

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

MAR 28 2 08 PM '80

RUSSELL M. COLWELL, MILDRED)
STEINMETZ and NORTHWEST DISTRICT)
ASSOCIATION,)

LUBA NO. 79-011

Petitioners,)

FINAL
OPINION AND ORDER

VS.)

CITY OF PORTLAND, MILDRED)
FISHER, NORMAN HOBBS, and)
ANN HOBBS,)

Respondents.)

Appeal from City of Portland.

Charles P. Duffy, Portland, argued the cause for
Petitioner. With him on the petition for
review were Duffy & Gibson, Edward J.
Sullivan and Mark Whitlow.

Ruth Spetter, Portland, argued the cause for
City of Portland. With her on the brief
was Christopher Thomas, City Attorney.

Katherine H. O'Neil, Portland, argued the cause
for Respondents Hobbs and Fisher. With her
on the brief were, Schwabe, Williamson, Wyatt,
Moore & Roberts, Terry Hauck, and Ridgway K.
Foley, Jr.

Reynolds, Chief Referee; Cox, Referee; Bagg, Referee;
participated in the decision.

Reversed.

3/28/80

You are entitled to judicial review of this Order.
Judicial review is governed by the provisions of Oregon
Laws 1979, ch 772, § 6(a).

1 REYNOLDS, Chief Referee

2 This appeal challenges the grant of a revocable permit
3 by the City of Portland to enable Respondents Norman and Ann
4 Hobbs to operate an office in a restored building which is
5 zoned and planned for residential use.

6 Petitioners argue the city's decision was in error
7 because the city's hearings officer converted a rezoning
8 proceeding into one for a revocable permit without giving
9 proper notice that the issuance of a revocable permit was
10 at issue. Petitioners further contend that there was not
11 substantial evidence to support the city's determination
12 that the Hobbs were misled by the city into believing that
13 the building which they had purchased was zoned for commercial
14 rather than residential use. Finally, petitioners assert
15 that in any event "hardship" on the part of the Hobbs is not
16 a sufficient basis upon which to make a decision to grant a
17 revocable permit.

18 Facts

19 In 1976, the Hobbs purchased a house on Flanders Street
20 in Portland, thinking the entire property on which the house
21 sat was zoned C2, Commercial. The Hobbs were intent upon
22 using the property as a travel agency and expended some
23 \$80,000 in restoration work on the house. The Hobbs' belief
24 that the property was zoned C2 was based upon statements
25 made by the seller's appraiser. The appraiser's statements
26 were, in turn, apparently based upon conversations which he had

1 had with the city planning staff, city hall and a title
2 company. In fact, only 25 feet of the property was zoned
3 C2 (the parking lot) and the remaining 50 feet upon which the
4 house sat was zoned AO, high density residential.

5 The Hobbs discovered the mistake in the zoning and applied to
6 the city for a rezoning. The city sent out notices that a rezoning
7 had been requested, which notices were received by all petitioners.
8 The city conducted a hearing before a hearings officer. The
9 zone change from AO to C2 was opposed by one neighbor not
10 a petitioner to this proceeding, and by the Northwest District
11 Association, a local neighborhood association. The hearings
12 officer heard testimony from the applicants as to how they
13 were misled by the city into believing that the property was
14 really zoned C2 when they made their improvements to the
15 property. The hearings officer recommended that the zone
16 change be denied because it violated the Northwest District
17 Association's plan for the area. The plan specifies preser-
18 vation of residential uses insofar as possible. Record, p. 75.
19 The Hearings Officer, however, recommended that the applicants
20 be granted a revocable permit until July 1, 1984, to enable
21 the Hobbs to use the property as a business or professional
22 office. He made this recommendation notwithstanding Section
23 33.98.060 of the Portland City Code which sets forth a specific
24 procedure to be followed in the granting of a revocable permit,
25 including the requirements that a request therefor be made and
26 that notice of the request be given to all persons within 150

1 feet of the property.

2 Both sides appealed this decision and recommendation to the
3 planning commission which passed without decision the appeal on
4 to the city council. Colwell and Steinmetz appeared in writing
5 at the city council proceeding in opposition to the granting of
6 a revocable permit. This appears to have been their first active
7 participation in the proceedings before the city. The City
8 Council adopted the recommendation of the hearings officer and
9 granted the Hobbs a revocable permit to allow use of the house
10 as a business or professional office.

11 Jurisdiction

12 Respondents Fisher, Norman and Ann Hobbs contend that the
13 Board does not have jurisdiction to review this land use decision
14 because it did not concern the application of "A zoning,
15 subdivision or other ordinance that implements a comprehensive
16 plan;" within the meaning of Oregon Laws 1979, ch 772, § 3(1).

17 Section 3(1) provides:

18 "(1) 'Land use decision' means:

19 "(a) A final decision or determination made
20 by a city, county or special district governing
21 body that concerns the adoption, amendment or
application of:

22 "(A) The state-wide planning goals;

23 "(B) A comprehensive plan provision; or

24 "(C) A zoning subdivision or other ordinance
that implements a comprehensive plan; or

25 "(b) A final decision or determination of a
26 state agency other than the Land Conservation and

1 Development Commission, with respect to which the
2 agency is required to apply the state-wide planning
goals."

3 The decision in this case involved the application of the
4 Northwest District Association plan. The reason stated by the
5 Hearings Officer for denying the rezoning was its conflict with
6 the NWDA plan. Record, p. 76. The NWDA plan was adopted and
7 has been followed by the City of Portland in making land use
8 decisions in the area covered by the plan. Record, p. 72-77.
9 It is the policy statement governing land use decisions for
10 the area covered by the plan. Record, p. 72-77. As such,
11 in our view, the NWDA plan qualifies at least as a comprehensive
12 plan provision for the City of Portland. This Board properly
13 has jurisdiction, therefore, because the decision concerns the
14 application of "A comprehensive plan provision" within the mean-
15 ing of ch 772, § 3(1)(a)(B).

16 First Assignment of Error

17 Petitioners argue in their first assignment of error
18 that the city's decision to grant a revocable permit was in
19 error because the hearings officer lacked authority to recommend
20 the granting of a revocable permit after denying the petition for
21 a zone change without the applicants having submitted a request
22 for a revocable permit and without complying with the notice
23 provisions contained in Portland's City Code for revocable
24 permits. Petitioners state:

25 "Here the applicant sought a zone change
26 and the notices so informed. Nowhere in the
application or notice does it state that a
revocable permit may be granted to allow a

1 commercial 'use' in a residential zone without
2 changing the zone. This is so basic to due
process that a reversal is mandated."

3 Petitioners argue that they and others who received notice
4 of the zone change were "harmed" as a result of the hearings
5 officer's action in granting the revocable permit because they
6 had no notice that the hearings officer would consider granting
7 a revocable permit. Because people are entitled to rely upon
8 the comprehensive plan and can rest assured that a zone change
9 will be denied if it conflicts with the comprehensive plan,
10 petitioners assert that people would not appear in opposition
11 to a request for a zone change if they knew that it violated
12 the comprehensive plan. However, petitioners argue that if
13 persons had known that a revocable permit was an issue then
14 they might have appeared.

15 In this case, however, the Northwest District Association
16 did participate from the hearings officer level all the way
17 through to the city council's proceeding. The other two peti-
18 tioners, Colwell and Steinmetz, are members of the Northwest
19 District Association and appeared in writing before the
20 city council. There is no assertion that anyone else did
21 not appear who would have appeared had the request been one
22 solely for a revocable permit instead of a zone change. With
23 respect to procedural errors committed by the governing body,
24 Oregon Laws 1979, Ch 772, §5(4) provides that the board "shall
25 reverse a land use decision under review only if the Board
26 finds that the city . . . failed to follow the procedure appli-

1 cable to the matter before it in a manner that prejudiced the
2 substantial rights of the petitioner." (Emphasis added).

3 We cannot conclude in this case that there is any factual
4 basis to support petitioners' claim that they were substantially
5 prejudiced by the hearings officer's action in recommending a
6 revocable permit. No assertion is made that petitioners' were
7 unable to introduce evidence at the city council hearing which
8 would have been admissible before the hearings officer. Nor have
9 petitioners pointed to any evidence which they would have
10 presented to the hearings officer had they known a revocable
11 permit would be under consideration. There is simply no basis
12 for this Board to conclude that had petitioners received proper
13 notice of a request for a revocable permit, and had they in turn
14 participated at the hearings officer level, the hearings officer's
15 recommendation or the city council's decision would have been dif-
16 ferent.

17 Second Assignment of Error

18 Petitioner's second assignment of error is that there was
19 no evidence in the record that the applicants were "misled" by
20 the city into believing their property was C2 and that, therefore,
21 there was no reason for the city's granting a revocable permit.
22 Petitioners submit this is a factual decision and not a legal one.
23 In any event, petitioners argue that this is not an adequate legal
24 basis upon which to grant a zone change or a revocable permit.

25 Respondent city argues that it did not find that the appli-
26 cants had been "misled" but found that a hardship situation

1 existed warranting the granting of a revocable permit.

2 The city failed to apply the proper legal standard in
3 granting the revocable permit. The stated reason for the grant-
4 ing of the permit was the hardship to the applicant which would
5 result if not allowed to operate his business for a few more
6 years. Yet, the standard identified by the city during oral
7 argument for granting a revocable permit is that contained in
8 § 33.114.060(b) of the Portland City Code:

9 "(b) The findings and conclusion of
10 the hearings officer shall set forth and
demonstrate:

11 "(1) The manner in which the decision is
12 consistent with the zoning code and the compre-
hensive plan of the City of Portland.

13 "(2) The manner in which the decision is
14 consistent with the public need, the extent to
15 which the general welfare of the public is served
by the decision and how the public need is best
met by the request."¹

16 A finding that not granting the permit would result in hardship
17 to the applicant is not the equivalent of finding that the
18 permit fulfills a public need. In fact, the expression of
19 public need for this area, as stated in the NWDA plan, is
20 for residential use.

21 It was error for the city to base its decision to grant
22 a revocable permit upon "hardship" which would result to the
23 applicant. For this reason, the decision of the city is reversed.

24 _____

25 ¹
26 We express no opinion whether this standard, if met, would
be legally adequate as a basis for granting a revocable permit.