BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

TAMMY STEVENS,
Petitioner,

vs.

CLACKAMAS COUNTY,
Respondent,

and

FAREN EATINGER and ALL ABOUT
AUTO DETAIL AND RECON INC.,
Intervenors-Respondents.

LUBA No. 2013-081

FINAL OPINION
AND ORDER

Appeal from Clackamas County.

Tammy Stevens, Beavercreek, filed the petition for review and argued on her own behalf.

Nathan K. Boderman, Assistant County Counsel, Oregon City, filed the response brief and argued on behalf of respondent. With him on the brief was Stephen L. Madkour, Clackamas County Counsel, Oregon City.

Wendie Kellington, Lake Oswego, represented intervenor-respondents.

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

AFFIRMED 12/17/2013

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

Petitioner appeals an ordinance that amends the Clackamas County Comprehensive Plan (CP) and Zoning and Development Ordinance (ZDO).

FACTS

The challenged ordinance adopts extensive amendments to the ZDO. The process that led to the amendments apparently began as an attempt to streamline a ZDO that had been amended many times over the years and in the process had become somewhat unwieldy. But the ordinance that was ultimately adopted included other policy changes.

As relevant in this appeal, the ordinance did several things. We briefly describe those relevant changes below, before turning to petitioner's assignments of error.

The pre-amendment ZDO included three industrial districts: Business Park (BP), Light Industrial (LI) and General Industrial (GI). Those three industrial districts we set out in separate sections of the pre-amendment ZDO: BP district (ZDO 606), LI district (ZDO 602), GI district (ZDO 603). Those three industrial districts were retained by the challenged amendments. But those three industrial zoning districts were reorganized into a single section of the ZDO—ZDO 602, the section that formerly set out the LI district only. Record 73-94 (new ZDO 602); Record 95-107 (repealed ZDO 603); Record 119-28 (repealed ZDO 606).

The amendments adopted a somewhat different approach for setting out the allowable uses in the three industrial zones. Under the amendments the listing of allowable industrial uses is consolidated into a single table with symbols used to identify primary, accessory, conditional and prohibited uses in each of the industrial zones and endnotes are used to impose other regulatory requirements. Record 73-78. And under the amended ZDO the planning director is authorized to approve "similar uses" in all zones. ZDO 106. This "similar use" authorization replaced the "compatible use" authorization in the former ZDO.

Under the former ZDO two industrial districts authorized "[w]arehouse and distribution facilities, manufacturing, and other compatible business and industrial uses, as determined by the Planning Director * * *." Record 80 (LI district); Record 95 (GI district). The BP district authorized the planning director to approve "[a]ny use that the Planning Director finds to be compatible with one or more of" the specifically authorized primary uses. Record 119. The county contends "[m]any of the uses specifically allowed by the challenged decision could have previously been allowed under a 'compatible use determination.'" Response Brief 3.

The challenged ordinance also eliminates some existing regulation of hazardous materials and makes changes to the county's existing sign regulations.

FIRST ASSIGNMENT OF ERROR

Both before and after the disputed amendments, the Clackamas County Comprehensive Plan included the following Goal:

> "Protect areas adjacent to industrial areas from potential blighting effects of noise, dust, odor or high truck traffic volumes." Clackamas County Comprehensive Plan IV-41.

Petitioner's entire argument under this assignment of error is set out below.

> "[The challenged decision] violates the 'Protect areas adjacent to industrial areas from potential blighting effects of noise, dust, odor or high truck traffic volumes' clause of the Clackamas County Comprehensive Plan by permitting heavy industrial uses in light industrial areas, which places heavy industrial uses immediately adjacent to residential areas. [Petitioner] further contends that the long standing principle of using lighter industrial uses as buffer areas between heavy industrial uses and residential areas is violated by [the amendments]. Essentially, the Board [of County Commissioners] approved all staff's recommendations." Petition for Review 11.

The county responds that petitioner does not identify the "heavy industrial uses" she objects to. Respondent's Brief 4-5. The county also notes that petitioner does not identify the source of the alleged "long standing principle" mentioned in the second sentence of the argument. *Id*. at 6-7. And the county further points out that CP language that appears shortly before the CP language petitioner relies on specifies the kinds of measures the county relies

on to determine that industrial uses are compatible with adjacent land uses.[1] A portion of the county's remaining response is set out below:

> "Petitioner does not explain why retained design review procedures, development standards, screening and buffering standards, as well as the significant restrictions and prohibitions on outdoor processing and storage and dimensional standards in all but the GI zone, are inadequate to 'protect areas adjacent to industrial areas from potential blighting effects * * *'
>
> "* * * * *
>
> "The various amendments to the industrial zones, effectively achieved the following:
>
> "1) Consolidated Sections 602 (Light Industrial District), 603 (General Industrial District), and 606 (Business Park District) into one Section 602, which would cover all of the aforementioned industrial zones.
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> "2) Expanded the list of permitted uses, and moved some uses from the accessory or conditional use categories to the primary use category.
>
> "3) Identified more primary uses, in lieu of requiring a 'compatible use' determination.
>
> "4) Allowed many uses to be permitted across all three zones, while retaining limits or prohibitions on outdoor operations (i.e. display, storage, and processing) that would apply individually to each of the distinct zones.
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> "The challenged decision complies with the Comprehensive Plan goal of protecting adjacent areas from the negative impacts of certain industrial uses by retaining zone restrictions which limit and prohibit various uses and certain outdoor operations, retaining different uses in the various industrial zoning districts, and maintaining a design review process which evaluates the impacts of industrial developments on surrounding properties. Petitioner has not demonstrated that Respondent's decision is inconsistent with the Comprehensive Plan." Respondent's Brief 7-8 (record citations omitted).

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[1] That CP text is set out below:

> "In all industrial areas, development standards, including site planning, building type, truck ~~and~~ traffic circulation, landscaping, buffering and screening shall be satisfied to ensure compatibility with, and an attractive appearance from, adjacent land uses." CP IV-41 (underlining and cross-out show text added and deleted by the appealed decision).

LUBA's scope of review is set out in part at ORS 197.835(9).[2] It is not clear to us what part of ORS 197.835(9) petitioner is relying on in the first assignment of error. But in reviewing a decision that adopts one approach to achieve overlapping and generally worded land use planning goals over another, different approach, LUBA is rarely in a position to second guess a governing body's choice. Petitioner provides no sufficient basis for questioning the board of commissioner's choice concerning the restructuring of and amendments to the LI, GI and BP districts.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

In her second assignment of error, petitioner contends the county committed a number of errors. Central to petitioner's arguments under this assignment of error is her contention that the county's action here effectively rezoned LI zoned property to the more permissive and intense GI zoning district.[3] Petitioner contends that action is quasi-judicial and the county therefore should have given the notice required by ORS 197.763.[4] From this

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[2] ORS 197.835(9) provides, in part, as follows:

"[LUBA] shall reverse or remand the land use decision under review if the board finds:

"(a) The local government or special district:

"(A) Exceeded its jurisdiction;

"(B) Failed to follow the procedures applicable to the matter before it in a manner that prejudiced the substantial rights of the petitioner;

"(C) Made a decision not supported by substantial evidence in the whole record;

"(D) Improperly construed the applicable law; or

"(E) Made an unconstitutional decision[.]"

[3] We understand petitioner's rezoning theory to be based on the fact that some uses that are now primary (permitted) uses in the amended LI district formerly were conditional or prohibited uses. Petitioner never identifies specific uses, but for purposes of this opinion we assume that is the case.

[4] ORS 197.763(2), (3) and (4) set out detailed statutory requirements for quasi-judicial hearings, including requirements for notice, and availability of staff reports and documents that are to be relied on.

overarching argument petitioner contends the county failed to give the public adequate notice of the true nature of the amendments, leaving the public unable to understand the proposal or to participate effectively in the way envisioned by Statewide Planning Goal 1 (Citizen Participation).

Petitioner's second assignment of error fails at the beginning. The county is correct that the amendments are legislative rather than quasi-judicial. That inquiry is guided by the three-part inquiry set out in *Strawberry Hills 4 Wheelers v. Benton Co. Bd. of Comm.*, 287 Or 591, 602-03, 601 P2d 769 (1979).[5] First, the process here apparently could have stopped at any time before the amendment was adopted, and generally the decision to adopt involved the exercise of a great deal of policy discretion. Second, while some preexisting criteria were applied, this was not a case where the county was primarily applying preexisting criteria to concrete facts. And finally, this is certainly not a decision that was directed at a closely circumscribed factual situation or a small number of persons. The amendments changed the ZDO in ways that affect all citizens of the county, and while owners of and neighbors of industrially zoned property are most affected, there are over 400 industrially zoned properties in the county with additional hundreds of nearby affected properties, if not thousands. The subject decision is accurately described as legislative, and we reject petitioner's contentions to the contrary.

Petitioner appears to be correct that, as far as the scope of uses that are allowable and the way those uses may be approved under the amended LI district goes, there are some similarities with the scope and manner of approval of uses that were allowed in the GI district

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[5] Those three inquiries were described in *Hood River Valley v. Board of Cty. Commissioners*, 193 Or App 485, 495, 91 P3d 748 (2004) as follows:

> "First, does 'the process, once begun, [call] for reaching a decision,' with that decision being confined by preexisting criteria rather than a wide discretionary choice of action or inaction? Second, to what extent is the decision maker 'bound to apply preexisting criteria to concrete facts'? Third, to what extent is the decision 'directed at a closely circumscribed factual situation or a relatively small number of persons'?" (Citations to *Strawberry Hill* omitted.)

before the amendment. But that coincidence does not mean the appealed ordinance is quasi-judicial. As we explained *NWDA v. City of Portland*, 47 Or LUBA 533, 569 (2004):

> "We adhere to our holdings in *OCAPA[v. City of Mosier*, 44 Or LUBA 452, 468 (2003)], *DeBell [v. Douglas County*, 39 Or LUBA 695, 698-99] and *D.S. Parklane Development, Inc. [v. Metro*, 35 Or LUBA 516, 655 (1999), *aff'd as modified* 165 Or App 1, 994 P2d 1205 (2000)], that, where a decision includes discrete determinations that, viewed in isolation, would constitute quasi-judicial decisions, whether the decision is viewed as legislative or quasi-judicial depends on the character of the whole decision. In other words, the entire decision will either be legislative or quasi-judicial, not a hybrid of both."

A similar principle applies here. The fact that some of the changes accomplished by the legislative ordinance that is the subject of this appeal could have been accomplished instead by rezoning LI zoned properties to GI falls far short of providing a basis to recharacterize what is clearly a legislative decision as a quasi-judicial decision.

The county alleges, and petitioner does not dispute, that the county fully complied with all the ORS 215.503 and ZDO 1400 requirements for adopting legislative changes to the ZDO. While we tend to agree with petitioner that the scope of the changes to the LI, GI and BP districts might have been easier to understand had the county more clearly set out a way to compare the pre-amendment and post-amendment treatment of uses in the three industrial zones, that is simply not a basis for reversal or remand.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

Petitioner next argues the challenged ordinance is inconsistent with Goal 1. Petitioner sets out the text of Goal 1 and part of the text of the Goal 1 Guidelines and highlights some of that text. Petition for Review 13-18.[6] Petitioner then sets out the purpose statement of the Clackamas County Committee for Citizen Involvement (CCI), which provides as follows:

[6] The Goal 1 text highlighted by petitioner is set out below:

> "The CCI shall be responsible for assisting the Clackamas County Board of Commissioners (BCC) and other appropriate governing bodies with the development of a program that promotes and enhances citizen involvement **in land use planning**, assist the BCC in special projects, events, and activities, implementation of the citizen involvement program and elevates the citizen involvement process." Petition for Review 19 (emphasis in original).

Petitioner argues the CCI was not directly consulted in this matter and repeats her complaint that the county failed to "provide[] easy to understand or complete documentation or analysis on what the currently permitted, conditionally permitted and prohibited land uses were for the existing ZDO and the proposed [amendments]." Petition for Review 18-19.

Goal 1 requires that the county adopt a citizen involvement program (CIP). The county has an acknowledged CIP. CP, Chapter 2, Citizen Involvement. Once a local government has adopted a CIP, amendments to acknowledged comprehensive plans and land use regulations must comply with the acknowledged CIP Unless a local government is amending its acknowledged CIP, Goal 1 does not apply directly to plan and land use regulation amendments, and the local government's Goal 1 obligation is to follow its

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> "**The citizen involvement program [that is required by Goal 1] shall be appropriate to the scale of the planning effort. The program shall provide for continuity of citizen participation and of information that enables citizens to identify and comprehend the issues**."
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> "Citizens shall have the opportunity to be involved in the phases of the planning process as set forth and defined in the goals and guidelines for Land Use Planning, including Preparation of Plans and Implementation Measures, Plan Content, Plan Adoption, Minor Changes and **Major Revisions in the Plan**, and Implementation Measures**.**"
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> "4. Technical Information -- **To assure that technical information is available in an understandable form**.
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> "Information necessary to reach policy decisions shall be available in a simplified**, understandable form**. Assistance shall be provided to interpret and effectively use technical information. A copy of all technical information shall be available at a local public library or other location open to the public."
>
> "6. Revision - **The general public, through the local citizen involvement programs, should have the opportunity to review and make recommendations on proposed changes in comprehensive land-use plans prior to the public hearing process to formally consider the proposed changes**."

acknowledged CIP. *Casey Jones Well Drilling, Inc. v. City of Lowell*, 34 Or LUBA 263, 284 (1998); *Churchill v. Tillamook County*, 29 Or LUBA 68, 73 (1995); *Holland v. Lane County*, 16 Or LUBA 583, 597-98 (1988).

The county argues that under the county's acknowledged CIP, it is not required to give notice to the CCI or to consult directly with the CCI on proposed amendments. Rather, the county argues, under its acknowledged CIP, the county is required to give notice to and consider any recommendations it may receive from Community Planning Organizations.[7] The county argues it did so here, and we do not understand petitioner to argue otherwise.

> "The County provided the required notice to all Community Planning Organizations as required by the County's CIP. In response to the notice provided by the County, representatives from those Community Planning Organizations, including Petitioner on behalf of the hamlet of Beavercreek, provided input and testimony. A more detailed report of the public outreach

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[7] CP, Chapter 2, Citizen Involvement Policy 9 provides:

> "9.0 Require the following functions and responsibilities of community organizations:
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> "a. Community organizations shall be advisory to the Board of County Commissioners, Planning Commission, and Planning Division on matters affecting their neighborhoods.
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> "b. The organization may develop planning proposals with respect to land use, zoning, parks, water resources, open space and recreation, annexation, housing, community facilities, transportation and traffic, community services, and other factors affecting the livability of their neighborhoods.
>
> "c. Community organizations should review and advise the County on changes in the land use plan and zoning ordinance and may submit zoning recommendations to the County. Such recommendations shall be actively considered.
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> "d. Community organizations should develop and submit annual requests for services supportive of their functions for County approval and inclusion during the regular budget process.
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> "e. Community organizations may request funding of neighborhood projects for possible inclusion in the County budget and capital improvement program.
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> "f. Community organizations should continue the planning process by reevaluating the goals, objectives, and recommendations contained in the Comprehensive Plan or a Community Plan."

> and work sessions involving these amendments has been included in the Record and is explained in part at Rec. 534. Highlights include use of a private-sector focus group, various study sessions with the Board of Commissioners and Planning Commission, presentations to Community Planning Organizations and other organizations, coordination with interested cities and agencies, and posting notice and materials of the proposal on the planning division website. These procedural steps are all consistent with those established by ZDO 1400 [governing legislative ZDO changes]. Respondent fulfilled its obligations under its CIP for providing public notice and opportunity for citizen involvement." Respondent's Brief 14.

We agree with the county.

And in response to petitioner's repeated complaint that the county did not make it easy enough to compare directly the old ZDO with the proposed amendments, the county responds that it used a "redline" and "track changes" approach that clearly showed text that was being added and text that was being deleted and provided marginal notes to further explain the amendments. Record 390-470; 672-894. Respondent contends that approach is sufficient to comply with any Goal 1 requirement that the proposal be "understandable," even if Goal 1 did apply directly.

Again, we agree with the county. The comprehensive plans and land use regulations that urban counties such as Clackamas County are required by state statute to adopt are inevitably somewhat complicated. Goal 1 is simply an attempt to require that counties make a reasonable effort to make their plans and land use regulations, and any amendments, understandable so that the interested public can participate effectively in the public policy discussion about whether the proposed policy and regulatory changes should be adopted, further amended, or abandoned. Some counties are far more successful in this effort than others. Clackamas County met its obligations in this regard in this proceeding.

The third assignment of error is denied.

FOURTH, FIFTH AND SIXTH ASSIGNMENTS OF ERROR

The appealed ordinance eliminates some existing county regulations of hazardous materials and amends existing sign regulations. Petitioner contends it was error to eliminate

those hazardous materials regulations because it will be more difficult for "to bring action against users that violate the regulations." Petition for Review 19. With regard to the sign regulations, petitioner contends those changes are "arbitrary and capricious" and inadequate notice was given for those changes. *Id* at 20. Finally, petitioner argues "there is no evidence whatsoever * * * to support the stated purpose of [the ordinance] which is 'to provide jobs.'" *Id*.

The county responds that the record shows the hazardous substances regulations were removed because the county believed they were "redundant" and "that the County Building Department, [Oregon] Department of Environmental Quality and other agencies already regulate hazardous substances and were in a better position to address those issues." Respondent's Brief 17. With regard to petitioner's evidentiary challenge regarding jobs, the county first points out that petitioner does not identify where the ordinance states a purpose of providing jobs. The county also argues that while there is nothing legally impermissible about adopting amendments based on a mere hope that they might provide jobs, there is in fact a letter in the record from the Clackamas County Business Alliance that takes the position that the amendments will "promote job creation." Record 389. We agree with the county.

With regard to the contention that the sign regulation amendments are arbitrary and capricious and lacked sufficient notice, the county contends those arguments are insufficiently developed for review and provide no basis for reversal or remand." *Deschutes Development v. Deschutes Cty*, 5 Or LUBA 218, 220 (1982). We agree with the county on that point as well.

The fourth, fifth and sixth assignments of error provide no basis for reversal or remand and for that reason are denied.

The county's decision is affirmed.