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BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

3	JAMES ATWOOD,)	
)	
4	Petitioner,)	LUBA NO. 80-158
)	
5	v.)	FINAL OPINION
)	AND ORDER
6	CITY OF PORTLAND, CLARK)	
	BINGHAM, STUART BINGHAM,)	
7	SELWYN A. BINGHAM, JR.,)	
	and SOPHIA BINGHAM,)	
8)	
	Respondents.)	

Appeal from City of Portland.

Timothy V. Ramis, Portland, filed a brief and argued the cause for Petitioner. With him on the brief were O'Donnell, Sullivan & Ramis.

Ruth Spetter, Portland, filed a brief and argued the cause for Respondent City of Portland.

Michael H. Schmeer, Portland, filed a brief and argued the cause for Respondents Bingham. With him on the brief were Black, Kendall, Tremaine, Boothe & Higgins.

Cox, Referee; Reynolds, Chief Referee; Bagg, Referee; participated in the decision.

Affirmed. 10/14/81

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a).

1 COX, Referee.

2 NATURE OF PROCEEDING

3 Petitioner challenges the October 16, 1980 decision of
4 Respondent City of Portland, whereby it designated Tax Lots 1,
5 3, 4, 13, 15, 16, 17 and 18, Block 51, Carters Addition, medium
6 density, multi-family. The contested designation is part of
7 Portland's Comprehensive Plan which was adopted on October 16,
8 1980 via Ordinance numbers 150580, 150581, 150582. Petitioner
9 contends the proper designation for the subject property is
10 medium density single-family.

11 STANDING

12 In his notice of intent to appeal petitioner states:

13 "Notice is hereby given that Petitioner James Atwood
14 intends to appeal that land use decision of Respondent
15 entitled Ordinance 150581 which became final on
16 October 16, 1980 and will be effective on January 1,
17 1981. The ordinance adopted the proposed
18 comprehensive plan for tax lots 1, 3, 4, 13, 15, 16,
19 17 and 18, Block 51, Carters Addition located between
20 S.W. Market Street and S.W. Vista Avenue, and S.W.
21 20th Avenue, which designates said property pursuant
22 to Ordinance No. 150134." (Emphasis added).

19 In his petition for review, however, petitioner attacks
20 Ordinance 150580 "which adopted the Comprehensive Plan."

21 Respondents object to petitioner's standing on the ground
22 that petitioner appealed the wrong ordinance in his notice of
23 intent to appeal if his intention, as evidenced in his petition
24 for review, is to attack Portland's Comprehensive Plan.

25 Respondents argue that Ordinance 150581 only amends and updates
26 Portland's zoning code, that it is ordinance 150580 which

1 adopts the Comprehensive Plan, and Ordinance 150582 which adopts
2 detailed plan maps (including the map applicable to the
3 property in question). Respondents reason that since
4 petitioner addressed ordinance 150580 in his statement of
5 standing, he has failed to allege how the ordinance he
6 announced he was appealing (150581) has injured or aggrieved
7 him (this is a legislative action). Both respondents move to
8 dismiss for lack of standing. We deny the motions.

9 Petitioner, in his notice of intent to appeal, stated "the
10 ordinance adopted the proposed comprehensive plan." In
11 actuality in order for the "Portland Comprehensive Plan" to be
12 operational and obtain the necessary LCDC acknowledgement (the
13 Plan was acknowledged by LCDC in May, 1981) all three
14 ordinances 150580, 150581, 150582 (which were adopted on
15 October 16, 1980), are necessary and interdependent. While
16 petitioner cited an ordinance which did not actually "adopt the
17 comprehensive plan" we find that error to be harmless in this
18 fact situation. If we were to exercise the number 150581 from
19 the notice of intent to appeal, the notice still identifies the
20 date (October 16, 1980) and the land use decision appealed
21 (adoption of the comprehensive plan). Such specificity is
22 sufficient. Petitioner's allegations of injury or aggrievement
23 regarding the "comprehensive plan" as a whole we find
24 sufficient to establish his standing.

25 ALLEGATIONS OF ERROR

26 Petitioner alleges three grounds upon which the City of

1 Portland's designation of the subject property as
2 medium-density, multi-family should be reversed.

3 A) "Respondent has acted arbitrarily and
4 capriciously in designating the subject parcel
medium-density, multi-family."

5 B) "Respondent City has acted contrary to the terms
6 of its Comprehensive Plan by designating the
subject property as medium-density, multi-family."

7 C) "Respondent City has improperly applied Statewide
8 Planning Goals 1, 2, 5, 6, 7 and 12 by
designating the subject property medium-density,
9 multi-family."

10 In light of the fact that LCDC acknowledged the City of
11 Portland's Comprehensive Plan as being in compliance with the
12 Statewide Goals, we summarily deny petitioners third ("C")
13 assignment of error. Once acknowledgment takes place, even if
14 there is a case pending before this Board, the standards
15 against which this Board will review the contested decision are
16 found in the acknowledged comprehensive plan (and its
17 implementing ordinances) and state statutes. Realty Investment
18 v. City of Gresham, 2 Or LUBA 153 (1981). See also Fujimoto v.
19 Metropolitan Service District, 1 Or LUBA 93, 1980, aff ____ Or
20 App ____ (1981); Stringer v. Polk County, ____ Or LUBA ____
21 (LUBA No. 81-068, 1981).

22 FACTS

23 This is the second case in which the City of Portland's
24 land use decisions regarding the subject property have been
25 appealed to this Board by petitioner. The first case Atwood v.
26 Portland, 2 Or LUBA 397 (1981) involved petitioner's contest of

1 On November 15, 1979 a zone change request for the subject
2 property was made by the deedholders and contract purchasers.
3 The purchasers are the respondent/applicants herein. The zone
4 change request was to change the existing designation of AO,
5 (High Density Apartments) and A2.5 (Low Density Apartments)
6 which existed on most of the property, and R-7 (One Family
7 Residential) which existed on a small block of the property, to
8 A1, (Medium Density Apartments). Five variances were also
9 requested. Petitioner was provided notice of the proceedings.

10 The requests were heard by the City of Portland hearings
11 officer. After the hearings and comments from staff, various
12 affected city bureaus and all interested parties, the hearings
13 officer recommended approval of the requests with conditions.

14 On February 28, 1980, the hearings officer's decision was
15 appealed by Petitioner to the Portland Planning Commission.
16 After a full hearing, at which Petitioner appeared, the
17 Planning Commission recommended that the requested zone change
18 and variances be granted.

19 On April 18, 1980, Petitioner appealed the decision of the
20 Planning Commission to the City Council. On July 30, 1980, the
21 City Council, after extensive testimony by Petitioner on three
22 separate days, denied Petitioner's appeal and the zone change
23 was granted, based upon specific findings and subject to
24 specific conditions. That decision was the subject of this
25 Board's ruling in Atwood v. City of Portland, 2 Or LUBA 397
26 (1981).

1 Portland's grant of a zone change on the property to A-1,
2 medium density apartments (A-1 designation in old Portland
3 zoning code changed to R-1 designation in revised Portland
4 zoning code). The record of that case has been incorporated
5 into the record before us in this appeal. We determine, after
6 review of the record now before us, that the facts we found in
7 Atwood supra are accurate in this context and incorporate them
8 into this opinion. For the sake of brevity, we will not repeat
9 them.

10 In 1977, the City of Portland began the comprehensive plan
11 process which culminated in May, 1981, with the plan's
12 acknowledgment by the Land Conservation and Development
13 Commission. The process was a detailed one which included the
14 creation of many documents for public consideration and
15 comment.

16 As the process continued, the City planning staff created a
17 number of draft plans for consideration and amendment. The
18 first was the Discussion Draft Comprehensive Plan of January,
19 1979. The second was the Proposed Plan of September, 1979.
20 The last draft plan was the Recommended Comprehensive Plan of
21 January, 1980.

22 As the City worked to create its comprehensive plan, its
23 regular land use functions continued to operate. This was the
24 statutory direction for the interim period. ORS 197.275(1).
25 Among other land use actions, the City continued to consider
26 zone change requests.

1 On August 11, 1980, the Petitioner participated in the
2 comprehensive planning process by appearing before the City
3 Council as it listened to citizen comments regarding the
4 proposed comprehensive plan. At that time petitioner requested
5 that the Council rezone the subject property from the A1
6 (medium-density, multi-family) designation placed on the
7 property on July 30, 1980, by Ordinance No. 150134 to R7,
8 medium-density, single-family.

9 The council considered his request, but did not adopt it.
10 On October 16, 1980 the Portland City Council signed three
11 ordinances which together constitute the adoption of the city's
12 comprehensive plan and implementing ordinances.

13 Ordinance 150580

14 This ordinance (1) adopted the comprehensive plan goals and
15 policies, (2) adopted the comprehensive plan map as the
16 official general map for future land use and zoning decisions,
17 and (3) directed that the official zoning maps on file with the
18 city auditor after the effective date of the ordinance be
19 considered the official detail maps of the comprehensive plan.
20 Ordinance 150580 directed that the official detail maps contain
21 comprehensive plan designations. It also directed that zone
22 changes approved by council after the date of passage but
23 before the effective date which are more permissive would be
24 considered as amendments to the plan and map.

25 Ordinance 150581

26 This ordinance "in order to implement the comprehensive

1 plan" amended various portions of the Portland Zoning Code.
2 Among other things, it changed the title of Chapter 33.32 which
3 had been, "A1 Apartment Residential Zone" to "R1 Multi-family
4 Residential Zone." The other amendments to this chapter do not
5 materially change the effect of the A1 (now R1) zoning on the
6 subject property. It is this particular ordinance that is
7 designated in petitioner's notice of intent to appeal.

8 Ordinance 150582

9 This ordinance approved designated "official zoning maps."
10 Among those maps is Map number 3127 which designates both the
11 current zoning and maximum potential zoning on the subject
12 property as being R1.

13 FIRST ASSIGNMENT OF ERROR

14 Petitioner's assertions, found in his brief and amplified
15 at oral argument, seem to be that:

16 (1) the Comprehensive Plan Map designates the subject
17 property as medium-density, single-family while the zoning map
18 which relates to the property (Map No. 3127 adopted by
19 Ordinance 150582) designates the property as medium-density,
20 multi-family,

21 (2) the official zoning map relating to the subject parcel
22 (No. 3127) is in violation of Portland Zoning Ordinance 150580
23 Section C which states,

24 "[t]he official zoning maps on file in the office of the
25 City Auditor, after the effective date of this
26 Ordinance, which shall also delineate comprehensive plan
designation, shall be considered the official detail
maps to the comprehensive plan;" (Emphasis Added),

1 because Map 3127 does not "delineate the comprehensive plan
2 designation," and

3 (3) In the alternative, if the zone map (No. 3127) is
4 interpreted as delineating a medium-density, multi-family
5 comprehensive plan designation, such a designation is in
6 conflict with the comprehensive plan map and the record is
7 devoid of explanation or factual support as to why.

8 Petitioner argues, citing Baker v. City of Milwaukie, 271 Or
9 500 (1975) that the Comprehensive Plan Map designation is
10 controlling over any conflicting zone designation for a given
11 parcel. The hub of petitioner's argument is that the
12 Comprehensive Plan Map designates the property as
13 medium-density, single-family, with the maximum zoning
14 permitted being R-7. Such a designation is depicted on the
15 comprehensive plan map by the color yellow with black polka
16 dots. In reference to the medium-density, single-family
17 designation, the Comprehensive Plan Map legend states:

18 Medium-Density, Single-Family identifies areas subject
19 to minor development constraints which would be
20 limited to a medium-residential lot size of 7,000 sq.
ft. Maximum zoning permitted is R-7."

21 Respondents argue, however, that the Comprehensive Plan Map
22 colors the subject property not yellow with black polka dots,
23 but blue with black polka dots. Blue with black polka dots on
24 the Comprehensive Plan Map depicts medium density,
25 multi-family. In reference to a medium-density, multi-family
26 designation the Comprehensive Plan Map legend states:

1 "Medium-Density, Multi-Family permits single family
2 houses, duplexes, rowhouses, and apartments. This is
3 a variable density designation, allowing by right 40
4 units per acre and a range of 40 to 60 units per acre
5 based on a series of amenity packages. Maximum zoning
6 permitted R-1."

7 The Comprehensive Plan Map is general in nature in that it
8 attempts to indicate by the use of contrasting colors plan
9 designations for all property covered by the City of Portland's
10 Comprehensive Plan. The ability to locate the specific
11 boundaries of the subject 1.10 acre parcel on this general map
12 is, to say the least, difficult. Viewed in a light most
13 favorable to petitioner, there could be a small pencil thin
14 line of yellow (not yellow with polka dots) touching part of
15 the subject property along SW Vista. As a whole, the site is
16 covered by blue with black polka dots as respondents assert.
17 Respondents Bingham state in their brief in reference to the
18 strip of yellow:

19 "In looking at the single sheet, small scale colored
20 general comprehensive plan map adopted by the City in
21 October, the subject property shows a tiny strip along
22 Vista of R7 land. This strip is approximately the
23 width of the lines separating zones on the map, and,
24 we are advised by the City, is probably a result of
25 the printing of the map being slightly out of
26 register. Numerous examples of this can be seen on
27 the general map. Even if this were controlling (which
28 it is not because of the detailed maps and contrary
29 provision of the applicable ordinance), it would only
30 affect a tiny portion of the subject property."

31 Respondent City of Portland confirmed at oral argument that the
32 yellow color on the subject property was the result of the
33 "printing being slightly out of register." While we tend to

1 view respondents' characterization as accurate, the
2 comprehensive plan map can nevertheless be said to be somewhat
3 ambiguous.

4 This debate, i.e. whether the site is yellow with black
5 polka dots or blue with black polka dots, is decided by looking
6 to the intent of the City of Portland. Zoning map number 3127
7 depicts the property in question. Map 3127 was adopted by
8 Ordinance 150582 as an "official zoning map." Official zoning
9 maps," pursuant to Ordinance 150580, are considered the
10 "official detail maps." Official detail map 3127, which by the
11 way contains no colors or polka dots, designates the entire
12 site as R-1. Such a designation would seem to be enough to
13 satisfy petitioner that the intent of the city was to designate
14 the property as medium-density, multi-family. But, petitioner,
15 in an attempt to snatch victory from the jaws of defeat,
16 counters with the argument that Map 3127 merely indicates that
17 the property is R-1 and does not, contrary to the requirements
18 of Ordinance 150580, "delineate the comprehensive plan
19 designation." By this argument we understand the petitioner to
20 be pointing out that Map 3127 does not state on it
21 "medium-density, multi-family." He is correct. Such an
22 observation does not, however, prevent the Board from
23 determining the City of Portland's intent nor does failure to
24 state "medium density, multi-family" on the map render it
25 invalid. By referring back to the Comprehensive Plan Map
26 (adopted on the same date), we can see that the R-1 code

1 appears in only one place; that being in conjunction with the
2 designation "medium-density, multi-family. From the foregoing,
3 we can only conclude the city's intent was to designate the
4 subject property on the Comprehensive Plan Map as medium
5 density, multi-family.

6 Since petitioner's alternative argument that the decision
7 is arbitrary and capricious is dependent upon the comprehensive
8 plan map designation being single-family, our determination
9 that the city intended a multi-family designation controls. In
10 an attempt to lay this controversy forever at rest, however, we
11 will briefly address his assertion that there is a lack of
12 explanation or facts in the record to support a medium-density,
13 multi-family designation on the subject property.

14 The property in question was the subject of a long and
15 detailed zone change proceeding which petitioner appealed to
16 this Board. The record of that zone change proceeding was
17 incorporated in the record on this appeal and it contains
18 sufficient explanation and facts to support the medium-density,
19 multi-family designation. See Atwood, supra. The result of
20 that zone change proceeding was the decision by the Portland
21 City Council, on July 30, 1980 (Ordinance 150134) to designate
22 the subject site A-1. A-1 zoning was converted by Ordinance
23 150581 on October 16, 1980 to R-1, the zone presently on the
24 property.

25 Based on the foregoing, petitioner's first assignment of
26 error is denied.

1 SECOND ASSIGNMENT OF ERROR

2 Petitioner asserts that a multi-family plan designation on
3 the subject property conflicts with Portland's comprehensive
4 plan policies. He cites as support for his position, Portland
5 Comprehensive Plan, Section VIII, paragraph 8.12 which states:

6 "Control the density of development in areas of
7 natural hazards consistent with the provisions of the
8 city's building code, Chapter 70, the Floodplain
9 Ordinance and the Subdivision Ordinance."

10 As we understand petitioner's argument, he is claiming that
11 because the subject property is prone to landslides, it is a
12 hazardous area and the only reasonable zoning for the property
13 is medium-density, single-family.

14 The concern expressed in Section VIII, Paragraph 8.12 is
15 explained more fully in Portland's comprehensive plan support
16 document entitled "Environment." At page 43 of that support
17 document it states:

18 "Natural hazards dictate restraint and careful
19 assessment of remaining vacant land in Portland prior
20 to development."

21 "Land is an increasingly limited resource in
22 Portland. Little land suitable for residential
23 development remains vacant. What vacant land does
24 exist has often been passed over due to constraints
25 such as slope, soils, lack of services or access.

26 "As increasing development pressures bring both
reassessment of these remaining parcels and
redevelopment of previously developed land, we must
carefully assess the ability of the land to support
development."

"Potential landslide hazard is the most prevalent
restriction on vacant residential land in Portland,
primarily in the West Hills and Powell Butte areas."

1 Petitioner does not specify how Portland has violated its
2 policy. He does not allege the "density of development" has
3 been left uncontrolled. The density, in fact, is "controlled"
4 by designating the property R-1 which allows only up to 40
5 units per acre as a matter of right.

6 Citing this Board's opinion in Miller v. Portland, 2 Or
7 LUBA 363 (1981), petitioner argues that we have construed
8 Portland's comprehensive plan to provide "absolute prohibitions
9 against increased levels of development," in hazardous areas.

10 Petitioner's interpretation of our holding in Miller,
11 *supra*, is incorrect and his reliance on the case is misplaced.
12 In Miller, the city had designated the petitioner's property
13 low density, single-family. The question presented was whether
14 such a designation was supported by substantial evidence. We
15 found it was and denied Ms. Miller's allegation of error. In
16 Miller the record supported the city's conclusion that a
17 "hazard" to development existed.

18 In the case before us now the city obviously does not be-
19 lieve that a similar "hazard" to development exists on the sub-
20 ject property. The city designated the property R-1 (medium-
21 density, multi-family) after extensive hearings, both during a
22 quasi-judicial zone change proceeding (Atwood, *supra*), and dur-
23 ing the legislative comprehensive plan adoption proceedings
24 contested by this appeal. Based on the record from those hear-
25 ings, it appears the city considered the characteristics of the
26 subject property before it zoned the property R-1.

1 The remainder of petitioner's arguments under this
2 assignment of error center around his "recommendation" that a
3 "variable density-overlay zone" be applied to the subject
4 property. Petitioner is making his "recommendations" in the
5 wrong forum. Such arguments should be made to the local
6 government.

7 Affirmed.

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