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

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JOHN DAWSON,)
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Petitioner,)
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vs.)
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CITY OF BOARDMAN,)
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Respondent)
)
and)
)
JOSPEH M. TATONE and)
ALICE M. TATONE,)
husband and wife,)
)
Intervenors.)

LUBA No. 83-064
FINAL OPINION
AND ORDER

Appeal from City of Boardman.

Sam H. Ledridge, LaGrande, filed a petition for review and argued the cause for petitioner.

M. D. Van Valkenburgh, The Dalles, filed a brief and argued the cause for Respondent City.

F. E. Glenn, Boardman, filed a brief and argued the cause for Intervenors Joseph and Alice Tatone.

KRESSEL, Referee; BAGG, Chief Referee; DUBAY, Referee participated in the decision.

REVERSED and REMANDED 02/08/84

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1983, ch 827.

1 Opinion by Kressel.

2 NATURE OF DECISION

3 Petitioner appeals the city's decision that a rodeo school
4 arena is a permitted use in the commercial district of the
5 Boardman Zoning Ordinance.

6 FACTS

7 Intervenor owns and operates the Dodge City Inn Restaurant
8 and Cocktail Lounge in Boardman. Adjacent to it is a parcel on
9 which intervenor has constructed a facility designed for use as
10 a rodeo training school and show arena. According to the
11 city's findings, the arena is constructed of steel panels, and
12 includes three bucking chutes, a calf and steer roping chute, a
13 loading/unloading chute, holding pens and alleys. The arena
14 covers 30,000 square feet. The land is designated commercial
15 by the Boardman Zoning Ordinance.

16 Petitioner resides on land which adjoins the rodeo school
17 arena. His property is zoned for residential use. After the
18 rodeo facility was built, petitioner complained to the city
19 police chief, who is assigned zoning enforcement responsibility
20 under the city code. Petitioner argued the use was not
21 permitted in the commercial zoning district. However, the
22 police chief took no enforcement action.

23 Petitioner then appealed to the city planning commission.
24 The commission found no zoning violation, but insisted on
25 certain operating limitations for the use. A further appeal to
26 the city council resulted in a similar ruling.

1 The city council's order describes the use as a "rodeo
2 school arena." Various measures designed to control insects,
3 dust, noise, and odor are listed. The order concludes that the
4 zoning ordinance allows the rodeo school arena, provided there
5 is no harboring of livestock overnight, on the theory that such
6 an activity would convert the facility into a "stable,"
7 "feedyard" or "stockyard" - uses expressly disallowed in the
8 commercial district.

9 MOTION TO DISMISS

10 Respondent and intervenor have moved to dismiss the appeal
11 on grounds this Board lacks jurisdiction to review the
12 challenged order. Pursuant to ORS 197.825(1) the Board's
13 jurisdiction extends only to "land use decisions." The motion
14 contends the city's action is not a land use decision as the
15 term is defined in ORS 197.015(10).

16 In pertinent part, "land use decision" is defined by the
17 statute as follows:

- 18 "(A) A final decision or determination made by a local
19 government or special district that concerns the
20 adoption, amendment or application of:
21 (i) The goals;
22 (ii) A comprehensive plan provision;
23 (iii) A land use regulation; or
24 (iv) A new land use regulation...." ORS 197.015(10).

25 According to the motion, the challenged order fits into
26 none of the above categories. In response to petitioner's
27 claim that the action concerns the application of a land use
28 regulation (ORS 197.015(10) (A) (iii)), it is argued that the

1 more appropriate characterization of the decision is an
2 "administrative type decision." This is allegedly because the
3 decision concerns zoning enforcement, normally an
4 administrative matter. The jurisdictional argument is that by
5 virtue of ORS 197.015(11), "administrative type decisions" are
6 outside the definition of "land use regulation;" therefore,
7 petitioner's theory that the decision concerns a land use
8 regulation must be in error.

9 The motion to dismiss is denied. The council's order, as
10 well as other portions of the record, make it clear that the
11 principal issue in this case is whether, and under what
12 circumstances, a rodeo school arena is allowed in the
13 commercial district of the Boardman Zoning Ordinance. See
14 e.g., Record at 6-17, 35-36, 96EE.¹ The city's decision
15 concerned the application (interpretation) of a zoning
16 ordinance. That ordinance is clearly a land use regulation
17 under ORS 197.015(11). The appeal therefore involves a "land
18 use decision" under ORS 187.015(10) and is within this Board's
19 jurisdiction.² The fact that the interpretation question
20 arose in the context of a zoning enforcement dispute does not
21 alter the character of the decision as an application of the
22 zoning ordinance. ORS 197.015(10)(A)(iii).

23 FIRST ASSIGNMENT OF ERROR

24 Petitioner claims that the Boardman Zoning Ordinance
25 prohibits a rodeo school arena in the commercial district. He
26 relies on Sections 30 and 31 of the ordinance, particularly the

1 provisions barring public stables, public feedyards,
2 stockyards, slaughterhouses and all other uses similar to the
3 above" from the commercial district. Section 30(1), Ordinance
4 No. 43. He contends that the rodeo school arena is
5 substantially similar to the specifically excluded uses because
6 of the presence of animals on the site, especially when rodeos
7 are held.

8 In the alternative, petitioner points out that Section 31
9 of the commercial district generally excludes "any uses which
10 are objectionable by reason of odor, dust, smoke cinders, gas,
11 noise, vibration, flammability, refuse matter, or water carried
12 wastes." He claims that the noise, dust, and odor which are
13 associated with an arena bring it within the general category
14 of uses which are objectionable, and therefore barred. The
15 city's attempt to eliminate or minimize the objectionable
16 features by requiring sprinklers, odor and fly control and
17 noise control are said by petitioner to be unauthorized by the
18 ordinance.

19 Respondent and intervenor meet these arguments by asserting
20 that the city has broad latitude in determining what uses are
21 allowed under the zoning code. They claim the city has
22 restricted the use so as to bring it within the terms of the
23 ordinance. They stress that the limitations contained in the
24 county's order make the use dissimilar to the expressly
25 prohibited uses and take the proposal out of the general
26 category of "objectionable uses."

1 Petitioner's claim that the city was powerless to treat the
2 proposal as a conditional use, because such uses are not
3 recognized by the ordinance, is met by the argument that the
4 limitations imposed by the city are not really conditions of
5 approval. Rather, it is argued that the limitations should be
6 construed as the city's way of defining the circumstances under
7 which the rodeo school arena can qualify as a permitted use.

8 For the reasons stated below, we conclude that the
9 challenged order cannot stand. While we do not agree the use
10 clearly falls within the prohibited categories, sufficient
11 question exists to require the city to demonstrate
12 affirmatively why it is permitted. The order as currently
13 drafted is inadequate for this purpose.

14 We do not accept petitioner's claim that the Boardman
15 ordinance clearly bars a rodeo school arena in the commercial
16 district. As far as the record in this case discloses, the use
17 proposed by intervenor does not coincide with the definitions
18 of prohibited uses (public stable, feedyard, stockyard) cited
19 by petitioner. Moreover, although there are some similarities
20 between the arena and the prohibited uses, (e.g., presence of
21 livestock on site) we cannot say as a matter of law that the
22 similarities are so great as to require prohibition. This
23 holding, however, is not to say the use as proposed is
24 permissible in the zone. See our discussion *infra* at pp. 7-10.

25 A more difficult question is presented by petitioner's
26 argument under Section 30(1) that, once certain objectionable

1 features of intervenors' proposed use (e.g., dust, odor, noise)
2 were acknowledged by the city council, there was no choice but
3 to treat it as a prohibited use. The commercial district of
4 the ordinance clearly prohibits "...any uses which are
5 objectionable by reason of odor, dust, smoke cinders, gas,
6 noise, vibration, flammability, refuse matter or water carried
7 wastes..." Section 30(1), Ordinance No. 43 (emphasis added).
8 Evidently, the council interpreted this provision to authorize
9 allowance of an otherwise objectionable commercial use by
10 limiting or curtailing the objectionable features. Petitioner
11 urges us to hold the council lacked power to take this approach.

12 We see no reason why the council could not define the
13 circumstances under which a questionable proposal would pass
14 the test. The council has not attached conditions but has only
15 outlined the circumstances under which the proposed use may be
16 considered free of "objectionable" characteristics. The case
17 by case approach may be unconventional, but petitioner has
18 presented no argument why it is unlawful.

19 Having rejected petitioner's arguments on the above points,
20 however, we nonetheless find merit in his challenge to the
21 city's order.

22 In prior cases, we have followed the state Supreme Court's
23 lead in holding that an ordinance interpretation by local
24 government, like a state agency's interpretations of enabling
25 legislation, must include a thorough explanation of the manner
26 in which the interpretation carries out underlying policy.

1 Springfield Education Association v. School District No. 19,
2 290 Or 217, 621 P2d 547 (1980); Hoffman Industries, Inc. v.
3 Beaverton, 2 Or LUBA 411, 420 (1981). Where a term in a land
4 use regulation is inexact or general in nature, we hesitate to
5 review a contested interpretation of the term without the
6 benefit of findings by the local jurisdiction setting forth
7 what the legislative purpose is and what the particular terms
8 mean in the context of that purpose and the facts presented.
9 The land v. Multnomah County, 4 Or LUBA 284, 288 (1981). As
10 stated in Springfield Education Association, supra, the final
11 order "is the instrument by which an agency demonstrates that a
12 particular interpretation or application of a statute is within
13 a generally expressed legislative policy." 290 Or at 227.

14 Our review of the challenged decision in light of the above
15 principles results in the conclusion that the city has not
16 adequately explained why the rodeo school arena, even as
17 limited by various controls over noise, dust, odor, etc., is a
18 permitted use in the commercial district. Although the order
19 attempts to distinguish the proposal from uses expressly
20 prohibited in the district, it does not affirmatively
21 demonstrate, as it must, that the proposal is permitted.

22 A. The Ordinance.

23 We note at the outset that the pertinent ordinance does not
24 define "rodeo school arena" or list the term as a permitted use
25 in any district. Section 30 sets forth the purpose of the
26 commercial district as follows:

1 "Section 30. Description of the C Zone.

2 "This zone is intended for a broad range of retail
3 commercial activities and services to meet the needs
4 of both the traveling public and the residents of the
5 city and its trade area. The regulations are designed
6 to encourage the development and expansion of
7 compatible commercial uses and to protect the abutting
8 or surrounding residential uses. Purchasers will
9 arrive generally by personal automobile and density of
10 development is kept low consistent with the provision
11 of automobile parking areas." Section 30, Ordinance
12 No. 43.

13 The permitted uses in the commercial district are
14 identified in the following section of the ordinance. That
15 section provides, in pertinent part:

16 "Section 31. Uses Permitted In C Zone.

17 "(1) All types of retail business activities and
18 services which do not include fabricating,
19 processing, or warehousing, except as a minor or
20 incidental activity, but not including any uses
21 which are objectionable by reason of odor, dust,
22 smoke cinders, gas, noise, vibration,
23 flammability, refuse matter, or water carried
24 wastes, and not including any of the following:

25 "animal hospital or kennel, automobile body shop,
26 billboard, building materials yard, carpet
27 cleaning, drive-in theater, public stables, dyeing
28 and cleaning works using flammable substances,
29 electric welding shop, feed or fuel yard, laundry
30 (other than hand or self-service), lumber yard,
31 machine shop, milk distributing station, truck or
32 heavy equipment storage, trucking terminal, and
33 all other uses similar to the above and all uses
34 excluded from an I Zone by a listing under
35 Section 37 herein." Section 31, Ordinance No. 43.

36 Also listed as permitted uses in the commercial zone are the
37 following: hotel or motel, public park, playground and similar
38 non-commercial recreation use, library, museum, club, lodge,
39 social or recreation building and similar uses. Id.

1 As we read the ordinance, then, the proposed use could be
2 classified as a permitted use in the commercial district if it
3 either (a) qualified as a type of "retail business activity or
4 service" and was found not objectionable in light of the factor
5 listed in paragraph (1) of Section 31, or (b) qualified as one
6 of the other specific uses listed in the section. We look to
7 the city's order to determine which, if either, of the above
8 approaches was taken. As noted above, we also look to the
9 order to determine why the city considered its interpretation
10 to be consistent with the stated purpose of the commercial
11 zoning district. Theiland, Inc. v. Multnomah County, supra.

12 B. The City's Order.

13 Given the critical role of the city's order in this case we
14 find it helpful to quote the findings verbatim. They read as
15 follows:

16 "THE CITY FINDS:

17 "1. That the property is zoned commercial.

18 "2. That the arena is constructed of steel panels
19 including three bucking chutes, a calf and steer
roping chute, a loading/unloading chute, holding
pens, alleys and an arena of 30,000 square feet.

20 "That the property is level with an underground
21 sprinkler system for lawn irrigating and arena
sprinkling for the purposes of controlling dust
22 and texture of the arena.

23 "3. That the purpose of the arena is to provide a
24 school for rodeo athletes and to provide rodeo
events therefor.

25 "4. That the control of insects can be maintained by
26 the installation of fly traps and compliance with
the recommendations of Mr. Dave Hughes, Manager

1 of North Morrow Vector Control District, which
2 letter is dated April 26, 1983.

3 "5. That the installation of the sprinkler system and
4 the demonstrated performance thereof demonstrates
5 that the dust and to some extent odor is
6 adequately controlled.

7 "6. That the crowd, animal and public address system
8 noise will not be excessive and will not exceed
9 that of sporting events of other local athletic
10 facilities and activities.

11 "7. That conditions required for animal waste
12 eradication, including daily application of straw
13 and removal after use, will adequately contain
14 the odor to an acceptable minimum.

15 "8. That the fences and shrubbery required,
16 consisting of lawn, shrubs, trees and child proof
17 fences will adequately protect the spectators
18 from the rodeo activities and will contain the
19 animals within the arena and preclude children
20 from entering the rodeo area.

21 "9. That the City Council further finds that animals
22 may not be allowed to remain or be boarded
23 overnight within the terms and definitions of the
24 allowed use.

25 "Since the various definitions set forth in the
26 Zoning Ordinance deal with 'public stables' - a
27 place which is primarily used for boarding of
28 animals and/or livestock; 'feedyard' - a place
29 which has the primary purpose of feeding out
30 livestock for sale; 'stockyard' - a place for
31 assembling livestock for transport, sale or
32 movement into commerce; it follows that the
33 definition of a rodeo school arena in a
34 commercial zone, as a permitted use, must be a
35 place where rodeo events, including teaching and
36 demonstrating of rodeo events, take place; and
37 precludes activities coming under the definition
38 of 'public establishments', 'feedyards', and
39 'stockyards.'

40 "By definition, therefore, harboring of livestock
41 overnight would be precluded as a generality.

1 "CONCLUSION

2 "The City therefore concludes that the zoning
3 ordinance allows the rodeo school arena within
4 the definitions of the findings hereby approved."

5 The findings make two major points. First, various
6 measures have been or will be taken to eliminate, or at least
7 mitigate, certain objectionable features of the use. See
8 Findings 2, 4, 5, 6, 7 and 8. Second, by prohibiting overnight
9 boarding of livestock, the city believed the facility would be
10 outside the definitions of other uses expressly prohibited in
11 the commercial district, e.g., "public stables," "feedyards"
12 and "stockyard." See Finding 9.

13 In a case such as this, a negative conclusion (that the use
14 is not similar to prohibited uses) is not an adequate
15 substitute for the affirmative determination which must be made
16 viz., that the use is permitted in the district.³ We find no
17 discussion in the order of whether the rodeo school arena
18 qualifies as a type of "retail business activity or service" or
19 is considered to be one of the other listed uses in Section
20 31. Nor is there any explanation of how the city's
21 interpretation of Section 31 comports with the purposes of the
22 commercial district stated in Section 30. Stated in other
23 words, the order does not tell us how the city's interpretation
24 "coincides with the legislative policy which inheres in the
25 meaning of the statute." Theiland, Inc. v. Multnomah County,
26 supra, 4 Or LUBA at 289.

For the above reason, the city's decision cannot withstand

1 petitioner's challenge. The order must be remanded to give the
2 city an opportunity to more fully explain its interpretation in
3 light of ordinance policy and the pertinent facts concerning
4 the rodeo school arena.

5 In light of the foregoing, the first assignment of error is
6 sustained.

7 SECOND ASSIGNMENT OF ERROR

8 Petitioner next charges that the city's decision violates a
9 comprehensive plan policy mandating the separation of
10 incompatible uses. Our resolution of the first assignment of
11 error is pertinent on this point also. In explaining the basis
12 for its interpretive decision, the city is obligated to
13 demonstrate how its interpretation carries out legislative
14 policy. Springfield Education Association v. School District
15 No. 19, supra 290 Or at 227. As stated in the commercial
16 district of the zoning ordinance itself, that policy includes
17 the express goal of protecting, abutting or surrounding
18 residential uses. The plan policy appears to echo the same
19 concept. Findings addressing either the ordinance or the plan
20 in light of the pertinent facts about the rodeo school arena
21 and surrounding developments will suffice.

22 This assignment of error is sustained.

23 THIRD ASSIGNMENT OF ERROR

24 This assignment of error charges that the city has not
25 adequately explained the basis for its decision. Our
26 resolution of the first assignment of error make it unnecessary

1 to discuss petitioner's claims further.

2 FOURTH ASSIGNMENT OF ERROR

3 Petitioner here claims that the city's order "...does not
4 address sanitary facilities, and seating capacities as required
5 by City Ordinance." Petition at 6. However, we find nothing
6 in the petition to advise us of what ordinance provision is
7 relied on by petitioner. Accordingly, we will not consider
8 this assignment of error.

9 FIFTH ASSIGNMENT OF ERROR

10 Finally, petitioner claims that he was denied the right to
11 an unbiased tribunal "...in that the attorney for the hearing
12 body actively entered into the hearing process on behalf of the
13 position opposing appellant." Petition at 6. We have
14 difficulty in comprehending how the conduct of the city
15 attorney at a quasi-judicial land use hearing could result in a
16 biased hearings body. Petitioner's theory seems to be that the
17 attorney usurped the power of the council by his forceful
18 questioning of witnesses and his apparent support of
19 intervenors' position.

20 We reject this claim. Parties to quasi-judicial land use
21 hearings are entitled to unbiased decisionmakers. The city
22 attorney was not a decisionmaker in this instance.

23 This assignment of error is dismissed.

24 CONCLUSION

25 Based on the foregoing, the city's order must be remanded.
26 The decision that intervenors' facility qualifies as a

1 permitted use under the Boardman Zoning Ordinance must be
2 explained by findings showing how this interpretation carries
3 out underlying policy. The findings must also explain which
4 commercial use category is considered controlling e.g., is this
5 a "type of retail or service use" or is it one of the other
6 uses listed in Section 31? The facts pertinent to this
7 determination must be set forth in the order.

8 Reversed and Remanded.

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FOOTNOTES

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4 For example, the planning commission's minutes of May 4,
5 1983 describe the issue presented as "does a rodeo school fit
6 the permitted use for the zone?" Record at 35.

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8 There is an interesting parallel between this aspect of the
9 case and Foreman v. Clatsop County, 63 Or App 617, 655 P2d 365
10 (1983). In Foreman, the county held a contested case hearing
11 to determine a vested rights claim. In deciding that the
12 resulting decision was a "land use decision" within LUBA's
13 jurisdiction, the Court of Appeals implied that had the county
14 not held the proceeding, the vested rights issue would have
15 been determinable in a circuit court suit for a declaratory
16 judgment. 63 Or app at 621. Similarly, had Boardman not held
17 the hearing to interpret the zoning code in this case,
18 petitioner would have been required to seek injunctive or
19 declaratory relief in circuit court on grounds the use
20 constituted a zoning violation. See, ORS 215.185. We do not
21 believe the recent decision by the Court of Appeals in
22 Mehring v. Arpke, 65 Or App 747 (1983) is inconsistent with
23 this view.

24 3
25 The Boardman Zoning Ordinance itself underscores this
26 point. Section 3 of the ordinance provides:

27 "Section 3. Compliance With Ordinance Provisions.

28 "No structure or premises may be used or occupied, and no
29 structure or part of a structure may be erected, moved,
30 reconstructed, extended, enlarged, or otherwise altered
31 except as permitted by this ordinance." Section 3,
32 Ordinance 43 (emphasis added).
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