

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

JUN 8 2 06 PM '82

FLOYD JONES and
CHEVRON U.S.A., Inc.

Petitioners,

v.

CITY OF MILWAUKIE, OREGON

Respondent.

LUBA NO. 82-015

FINAL OPINION
(ORDER OF DISMISSAL)

Appeal from the City of Milwaukie.

Michael J. Lilly, Portland, filed a petition for review and argued the cause for Petitioners. With him on the brief were Spears, Lubersky, Campbell & Bledsoe.

Greg Eades, Milwaukie, filed a brief and argued the cause for Respondent.

COX, Referee; REYNOLDS, Chief Referee; BAGG, Referee; participated in the decision.

DISMISSED 6/08/82

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 is contesting the Milwaukie City Council
4 approval of a concept plan authorizing Tri-Met to proceed with
5 a federal grant application to site a transit center on
6 petitioner's property. The City Council adopted neither
7 findings nor a formal order. The information concerning the
8 decision is found in the minutes of the February 2, 1982 city
9 council meeting. Petitioner requests that the city council's
10 action be reversed and remanded for further proceedings.

11 STANDING

12 Respondent City of Milwaukie contests petitioner's standing
13 on the ground there has been no land use decision made and,
14 therefore, petitioner is not aggrieved by a land use decision.
15 This argument is disposed of by our order on respondent's
16 motion to dismiss.

17 ALLEGATIONS OF ERROR

18 Petitioner sets forth three assignments of error:

19 "1. The city failed to make findings of fact and
statements of reasons in support of its decision.

20 "2. The city failed to consider whether the
21 location of the site was consistent with the city's
22 zoning ordinance and comprehensive plan, and no
evidence was presented on this issue.

23 "3. The city failed to give appropriate notice."

24 FACTS

25 On February 2, 1982, the City of Milwaukie considered a
26 continuing request from Tri-Met to approve the siting of a

1 transit center on property owned by petitioner. The record
2 shows discussion by the city council with its planning staff,
3 Tri-Met representatives and citizens regarding the proposed
4 site. Petitioner, who owns a Chevron gas station on the site,
5 asked the council to consider another location since he did not
6 want to move and would have problems relocating. There was
7 some discussion of transit center design, parking problems and
8 alternative sites. The record reveals a motion was made,
9 seconded and unanimously adopted approving the site and
10 accepting the concept plan.¹

11 Minutes in the record indicate the transit center was also
12 considered at city council meetings on 12/15/81, 12/17/82 and
13 1/14/82. The minutes of the hearings on those dates reveal
14 discussions by the city council, with inputs from interested
15 parties, of alternative sites to the one at issue in this
16 proceeding. In addition, various design and traffic flow
17 issues were discussed at those prior hearings.

18 The record does not contain any formalized documents
19 adopting findings of fact or a statement of reasons for the
20 city's decision. Neither does the record indicate what, if
21 any, notices of hearing were sent out and it is silent on what
22 zoning ordinance and comprehensive plan provisions were
23 considered before the city council vote.

24 DECISION

25 Respondent City of Milwaukie moves to dismiss the appeal on
26 the ground the action taken by the city is not a "final land

1 use decision" within this Board's jurisdiction as that term is
2 defined in Oregon Laws 1979, ch 772, as amended by Oregon laws
3 1981, ch 748.² The city argues the subject of petitioner's
4 appeal is merely a city council decision tentatively approving
5 the transit center site thus enabling Tri-Met to apply for a
6 federal grant. It states Tri-Met's ultimate use of the
7 property is contingent on funding and various other approvals.
8 Respondent states that although it is not apparent in the
9 record, the transit center is only allowable as a conditional
10 use since the site is zoned C-L, Limited Commercial.
11 Respondent argues, and petitioner does not dispute, that
12 pursuant to Milwaukie Zoning Ordinance No. 1438, Section 3.10,
13 parking facilities and passenger terminals are allowed in a C-L
14 zone only as conditional uses subject to the hearing procedures
15 of section 6.01 of the Milwaukie Zoning Ordinance.

16 Pointing to LUBA Rule No. 3(C) which requires written and
17 signed decisions,³ the city next argues that such a written
18 decision need only be made in this case after Tri-Met applies
19 for a conditional use permit. It is at that point, argues the
20 city, that the Milwaukie Comprehensive Plan provisions (the
21 plan has been acknowledged by LCDC) will be addressed. Since,
22 reasons the city, there is yet no written decision containing
23 the signatures required by LUBA Rule 3(C), this Board has no
24 jurisdiction.

25 Petitioner takes the position this is a quasi-judicial land
26 use decision made without findings of fact or reasons in

1 support of its decision. Petitioner reasons the city's
2 decision to locate a transit station at a particular site is
3 certain to have an effect on the city's traffic and parking
4 patterns and consequently will have a considerable impact on
5 land use in the city. Petitioner cites us to the City of
6 Milwaukie Comprehensive Plan's transportation elements which
7 specifically deal with the siting of transit stations.⁴
8 Petitioner argues the decision involves application of and
9 implements the city's comprehensive plan and is, therefore, a
10 land use decision within the definition found in ORS
11 197.015(10). See footnote 2. Therefore, concludes petitioner,
12 the city was remiss in not adopting findings of fact and
13 conclusions of law to explain the basis of its decision and how
14 the decision complies with the comprehensive plan.

15 Milwaukie's reliance on LUBA Rule 3(C), supra, is somewhat
16 misplaced. The fact that a local government has not reduced
17 its decision to writing can not be used as a means of
18 circumventing this Board's jurisdiction over an action which is
19 nevertheless deemed to be a "final" land use decision. Our
20 main inquiry in this fact situation is whether the decision
21 under appeal is "final."

22 This Board is not entirely sure to what the city committed
23 itself when it authorized Tri-Met to proceed with an
24 application for federal grant money. It is clear the action of
25 February 2, 1982 is an effort designed to implement the city's
26 comprehensive plan. We can not tell from the record before

1 this Board, however, whether the city's action somehow locks it
2 into accepting petitioner's site as the only appropriate
3 transit station location.

4 It may be as petitioner argues that once federal funds are
5 granted for a facility at the subject site, alternative sites
6 will not be given serious and equal consideration when the city
7 finally gets around to applying its comprehensive plan to
8 selection of a transit center site. If that is the case, then
9 the city has certainly painted itself into a corner from which
10 it will have difficulty extracting itself. We do not believe,
11 however, that the city has yet made a "final" decision as that
12 term is used in ORS 197.015(10). Apparently, the city has done
13 nothing which would be considered an ordinance or permit
14 approval within the scope of ORS 227.160 et seq. It does not
15 appear from the record submitted to this Board that Milwaukie
16 has changed the permitted use of the site or granted to Tri-Met
17 any rights Tri-Met did not already possess. If such change of
18 use or bestowing of rights were to have taken place an
19 ordinance or permit would have been required. We have no
20 record of either such action having taken place. There is a
21 possibility the Milwaukie City Ordinances contain a provision
22 by which the city can make a "final decision" other than by
23 ordinance or permit. No such provision has been brought to our
24 attention, however. We find, therefore, that no "final"
25 decision has been made. Respondent's motion to dismiss is
26 granted.

Page Dismissed.

FOOTNOTES

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Specifically the minutes state:

"Pete Sinclair, Bank of Milwaukie presented a memorandum dated February 1, 1982, from the Milwaukie Business Association recommending acceptance of the Chevron site. The recommendation contained a list of eight requirements to be agreed upon between the city and Tri-Met.

"There was more discussion on the problems involved in relocation. Steve Hall, Public Works Director, endorsed the second site and said that there were very few sites in Milwaukie where the Transit Center could be located. Time was running out, said Hall, and staff was recommending that the Council approve the site, the plan in concept, and the requirements listed by the Milwaukie Business Association. Mr. Floyd Jones, owner of the Chevron Gas Station, asked the Council to consider another site, since he did not want to move and would have problems relocating.

"There was more discussion on the design of the plan and possible parking problems as a result of the Transit Center. It was MOVED by Paulson, SECONDED by Hall, that the Council approve site # 2 as proposed by Tri-Met, including recommendation by Steve Hall, that Council accept the concept plan, authorize Tri-Met to proceed with the grant application and accept recommendations of the Milwaukie Business Association. MOTION CARRIED unanimously." (Emphasis added).

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Apparently respondent is referring to ORS 197.015(10) which defines land use decision as:

"(a) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

"(A) The goals;

"(B) A comprehensive plan provision; or

"(C) A land use regulation; or

1 facilities for the handicapped, etc.

2 Policy No. 6 states:

3 "Through its Community Conservation and Development
4 Division policies, the city will encourage the
5 provision of housing suitable for the elderly, and
6 moderate income families to be locate in close
7 proximity to regional transit facilities. The
8 concentration of employment opportunities is also
9 encouraged."

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