

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3 FRIENDS OF LINCOLN COUNTY, INC.,)
4 and OREGON SHORES CONSERVATION)
5 COALITION, INC.,)

6 Petitioners,)

7 vs.)

8 CITY OF NEWPORT,)

9 Respondent,)

10 and)

11 RICHARD and MARGARET ANDERSEN,)

12 Participants.)

LUBA NO. 82-016

ORDER ON MOTION
TO DISMISS

13 Respondent City of Newport moves to dismiss the above
14 entitled review proceeding on the ground that the issues
15 presented in the notice of intent to appeal "are not properly
16 before this Board, and therefore petitioners' appeal should be
17 dismissed."¹

18 FACTS

19 A subdivision application was filed with the City of
20 Newport by a Mr. and Mrs. Andersen. The proposed subdivision
21 was to be known as "Beachland Estates," and was located in an
22 area of Newport commonly known as "Jump-Off Joe." The matter
23 was heard before the Newport Planning Commission, on March 9
24 and April 13, 1981; and the Planning Commission granted the
25 subdivision application on April 27, 1981 along with findings
26 of fact and conclusions of law.

The petitioners herein appealed the planning commission

1 decision to the city council. We understand petitioners'
2 appeal challenged the validity of the subdivision ordinance,
3 the validity of city resolution 2104 establishing charges for
4 appeals (cost of transcripts, fees and copying), the amount of
5 money charged for petitioners' appeal and the city planning
6 commission's approval of the subdivision. On February 5, 1982,
7 two separate findings documents were adopted. The first is
8 entitled'

9 ADOPTED
10 FINDINGS OF FACT
11 Appeal of Tentative Approval
of
12 Beachland Estates Subidivision

13 This set of findings concerns procedural issues apparently
14 raised by petitioners before the city council.² The effect
15 of this document is to dispose of procedural objections raised
16 by petitioners and to declare that both the Friends of Lincoln
17 County and Oregon Shores Conservation Coalition have standing
18 to bring the appeal of the subdivision.

19 The next set of findings, also bearing a February 5, 1982
20 date, addresses the merits of the proposed subdivision. The
21 city titles the findings

22 FINDINGS OF FACT
23 Revised and Adopted by the City Council
24 on February 1, 1982

25 These findings address what the city believes to be the
26 important criteria for approval of a subdivision and adopts the
findings of the planning commission made in support of its
approval of the subdivision and the "previous findings made by

1 the council * * * * " We believe the city is referring to the
2 findings on procedural issues mentioned above. After
3 discussing the merits of the case, the city makes the following
4 statement and conclusion.

5 "that the City Council adopts the Planning Commission
6 findings, previous findings made by the Council and
7 the above findings to provide guidance to the
8 administrative staff, even though the applicants have
formally withdrawn their application for tentative
plan subdivision approval effective as of February 1,
1982.

9 Following this statement, the city declared the appeal
10 "moot" and ended consideration of the tentative subdivision
11 plan. The city's order withdrew the plan from further
12 consideration

13 "The Council therefore orders that the appeal be
14 dismissed as being moot and that the tentative
subdivision plan be withdrawn from further
consideration by the City Council."

15 ARGUMENT

16 After listing the four issues raised by petitioners in
17 their notice of intent to appeal, respondent characterizes the
18 issues as follows:

19 "(1) The approval by the Planning Commission on April
20 27, 1981, of the Beachland Estates Subdivision
Application.

21 "(2) The requirement that Petitioners pay \$2,000.00 to
22 bring the appeal to the City Council, said \$2,000.00
23 being a portion of the actual cost of the transcript;
and the refusal to refund the \$50.00 appeal fee and
24 transcript costs upon the withdrawal of the
subdivision application.

25 "(3) Whether or not the proposed, but withdrawn,
26 subdivision application complied with local and state
laws, including the statewide goals."

1 Respondent claims that these issues are not properly before
2 LUBA, and the appeal should be dismissed. Respondent answers
3 its own characterization of petitioners' first issue by stating
4 the planning commission decision was appealed to the city
5 council and was therefore not a "final decision or
6 determination" made by the city and, therefore, not properly
7 appealable to LUBA. See ORS 197.015(1)(a) and Footnote 1 in
8 Wyatt v. Antelope, _____ Or LUBA _____ (LUBA No. 82-024,
9 1982). Respondent argues in the alternative that the planning
10 commission decision was made on April 27, 1981, and petitioners
11 failed to appeal that decision to LUBA within the 30-days
12 allowed under Oregon Laws 1979, ch 772, sec 4 (as amended by
13 Oregon Laws 1981, ch 748). Respondent concludes that the
14 planning commission decision became moot with the withdrawal of
15 the subdivision application.

16 As to the issue of appeal fees and the validity of the
17 city's ordinances and resolutions controlling appeals,
18 respondent states:

19 "(A) The final decision to charge Petitioners
20 \$2,000.00 for the cost of the verbatim transcript was
21 made by the Council on October 19, 1981. Petitioners
22 failed to appeal within the required thirty (30)
23 days. 1979 Or. Laws, Ch. 772, sec 4 (as amended).

24 "(B) Resolution No. 2104, which required the
25 payment of the appeal fees and transcript cost, is not
26 a 'land use regulation' and therefore the decision of
27 the Council to charge for the cost of the transcript
28 and the appeal fee was not a 'land use decision'
29 appealable to this Board. ORS 197.015(10)(a)(C); LUBA
30 Rule 3(E).

1 "(C) The requirement of paying the appeal fee
2 and transcript cost for the appeal is a budgetary
3 decision and is not subject to review by this Board.
4 State Housing Council v. City of Lake Oswego, 43 Or
5 App 525, 617 P2d 655 (1980), pet. dismissed, 291 Or
6 878, 635 P2d 647 (1981)."

7 "(D) Resolution No. 2104 provides that all
8 appeal fees and costs are not refundable. Therefore,
9 even if the subdivision application had been fully
10 considered on the merits and the subdivision
11 application denied, Petitioners would not have been
12 entitled to a refund. Resolution No. 2104, sec 13.

13 "(E) The rejection by the City Council of
14 Petitioners' argument that previously enacted
15 ordinances and resolutions were not validly enacted is
16 not a land use matter, and is therefore not subject to
17 review by this Board. Grant County v. Oregon
18 Department of Fish and Wildlife, 1 Or. LUBA 214
19 (1980). The decision to adopt the Subdivision
20 Ordinance and Resolution No. 2104 was made in 1974 and
21 1979, respectively. A decision by the City Council as
22 to the validity of previously adopted City ordinances
23 and resolutions is not a 'land use decision,' but
24 rather is the mere affirmation of the prior adoption
25 of ordinances and resolutions by the City. ORS
26 197.015(10)(a)."

 As to the matter of compliance with statewide goals,
respondent states the petitioners are not able to appeal
conformance of the proposed subdivision with local and
statewide land use laws because the city did not make a final
determination on the merits of the application. The
application was withdrawn, and the city dismissed the appeal.
The city did not grant or deny the application, and the
dismissal "was not a consideration as to the merits of the
application * * * *"

PETITIONERS' RESPONSE

Petitioners take issue with respondent's characterization

1 of petitioners' argument. Petitioners remind the Board that
2 the notice of intent to appeal is not required to state the
3 issues to be raised during the review proceeding. Petitioners
4 say the only issue raised here and the only issue to which the
5 petitioners are able to respond without a record of the
6 proceeding "is whether the City of Newport decision which
7 petitioners seek to appeal is a 'land use decision', as defined
8 in ORS 197.015(10)." Petitioners cite the definition of "land
9 use decision" appearing in Oregon Laws 1979, ch 772, sec 4(1)
10 as amended by Oregon Laws 1981, ch 748, sec 35 and argue the
11 decision on appeal "concerns the application of the statewide
12 planning goals (goals), City of Newport Comprehensive Plan
13 (plan), policies and land use regulations (regulations)."³
14 Petitioners claim application of the goals, the plan and land
15 use regulations is evidenced in the decision by the numerous
16 findings and conclusions about the goals, plan policies and
17 regulations. Also, petitioners argue LUBA Rule 3(C) (OAR
18 661-01-000(3)(C)) establishes that a final land use decision or
19 determination is one "which has been reduced to writing and
20 which bears the necessary signatures of the governing body."
21 Petitioners state that the order of the city meets this
22 definition.⁴

23 Petitioners turn their attention to respondent's
24 characterization of the decision as "moot." Petitioners do not
25 agree the case is "moot." Petitioners say the action taken by
26 respondent does have legal and policy consequences. The

1 findings adopted by the city are for the express purpose of
2 providing "guidance to the administrative staff."

3 "Thus, the findings and conclusions, set policies and
4 established facts which can and will be used by the
5 city staff in making administrative decisions
6 regarding land use matters related to the subject
7 property and possibly other similarly situated
8 properties."5

9 In support of this view, petitioners point to a fill and
10 removal permit filed with the Division of State Lands which is
11 still pending. The permit is for a proposed seawall that is
12 part of the subdivision application. Petitioners claim the
13 state permit consistency rule applies in this case; and "an
14 argument could be made that the DSL [Division of State Lands]
15 must rely upon respondent's adopted findings regarding
16 compliance of a proposed seawall with the goals, as the local
17 review did include consideration of (what the city considered
18 to be) appropriate statewide planning goals and did include
19 notice and opportunity for at least public comment."6

20 Petitioners claim that should the Division of State Lands
21 rely on respondent's findings of goal compliance, and should
22 there be a later attempt to challenge the validity or legality
23 of the findings by appealing the Division of State Land's order
24 to LUBA, "this Board might then not be willing to review the
25 finding on the merits." We understand petitioners to fear an
26 argument that the goals had been applied in the previous city
determination; and, therefore, petitioners could be said to be
attempting a "belated collateral attack." Cf. Hilliard v. Lane

1 County, ____ Or LUBA ____ (LUBA 79-012, 1982).

2 Petitioners conclude that the validity of the city decision
3 is not an abstract question, and it is not moot. Petitioners
4 argue

5 "reversal of the city's decision, on whatever grounds,
6 would result in the invalidation of the findings
7 adopted as part of that decision, and thereby prevent
both the city and state agencies from being able to
rely upon those findings in the future."

8 CONCLUSION

9 With the withdrawal of the subdivision application, the
10 city ordered the issue of a subdivision on the property
11 closed. With withdrawal of the subdivision application, the
12 city's proceedings on the application became moot. There no
13 longer was an applicant to whom a permit might be granted.⁷
14 There was no act that had any effect upon the land. Grant
15 County v. Oregon Department of Fish and Wildlife, 1 Or LUBA 214
16 (1980).

17 We view the extensive findings discussing the merits of the
18 subdivision application to be surplusage. We do not view the
19 findings as having any more force and effect than a memo from
20 the city council to the planning staff. To the extent that
21 this "memo" may include erroneous information or erroneous
22 conclusions as to statewide land use requirements, the memo may
23 come to haunt the city in a later proceeding, but the memo
24 itself is not appealable as a "decision." When these findings
25 are adopted in support of a land use decision (if they are
26 adopted), then the decision may be subject to invalidation. We

1 do not believe this Board has the power to declare mere words
2 or expression of opinion of a public body to be invalid. The
3 only way to test the views of a public body is through a
4 specific land use action in which those views are expressed as
5 part of the decision. As the respondent states in a memorandum
6 in opposition to petitioners' answer to the motion to dismiss
7 "the proper procedure would be to appeal from any future land
8 use decision." The respondent states that it does not know of
9 any city ordinance requiring future land use decisions to be
10 made in conformance with the portion of the findings of fact
11 adopted. "If the findings of fact do not have any binding
12 effect on future land use decisions, then the findings can
13 hardly be said to be a 'decision' standing by themselves,"
14 argues respondent.

15 The city's handling of the application and the validity of
16 the city's procedural ordinances were similarly rendered moot
17 by the city's order. With no application to process and with
18 an order directing consideration of the application closed, the
19 ordinances controlling the application have no effect on
20 petitioners. Any order we might make as to the validity of the
21 city's handling of the application would have no beneficial
22 effect on any party to the case. We may not tell the city to
23 go back and conduct a subdivision application differently when
24 no application exists for the city to consider.

25 We also reject petitioners conclusions as to state agency
26 reliance upon the findings made by the city. The findings are

1 standing alone, ineffective and can only represent an
2 expression of the present belief of the city council. State
3 agency reliance on such findings is entirely at the state
4 agency's peril. If the state agency chooses to believe (and
5 thereby adopt) the city's findings, and should the state agency
6 decision be challenged before this Board, the city's findings
7 would be regarded as part of the state agency decision and
8 reviewable as part of the state agency decision. In other
9 words, a state agency or a local government may not include
10 findings made more than 30 days previously and thereby claim
11 that the findings are too old to be subject to review. It is
12 the land use decision that is subject to review, and it is
13 subject to review through the findings. The findings
14 themselves are not subject to review separate and apart from a
15 land use decision. This Board does not hold reasons valid or
16 invalid, this Board holds decisions valid or invalid based upon
17 the legal adequacy of reasons given in support of the decision.

18 We are left with the issue of fees. Petitioners do not
19 argue the issue of payment of appeal fees to the city in their
20 memorandum, but we believe we may assume from the materials
21 before us that petitioners paid fees and dispute the payment.
22 Payment of fees to initiate an appeal within the city appears
23 on its face to be an act that "concerns the * * * application
24 of * * * a land use regulation." ORS 197.015(10). As such,
25 this act appears to be reviewable by this Board under Oregon
26 Laws 1979, ch 772, as amended by Oregon Laws 1981, ch 748.

FOOTNOTES

1
2
3 1

The Notice of Intent to Appeal states as follows:

4 "Notice is hereby given that petitioners intend
5 to appeal that land use decision of respondent
6 entitled Order Dismissint [sic] the Appeal of
7 Beachland Estates Subdivision Tentative Plan approval
8 and adopting findings made by the City Council on
9 February 1, 1982 and October 19, 1981, and by the
10 Planning Commission on April 27, 1981. This decision
11 became final on February 5, 1982 or February 16, 1982
12 and involves the dismissal of an appeal from the City
13 of Newport Planning Commission's approval of the
14 tentative plan of Beachland Estates Subdivision
15 concomitant with the adoption of findings regarding
16 (1) the validity of certain City Ordinances and
17 Resolutions, (2) the validity of Petitioners being
18 required to pay \$2050 to bring their appeal to the
19 City Council, and (3) the compliance of the proposed
20 subdivision with certain provisions of the State
21 statutes, the Statewide Planning Goals, the City of
22 Newport Comprehensive Plan and the City of Newport
23 Zoning and Subdivision Ordinances, and with a refusal
24 to refund the fees required of petitioners."

16 2

We say "apparently" because the document appears to
address itself to city jurisdiction, to city resolution
2104 controlling appeals, and to procedures generally
including the conduct of subdivision approvals.

19 3

20 ORS 197.015(10) defines land use decision as:

21 "(10) 'Land use decision' means

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

24 "(A) The goals;

25 "(B) A comprehensive plan provision; or

26 "(C) A land use regulation; or

1 "(b) A final decision or determination of a
2 state agency other than the commission with respect to
3 which the agency is required to apply the goals."

3
4 _____

4 4 We do not understand petitioners to appeal the decision to
5 end consideration of the subdivision application. Presumably,
6 the decision to close the proceedings is a decision that
7 implements the city's comprehensive plan and subdivision
8 ordinance.

7
8 _____

8 5 Petitioners claim that on February 9, 1982, respondent
9 issued a building permit on a portion of the property subject
10 to the instant appeal. Petitioners claim the city planner
11 relied on findings made in this case in issuance of the
12 building permit. We do not understand petitioners to appeal
13 the issuance of the building permit. As explained infra, we
14 don't believe this act has any particular relevance to the
15 instant case.

12
13 _____

13 6 The consistency rule, OAR 660-31-035, provides

14 "State Agencies shall rely upon the affected local
15 government's consistency determination in the
16 following cases: * * *

16 "(2) Where the affected local government does not have
17 an acknowledged plan * * * and, the state agency
18 finds that:

18 "(a) the local review included consideration of
19 the appropriate Statewide Planning Goals;
20 and

20 "(b) the local review provided notice and the
21 opportunity for public and agency review and
22 comment * * * *"

22
23 _____

23 7 There is no assertion that the city itself undertook
24 to become the applicant for the subdivision. Whether the
25 city may be an applicant for such a permit is not before
26 us.