

LAND USE
BOARD OF APPEALS

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

MAY 17 4 56 PM '84

3	ALLEN ASSOCIATES,)	
)	
4	Petitioner,)	LUBA No. 84-002
)	
5	vs.)	FINAL OPINION
)	AND ORDER
6	CITY OF BEAVERTON,)	
)	
7	Respondent.)	

8
9 Appeal from City of Beaverton.

10 Jack L. Orchard, Portland, filed the petition for review
and argued the cause on behalf of petitioner.

11 Eleanor S. Baxendale, Beaverton, filed a brief and argued
12 the cause on behalf of Respondent City.

13 Gordon Baker, Beaverton, filed a brief and argued the cause
on his own behalf.

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

15 DISMISSED 05/17/84

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

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1 Opinion by Kressel

2 NATURE OF THE DECISION

3 Petitioner appeals the city's refusal to reconsider the
4 terms of a previously issued order. That order partially
5 denied one aspect of petitioner's 15 lot industrial subdivision
6 proposal, known as the Allen Business Center.

7 FACTS

8 On September 15, 1983, the Beaverton City Council adopted
9 Order No. 381, the final order in three related appeals
10 concerning the Allen Business Center: (1) SUB-4-83, an appeal
11 of the hearings officer's approval of a preliminary subdivision
12 plan for the center, (2) BSDR 23-83, an appeal of the decision
13 of the Board of Site and Design Review approving the design of
14 the center, and (3) an appeal of the proposed issuance by the
15 city engineer of a site development permit for placement of
16 fill in a flood plain district affecting the center. The
17 applicant for the permits was Allen Associates, petitioner in
18 this proceeding. The appellants before the city council, who
19 are participant-respondents in this proceeding, were lot owners
20 in a nearby residential subdivision.

21 Order No. 381 approved all but one component of the Allen
22 Business Center. That component, described in the order as
23 "Tract A," was found to be inappropriate for division and
24 immediate development by virtue of its apparent status as a
25 wetland and a wildlife habitat. Accordingly, the order
26 rejected the proposal for Tract A as in conflict with a policy

1 in the city's general plan mandating protection of areas
2 "conducive to native vegetation and wildlife."¹ Record at
3 33-34. However, the order indicated development of the tract
4 would be permissible after the city completed a study of the
5 site's wetland and wildlife features.

6 The provisions of Order No. 381 with respect to Tract A are
7 critical to an understanding of the events leading up to this
8 appeal. In pertinent part, the order stated:

9 "Further study of the wetland area and the wildlife
10 area is necessary before the subdivision criteria of
11 General Plan compliance can be met. Studies must be
12 undertaken by the City and appropriate government
13 agencies to determine the location of the floodplain
14 and any wetlands and wildlife habitat. The area under
15 study shall be designated Tract A * * *

16 "Until the appropriate City maps and policies are in
17 place and permits for change and development have been
18 submitted and approved by the proper City authority,
19 no change, including but not limited to storing
20 materials and removing trees and other vegetation,
21 shall be allowed, with the following exception.
22 Public facilities serving the area outside of Tract A
23 may be installed because such activities must be
24 approved by the Army Corps of Engineers and because
25 such limited activity will not affect the wildlife
26 habitat.

19 "This finding does not affect lots 1-4 and 10-15 and
20 the other area outside Tract A, which are all
21 buildable. Record, pp. 33-35."

21 * * *

22 "IT IS HEREBY ORDERED BY THE COUNCIL:"

23 * * *

24 "2. The appeal of SUB 4-83 for the area referred to
25 as Tract A is granted. Although it is part of
26 this subdivision, Tract A may not be developed
until the conditions attached to this order are
met, at which time permits for changes and

1 development may be submitted without prejudice."

2 * * *

3 "CONDITIONS

4 "Preliminary Plat Approval.

5 "*****

6 "10. The area generally south of the existing tree
7 line, Tract A, shall remain in its present
8 natural condition pending a determination on the
9 wetlands issue. No vegetation shall be removed
10 prior to this determination. This portion of the
11 property cannot be used for storage or any other
12 use until the wetlands issue is resolved. Should
13 it be determined that all or a portion of the
property south of the tree line is buildable, the
applicant will be required to re-submit detailed
plans for Facilities Review and the Board of Site
and Design approval. Further, [sic] partitioning
or subdividing of Tract A will require approval
as per Ordinance 2050 (Section 195-204). Record,
pp. 37-38."

14 No appeal was taken from the city's adoption of Order No.
15 381. However, following adoption of the Order petitioner and
16 the city took divergent views of the procedure for satisfying
17 the above-quoted limitations. On its own initiative,
18 petitioner formulated a new site plan for Tract A, a plan
19 petitioner believed addressed the concerns expressed in the
20 Order. During this time, however, city officials set in
21 motion what appears to be a broader effort, aimed at the
22 identification of significant wetland and wildlife areas in the
23 city and the drafting of policies to control development in
24 those areas. A task force was formed for these purposes.

25 In October 1983, petitioner applied to the city for
26 approval of its new site development plan for Tract A.

1 However, review of the application by city planning officials
2 was halted about one month later, after the office of the city
3 attorney advised that Order No. 381 prevented development on
4 Tract A until new policies concerning wetlands and wildlife
5 habitat were in place. According to the city attorney,
6 petitioner's new proposal could be considered prior to
7 completion of the policy study only if the city council first
8 modified the prohibitory terms of Order No. 381.

9 On December 13, 1983, petitioner filed a letter with the
10 city recorder, requesting an opportunity to address the city
11 council at its public meeting of December 19, 1983. The letter
12 described the request as follows:

13 "According to the advice of the city attorney, it is
14 necessary for the council to hold a public hearing to
15 determine the specifics of processing Mr. Maclellan's
16 pending application. Therefore, we request that the
17 council consider, as an agenda item on December 19,
18 the scheduling of any necessary public hearing
19 required to allow the staff to process the pending
20 application." Record at 25.

21 Petitioner's request that the council consider the
22 scheduling of a public hearing to "determine the specifics of
23 processing Mr. Maclellan's pending application" was somewhat at
24 variance with the city attorney's characterization of the
25 purpose of the December 19 meeting. In line with her earlier
26 advice, the city attorney viewed the question before the
27 council as the narrower one of whether the council wished to
28 reconsider the terms of Order No. 381 with respect to Tract A.
29 In a memorandum to the mayor and city council, dated December 19,
30 1983, the city attorney stated as follows:

1 "If the council wishes to reconsider this part of the
2 order [the prohibition on development of Tract A] a
3 public hearing must be held. If the council does not
4 wish to reconsider this order, it may simply refuse to
5 hold a public hearing and stand on the order." Record
6 at 27.

7 At the hearing of December 19, 1983, a representative of
8 petitioner urged the council to allow the new application for
9 Tract A to proceed, rather than be delayed until completion of
10 the study contemplated by Order No. 381. Record at 6-7, 14.
11 He proposed that a hearing be scheduled for the purpose of
12 informing the council of the nature of the new proposal.
13 Record at 7. However, after discussion, the council voted to
14 deny petitioner's request for a further hearing. The
15 transcript of the discussion preceding the vote indicates
16 members of the council construed the terms of Order No. 381 in
17 a manner consistent with the city attorney's approach, i.e., to
18 prevent development of Tract A until a wetland/wildlife study
19 was completed by the city. We read their vote to reflect
20 agreement that those terms should not be reconsidered.²
21 However, no written findings were adopted.

22 Petitioner appeals the city council's action of December
23 19, 1983. As discussed below, we find the appeal to be outside
24 our jurisdiction and therefore dismiss it.

25 JURISDICTION

26 Petitioner characterizes the city's December 19, 1983, vote
as a refusal to process its site development plan for Tract A.
This description lays the groundwork for two arguments in favor

1 of this Board's jurisdiction. First, petitioner describes the
2 city's action as a de facto moratorium on development of Tract
3 A, reviewable by LUBA under ORS 197.505 - 197.540. Second,
4 petitioner contends the city's action constitutes a reviewable
5 "land use decision" as that term is defined by ORS
6 197.015(10)(a)(A)(iii),³ because it concerns the application
7 of a section of the city's zoning ordinance. That section
8 provides, in pertinent part, as follows:

9 "If a request is denied by...the council...no new
10 request for the same or substantially similar proposal
11 shall be filed within one year after the date of final
12 denial unless the denial is specifically stated to be
13 without prejudice or unless, in the opinion of the
14 planning commission, new evidence is submitted or
15 conditions have changed to an extent that further
16 consideration is warranted." Section 132.8, City of
17 Beaverton Zoning Ordinance.⁴

18 As might be expected, the city and participant-respondents
19 describe the decision of December 19, 1983 in different terms.
20 They describe the council's action as the mere reiteration of a
21 previously made decision (adoption of Order No. 381) - a
22 decision which petitioner could have appealed to this Board but
23 did not. When the vote of December 19, 1983 is considered in
24 context, they argue, it amounts to no more than the restatement
25 of a decision, not the making of a new decision. Neither of
26 the statutory bases for this Board's jurisdiction are said to
27 apply to such a circumstance.

28 The parties' disagreement over the correct characterization
29 of the decision at issue is important in terms of our
30 jurisdiction over the appeal. As an agency created by the

1 legislature, our jurisdiction depends on whether the decision
2 in question falls within statutorily defined limits. Valley &
3 Siletz Railroad v. Laudahl, ___ Or ___, ___ P2d ___ (Apr. 17, 1984)
4 (slip op.). Those limits are worded in fairly broad terms, but
5 they do not go so far as to encompass all local government
6 actions that concern proposals for land use.

7 In a number of cases this Board has dismissed appeals for
8 want of subject matter jurisdiction. In some of the cases, our
9 focus has been on the tentative or preliminary nature of the
10 challenged decision, e.g., Grant County v. Department of Fish
11 and Wildlife, 1 Or LUBA 214 (1980) (directive that departmental
12 staff develop proposal for land exchange by agency not a final
13 decision); NOPE v. Port of Portland, 2 Or LUBA 243 (1980)
14 (order to prepare siting plan for airport not a final
15 decision). Implicit in these holdings is the idea that once
16 the challenged proposals reached final form and were acted on
17 by the appropriate decisionmakers, review might well be
18 available in this forum.

19 In other cases, we have dismissed appeals of decisions
20 clearly final in nature but nonetheless inappropriate for our
21 review. For example, in West v. City of West Linn, 6 Or LUBA
22 139 (1982), the city conducted a contested case hearing to
23 determine whether a developer was in violation of the terms of
24 a subdivision improvement agreement. We held the city's
25 determination was not reviewable by this Board even though it
26 concerned a land use matter. In so holding, we stressed that

1 the controversy over the improvement agreement was not one the
2 city was empowered to adjudicate. Rather, we viewed the city's
3 decision as advisory in nature, i.e., it expressed the city's
4 position in a contract dispute in which the city itself was a
5 party. In our view, the validity of the city's position vis a
6 vis the contract dispute was for a circuit court to determine.
7 6 Or LUBA at 143.

8 The present case is factually distinct from any of our
9 previous holdings on subject matter jurisdiction. At issue, as
10 we construe the record, is a decision expressing a city's
11 interpretation of a previously issued, appealable,
12 quasi-judicial order. We believe an appeal of such a decision
13 falls within the second category⁵ of decisions discussed
14 above. Although the city's December 19, 1983 action
15 undoubtedly concerns a land use project, we view it as advisory
16 in nature. We conclude it is neither a reviewable "land use
17 decision" under ORS 197.015(10) nor a reviewable moratorium
18 under ORS 197.505.

19 In reaching this decision, we take note of the unusual
20 context (described above) in which the challenged action was
21 taken. cf. Hitchcock v. McMinnville City Council, 291 Or 404,
22 631 P2d 777 (1981). As we construe the record, the council's
23 hearing of December 19, 1983 with respect to this request was
24 held as a matter of courtesy to petitioner and under the
25 assumption, based on the city attorney's memorandum, the
26 council would have to amend Order No. 381 if it wished to

1 alter the status quo. We are aware of no ordinance or other
2 law requiring the city to hold this hearing. There is nothing
3 in the record to indicate the applicability of any formal
4 procedure⁶ or standards,⁷ either for the reconsideration of
5 the prior decision or for the review of the administrator's
6 interpretation of the prior decision in connection with
7 petitioner's new development plan.

8 When the record of the December 19, 1983 hearing is
9 examined in context, it becomes clear the council's action was
10 the limited one of construing and reiterating the terms of
11 Order No. 381 (as applied to Tract A) and expressing the
12 council's resolve not to depart from those terms. The
13 transcript of the hearing bears out this point. Like the
14 decision we found outside our jurisdiction in West v. City of
15 West Linn, supra, the council's action was advisory in nature.
16 In our view, an advisory action which interprets a prior land
17 use decision⁸ is not reviewable in this forum, either as a
18 land use decision or a moratorium.

19 No "land use decision" is at issue because the city's
20 December 19, 1983 action concerned the application of Order No.
21 381, not a statewide goal, comprehensive plan provision or land
22 use regulation. ORS 197.015(10). No moratorium is at issue,
23 as that term is defined by ORS 197.505⁹ because assuming the
24 statute applies to an industrial proposal, Order No. 381
25 established the development prohibition in issue, not the
26 December 19, 1983 vote of the council. Even if the council's

1 vote is considered a reaffirmation of Order No. 381, no
2 moratorium is involved because that order prohibited Tract A
3 development on grounds of inconsistency with the comprehensive
4 plan and an implementing ordinance. The statute expressly puts
5 such plan and ordinance-based decisions outside the definition
6 of "moratorium."

7 For the preceding reasons, we agree with respondents'
8 contention this appeal should be dismissed on jurisdictional
9 grounds.

10 Dismissed.

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FOOTNOTES

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4 In addition, the order denied site and design review
5 approval for Tract A on grounds of violation of a code
6 provision requiring that due consideration be given "to the
7 preservation of distinctive historical or natural features."

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8 The council's action was taken on a motion stated as
9 follows:

10
11 "Coun. Cole: I move that the Council deny the request
12 to hold a public hearing on the Allen Business Center
13 Project."

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3
12 ORS 197.015(10) (a) (A) (iii) states:

13 "(10) 'Land use decision':

14 "(a) Includes:

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

19 "(i) The goals;

20 "(ii) A comprehensive plan provision;

21 "(iii) A land use regulation; or

22 "(iv) A new land use regulation; or...."

21

4
22 Petitioner reads this provision to imply a right to a
23 ruling by the city as to whether a given proposal qualifies as
24 substantially dissimilar from one rejected within the preceding
25 twelve months. Whether such a right can generally be implied,
26 however, makes no difference in this case. As we note in this
27 opinion, Order No. 381 clearly indicated that no new proposals
28 for Tract A, whether similar or different from the one rejected
29 in September 1983, were to be considered until the
30 wetland/wildlife policy study was completed by the city. We

1 are cited to no reason the order could not contain such a
2 limitation. Moreover, we believe the appropriate time for
3 challenging it was immediately after adoption of Order No. 381,
4 not four months later.

5

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7 A third category of decisions outside our jurisdiction
8 despite the fact they have land use implications has been
9 defined by appellate courts and recognized by this Board. In
10 this category are final decisions which are beyond our review
11 (for statewide goal compliance) because they either (1) have no
12 "significant impact" on present or future land use, e.g., City
13 of Pendleton v. Kerns, 294 Or 126, 643 P2d 658 (1982) or (2)
14 they are principally fiscal or budgetary in nature, e.g.,
15 Housing Council v. City of Lake Oswego, 48 Or App 525, 617 P2d
16 655 (1980) pet rev dis 291 Or 878, 635 P2d 647 (1981); Friends
17 of Lincoln City v. City of Newport, 7 Or LUBA 114 (1982). See
18 also, Westside Sanitary District v. LCDC No. 26780, 289 Or 393,
19 614 P2d 1141 (1980) (rejecting jurisdiction of LCDC over
20 petition seeking review of health hazard annexation).

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22 For example, it appears no notices of the hearing were
23 provided to other interested parties. The transcript of the
24 hearing reflects an informal discussion between petitioner's
25 representative, the city attorney and the city council. Also,
26 little in the way of factual material pertaining to the Allen
27 Business Center proposal, or the various Tract A proposals, was
28 before the council. Petitioner has sought to extensively
29 supplement the record in order to apprise the Board of the
30 history of the project, a step which further illustrates the
31 very circumscribed nature of the challenged action and supports
32 our jurisdictional holding.

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34 As noted in footnote 4, petitioner contends the applicable
35 standard was contained in §132.8 of the city's zoning ordinance
36 (quoted at page 7, supra). That section pertains to the
37 procedure for filing a new land use proposal once a similar one
38 has been rejected by the city. However, we do not believe the
39 ordinance provision governed the action at issue. The terms in
40 Order No. 381 made it clear that any proposal for development
41 of Tract A would be held in abeyance pending the policy study.
42 As one member of the council put it at the December 19 hearing:

43 "In my view it wouldn't matter whether or not the
44 applicant wanted to submit plans that were similar or
45 dissimilar. My reading of this is quite clear that no

1 development is allowed, period, until we have made the
2 determination on the wetland issue." Record at 12-13.

3 8
4 Compare the circumstance in this case with Claffin v.
5 Deschutes County, 6 Or LUBA 401 (1982), where an amendment
6 to a prior order was considered reviewable by this Board.
7 In the present case, the challenged action of December 19,
8 1983 neither readopted nor amended the prior order.

9
10 ORS 197.505 states:

11 "As used in ORS 197.505 to 197.540, "moratorium on
12 construction or land development" means engaging in a
13 pattern or practice of delaying or stopping issuance
14 of permits, authorizations or approvals necessary for
15 subdivision and partitioning of, or residential
16 construction on, urban or urbanizable land. It does
17 not include actions engaged in, or practices in
18 accordance with a comprehensive plan or implementing
19 ordinances acknowledged by the Land Conservation and
20 Development Commission under ORS 197.251, nor does it
21 include denial or delay of permits or authorizations
22 because they are inconsistent with applicable zoning
23 or other laws or ordinances."
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