

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

3 RUSSELL M. COLWELL, MILDRED)
4 STEINMETZ AND NORTHWEST)
5 DISTRICT ASSOCIATION)

6 Petitioners,)

7 v.)

8 CITY OF PORTLAND, MILDRED)
9 FISHER, NORMAN HOBBS AND)
10 ANN HOBBS,)

11 Respondents.)

CA No. 17460

LUBA 79-011

OPINION AND ORDER
(Denying Motion to Stay)

12 Respondents Mildred Fisher, Norman Hobbs and Ann Hobbs have
13 moved the Board for an order staying enforcement of the Board's
14 final opinion and order in the above captioned case until the
15 appeal of the Board's final opinion and order has been resolved
16 by the Court of Appeals. Respondents contend that, unless the
17 final opinion and order of the Board is stayed in this matter,
18 Respondents will suffer irreparable injury. Respondents
19 further assert that there is a colorable claim of error in the
20 Board's order. Petitioners have filed an objection to the
21 Respondents' motion, contending that the Respondents will not
22 suffer irreparable injury if the Board's order is not stayed,
23 and that there is no colorable claim of error in the Board's
24 order.

25 1. Irreparable injury to Respondents. Respondents claim
26 of irreparable injury is founded upon the following statement
27 contained in their motion:

 ". . . during the many months required for an
 appeal they would be unable to carry on their travel
 agency business in the building which they in good

1 faith remodeled at great expense. The building would
2 stand vacant and subject to vandalism and
3 deterioration as is it (sic) not suited for occupancy
4 as a residence (sic) and the Board order prevents its
5 use as an office facility. Respondents, Mildred
6 Fisher, Norman Hobbs and Ann Hobbs, would suffer
7 financial loss of an inability to amortize their
8 Eighty Thousand (\$80,000) Dollars invested in
9 restoration of the structure as well as losses from
10 vandalism and deterioration of the structure itself."

11 Petitioners dispute these conclusory statements of
12 Respondents by stating that Respondents have moved to an office
13 building approximately one block away and will, thus, be nearby
14 their building at all hours. The building need not stand
15 vacant, according to the Petitioners, as it is possible for
16 Respondents to live in the building.

17 The requirement that one seeking to stay enforcement of an
18 agency order must demonstrate irreparable injury is contained
19 in ORS 183.482(3)(a):

20 "(3)(a) The filing of the petition [for review]
21 shall not stay enforcement of the agency order, but
22 the agency may do so upon a showing of:

- 23 (A) Irreparable injury to the petitioner; and
24 (B) A colorable claim of error in the order."
25

26 Under this provision the burden of showing irreparable
injury is upon the one seeking the stay order. Respondents in
their motion have not demonstrated by factual showing why they
will suffer irreparable injury if the Board's order is not
stayed. There is no explanation as to why Respondent's
business will be substantially harmed when they are apparently
conducting business in an office one block away from the

1 building. There is no explanation as to why at least some
2 portion of the building is not suited for residential occupancy
3 nor why it would not be possible for someone to stay in the
4 building in order to prevent vandalism. There are no facts
5 showing what the actual rate of vandalism is in the area nor
6 what the likelihood might be that vandalism would occur. In
7 the absence of some factual demonstration, Respondents have not
8 shown that they will suffer irreparable injury if the Boards
9 order is not stayed.

10 2. Colorable claim of error. Respondents assert that
11 there is a colorable claim of error in the Board's order in
12 that the Board based its decision to reverse the city's
13 granting of a revocable permit on an issue which was not
14 briefed by the Petitioners. Respondents are in error. In
15 their second assignment of error, the Petitioners stated, in
16 the second paragraph to that assignment, the following:

17 "Petitioners claim that, in fact the Applicants were
18 not misled and therefore they are not entitled to any
19 "hardship" decision. Further, this is not an adequate
legal basis upon which to grant a zone change or a
revocable permit."

20 This contention by Petitioners was apparently sufficient to
21 give notice to the city that an issue existed as to whether
22 "hardship" to an applicant was sufficient to entitle the city
23 to grant a revocable permit. See brief of Respondent City of
24 Portland at 10-11.

25 Even if it were not clear from simply reviewing the
26 petition for review as to whether petitioners were contending

1 that hardship was not a sufficient basis for granting a
2 revocable permit, it was made clear to the Respondents during
3 oral argument that the Board considered this to be an issue in
4 the case. The Board asked numerous questions of the city as to
5 the applicable standard for granting a revocable permit and
6 whether that standard had been met in this case. Counsel for
7 the city cited the Board to a provision of the Portland City
8 Code, which was not in the record, as the standard upon which
9 the city based its decision to grant a revocable permit. The
10 Board asked for, and received without objection from any of the
11 parties, a copy of the Portland City Code referred to by
12 Counsel for the city. If Respondents Fisher and Norman and Ann
13 Hobbs had felt they were surprised or prejudiced by the Board's
14 inquiry on this issue they could have requested the opportunity
15 to file a supplemental brief on that issue. No such request
16 was made, however.

17 While nothing in Oregon Laws 1979 chapter 772 limits the
18 Board's review to the precise issues raised by the Petitioner,
19 the Board has not in the past expanded, nor does it intend in
20 the future to expand, as a general proposition, its review
21 beyond the issues raised by the petitioner. This is not to
22 say, however, that the board will never or as a matter of law
23 cannot in an appropriate case so expand its review. The Board
24 is of the opinion that in this case petitioners did raise the
25 issue of whether hardship to an applicant was a proper basis
26 for granting a revocable permit. The Board is also of the

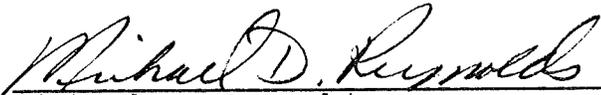
1 opinion, however, that even if not actually raised by the
2 Petitioners in their brief, sufficient notice was given to the
3 Respondents that the Board considered this to be an issue in
4 the case to enable the respondents to object or request the
5 opportunity to file a supplemental brief so as to cure any
6 claim of surprise or prejudice from the Board's consideration
7 of the issue .

8 Moreover, the error made by the City in this case is
9 clear. The decision to grant the revocable permit was based on
10 a finding of hardship to the applicant. Yet the standard
11 relied upon by the city was a "public need," "Fasano" type
12 standard codified in section 33.114.060(b) of the Portland City
13 Code. While it may be under certain circumstances that
14 avoiding hardship to an individual would rise to the level of a
15 "public need", there are no facts or reasons in the order
16 explaining why this should be so in this particular case.

17 The Board finds that Respondents have failed to show that
18 they will suffer irreparable injury or that there is a
19 colorable claim of error in the Board's order. For the
20 foregoing reasons, it is hereby ordered that Respondents'
21 motion for a stay of the Board's final opinion and order in the
22 above captioned matter is denied.

23 Dated this 12th day of May, 1980

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Michael D. Reynolds
Chief Hearings Referee