implicitly interprets local law, those interpretations are entitled to deference on review. *Gage v. City of Portland*, 319 Or 308, 317, 877 P2d 1187 (1994); *compare Forster v. Polk County*, 115 Or App 475, 478, 839 P2d 241 (1992) (local government interpretations of state law are not entitled to the deferential standard of review required by ORS 197.829(1) and *Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992))."

As was the case in *Hubenthal*, KCLDC 47.030(B)(5) imposes a "need" requirement and KCLDC 48.030(B)(1) requires a demonstration of "public need." But neither the KCLDC 47.030(B)(5) "need" standard nor the KCLDC 48.030(B)(1) "public need" standard is formulated in the same way as the *Fasano* public need standard, which requires both a finding of public need and a finding that the property proposed for redesignation is the best site available to meet that need.

Turning to petitioners' substantial evidence challenge, intervenor submitted evidence that the cost of transporting aggregate is significant, and with the increasing price for fuel that cost is even greater. Record 151. Intervenor's evidence also showed that the aggregate material at the subject property meets American Association of State Highway and Transportation (AASHTO) and Oregon Department of Transportation (ODOT) requirements and that in Klamath County there are only ten other sites that meet those standards. Record 150. Two of those sites are closed, and the other eight sites are 20 miles, 40 miles, 10 miles, 90 miles, 7 miles, 9 miles, 25 miles, and 30 miles from the City of Klamath Falls. *Id*. The subject site is only five miles from Klamath Falls. The city's findings cite evidence that the cost of transporting "aggregate from sites not close to the existing markets is creating a significant problem." Record 379. We agree with intervenor that the cited evidence is evidence that a reasonable person could believe to support a finding that the subject property will meet a "need," as required by KCLDC 47.030(B)(5) and a "public need," as required by KCLDC 48.030(B)(1).

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

In their third assignment of error, petitioners allege the county committed error by rezoning the subject property from EFU to NR without requiring a separate application for rezoning.

Intervenor's application was submitted on a form that is entitled "Comprehensive Plan Change Application." Record 998. The third paragraph of that application is set out bellow:

"3. General Property Description

Current Comprehensive Plan: Agriculture Zone: EFU

Proposed Comprehensive Plan: SRO Zone: SRO"

The underlined entries were added by intervenor. Therefore, in his initial application, intervneor proposed a comprehensive plan map amendment from Agriculture to SRO and proposed a zoning map amendment from EFU to SRO. Later, intervenor requested rezoning to NR rather than SRO. Record 565.

If there is a KCLDC requirement that separate applications are required for a request for both a comprehensive plan map and a zoning map amendment, petitioners do not cite it. If petitioners' point is that the original application was never formally amended, petitioners do not claim that there was any confusion that after early 2008 intervenor was seeking NR zoning. Even if there is a KCLDC requirement that the original application must be formally amended, failure to do so would at most be a procedural error. Such an error would only provide a basis for reversal or remand if it prejudiced petitioners' substantial rights. *See Monogios and Co. v. City of Pendleton*, 42 Or LUBA 291, 295, *rev'd and remanded on other grounds* 184 Or App 571, 56 P3d 960 (2002) (failure to fill out a conditional use application on city form provides no basis for reversal or remand unless petitioners' substantial rights were thereby prejudiced). Petitioners do not argue that any such error prejudiced their substantial rights.

The third assignment of error is denied.

FOURTH THROUGH EIGHTH ASSIGNMENTS OF ERROR

KCLDC 47.030(B) sets out the following criteria for changing zoning map designations:

> "A request for a change of zone designation shall be reviewed against the following criteria:
>
> "1. The proposed change of zone designation is in conformance with the Comprehensive Plan and does not afford special privileges to an individual property owner not available to the general public or outside the overall public interest for the change;
>
> "2. The property affected by the change of zone designation is adequate in size and shape to facilitate any uses allowed in conjunction with such zoning;
>
> "3. The property affected by the proposed change of zone designation is properly related to streets and roads and to other public facilities and infrastructure to adequately serve the types of uses allowed in conjunction with such zoning;
>
> "4. The proposed change of zone designation will have no significant adverse effect on the appropriate use and development of adjacent properties[.]"

KCLDC 48.030(3)(B)(3) requires that a comprehensive plan map amendment must comply "with the Oregon Statewide Planning Goals and Administrative Rules."

Petitioners allege the county failed to adopt any findings concerning the KCLDC 47.030(B)(4) "no significant adverse effect" standard (fourth assignment of error), the KCLDC 47.030(B)(1) no "special privileges to an individual property owner" standard (fifth assignment of error), the KCLDC 47.030(B)(2) adequate "size and shape" standard (sixth assignment of error), and the KCLDC 47.030(B)(3) "streets and roads" and "other public facilities and infrastructure" standard (seventh assignment of error). In their eighth assignment of error, petitioners allege the county failed to adopt findings concerning the KCLDC 48.030(B)(3) requirement that comprehensive plan map amendments must comply with statewide planning goals and administrative rules standard.

Intervenor identifies findings that address each of the KCLDC 47.030(B) standards that form the basis for petitioner's fourth through seventh assignments of error. Record 379-81. Contrary to petitioner's fourth through seventh assignments of error, the county did adopt findings concerning the KCLDC 47.030(B)(1) through (4) standards. Because petitioners do not assign error to the adequacy of those findings, petitioners' fourth through seventh assignments of error provide no basis for reversal or remand.

The county also adopted findings that address OAR 660-023-0180 and several statewide planning goals. Record 355-72, 374-79. Petitioners neither acknowledge those findings nor make any attempt to identify additional statewide planning goals or administrative rules that they believe the county should have addressed in its findings. Petitioners' eighth assignment of error provides no basis for reversal or remand.

Petitioners' fourth through eighth assignments of error are denied.

The county's decision is affirmed.