

LAND USE  
BOARD OF APPEALS

MAR 11 2 40 PM '81

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

3	WATERY LANE HOMEOWNERS	)	
	ASSOCIATION,	)	
4		)	
	Petitioner,	)	LUBA NO. 80-066
5		)	
	v.	)	
6		)	FINAL OPINION
	CITY COUNCIL OF THE	)	AND ORDER
7	CITY OF PORTLAND,	)	
	FUHRMAN LAND CO., LFC, INC.	)	
8	HTK, INC., DWK, INC., and	)	
	DEAN LONEY,	)	
9		)	
	Respondents.	)	

Appeal from City of Portland.

William Dickas, Portland, filed a brief and argued the cause for Petitioner. With him on the brief were Kell, Alterman & Runstein.

Ruth Spetter, filed a brief and argued the cause for Respondent City of Portland. With her on the brief was Christopher P. Thomas, City Attorney.

Frank V. Langfitt III, filed a brief and argued the cause for Respondents Fuhrman Land Co., LFC, Inc. HTK, Inc., DWK, Inc., and Dean Loney. With him on the brief were Landsay, Hart, Heil & Weigler.

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

REMANDED.

3/11/81

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 BAGG, Referee.

2 STATEMENT OF THE CASE

3 This case is about the Portland City Council's denial of a  
4 hearing on the merits of an appeal. The appeal attempted by  
5 the Watery Lane Homeowners Association concerned a minor  
6 partitioning and other alleged land use decisions involving a  
7 condominium project along the east bank of the Willamette  
8 River. The city denied petitioner a hearing on the ground that  
9 its ordinances do not provide for appeals of partitioning  
10 approvals other than those brought by an applicant.<sup>1</sup>

11 STANDING

12 Respondent City of Portland does not challenge standing,  
13 but Respondents Fuhrman Land Co., LFC, Inc. HTK, Inc., DWK,  
14 Inc., and Dean Loney do challenge standing. Their challenge  
15 alleges petitioner may not bring this action because it was not  
16 entitled to standing before the city council below. As we  
17 explain in the body of this opinion, we believe petitioner was  
18 entitled to standing before the city council. Respondents  
19 Fuhrman Land Co., et al, also attack standing on the ground  
20 that petitioner has not stated sufficient facts alleging how it  
21 has been adversely affected or aggrieved differently than the  
22 public at large. Respondent claims "[t]he only thing that  
23 petitioner can point to is the hope that through this process,  
24 the owners of condominium units would end up as the title  
25 owners of the riparian strip of property and the petitioner can  
26 deal with the unit owners as landlords." Respondent Fuhrman

1 Land Co. brief at 12.

2 There is no separate statement of facts to show standing  
3 appearing in the petition. Taken as a whole, however, the  
4 petition does allege that the petitioner was denied an appeal  
5 of a minor partitioning granted by the city. Petitioner's  
6 authority to bring an appeal is provided for by statute, and  
7 the city's alleged refusal to follow that statute is a  
8 sufficient allegation of injury to confer standing.<sup>2</sup>

9 FACTS

10 On February 25, 1980, petitioner wrote the Auditor of the  
11 City of Portland, complaining of what petitioner claimed was  
12 approval of a condominium plat and a subdivision "in Violation  
13 of Title 34 of the Portland City Code." On February 29, 1980,  
14 the city granted a minor partitioning approval to developers,  
15 respondents herein. On March 4, petitioner addressed a letter  
16 to the city auditor's office entitled "Appeal of The Approval  
17 of the Director of the Planning Bureau of an Amended  
18 Condominium Plat and of a related Minor Partition Map for  
19 Sellwood Harbor Condominium." The city referred the letter to  
20 the planning department for comment. On April 22, the acting  
21 Director of the Bureau of Planning responded to the petitioner,  
22 and said he knew of no course of action available to remedy the  
23 petitioner's complaint. The acting director also advised that  
24 the city code did not permit appeal of minor partitioning  
25 except by the applicant for the partitioning.

26 On May 22, the city council considered the petitioner's

1 request for a hearing. The city council set the matter down as  
2 a "communication." A "communication" is a means whereby the  
3 city council can hear comments and concerns of citizens where  
4 city procedures do not otherwise allow for such comments. The  
5 council voted 2 to 2 not to hold a separate hearing on the  
6 merits of any decision regarding Sellwood Harbor Condominiums.  
7 In particular, the transcript of the council hearing shows that  
8 the city council seemed to be addressing only sec 34.110.020 of  
9 the Portland City Code. Code provision limits appeals of minor  
10 partitions to the application therefor. The transcript does  
11 not show consideration of any method of appeal in the city code  
12 regarding subdivisions. Petitioner was told it could file  
13 again when all five council members were present. Petitioner  
14 did so, and on June 4, the full council again considered his  
15 request. The council voted not to hear petitioner's appeal.  
16 Again, the transcript of the council deliberations shows the  
17 basis for the vote to be the minor partition appeal procedure  
18 specified in the city code. The city made no findings or  
19 formal order on the matter, and petitioner appealed to this  
20 Board.

21 ASSIGNMENT OF ERROR NO. 1

22 Assignment of error no. 1 alleges that the city erred by  
23 approving the condominium plat and the minor partition  
24 application. This assignment of error is directed primarily at  
25 the merits of the alleged illegal subdivision, condominium plat  
26 approval and minor partition approval. As mentioned earlier,

1 this Board believes the case is about the city's denial of a  
2 hearing on the merits of those approvals. The Land Use Board  
3 of Appeals is not in a position to conduct a hearing on the  
4 merits of land use decisions where there has been no review by  
5 the local government. Also, we do not believe petitioner has  
6 established standing to attack these other alleged actions.  
7 See footnote 2 supra.

8 As noted earlier, there are no written findings or order on  
9 this matter. The city's reasons for denying petitioner's  
10 request appear only in the transcript of the hearings. It is  
11 the Board's view that even if the city does not agree with the  
12 petitioner as to whether these alleged acts were within the  
13 city's power to perform or not, an order explaining the  
14 decision is required for our review. However, the failure to  
15 provide an order has not been alleged as error.

16 Assignment of error no. 1 is denied.

17 ASSIGNMENT OF ERROR NO. 2

18 Assignment of error no. 2 alleges the city erred in failing  
19 to grant petitioner a hearing on its appeal. As mentioned  
20 above, the city has no means whereby someone other than an  
21 applicant for a minor partition may appeal an approval or  
22 denial to the city council.

23 "34.110.020 Appeal from decision on minor  
24 partition map. (A) The decision of the planning  
25 director to deny or approve with conditions a minor  
26 partition map may be appealed to City Council by the  
applicant within 10 days following such decision. The  
planning director's decision is effective on the 11th  
day after rendering unless appealed to the City Council.

1           "(B) An appeal may be made by the applicant, in  
2 writing, to the City Council. Appeals shall state  
3 specifically how the planning director failed to make  
an appropriate affirmative finding as specified in  
section 34.30.030(A) of this title."

4           Petitioner asserts the above section of the city code  
5 conflicts with a portion of ORS 92.046(3).

6           "(3) The governing body of a city or county may  
7 provide for the delegation of any of its lawful  
8 functions with respect to minor partitions to the  
9 planning commission of the city or county or to an  
10 official of the city or county appointed by the  
11 governing body for such purpose. If an ordinance or  
12 regulation adopted under this section includes the  
13 delegation to a planning commission or appointed  
14 official of the power to take final action approving  
or disapproving a tentative plan for a minor  
partition, such ordinance or regulation shall also  
provide for appeal to the governing body from such  
approval or disapproval and require initiation of any  
such appeal within 10 days after the date of the  
approval or disapproval from which the appeal is  
taken." ORS 92.046(3). (Emphasis added).

15 The above portion of the statute requires that an appeal  
16 mechanism be available, and the statute does not limit the  
17 appeal to the applicant. We view the statute as a requirement  
18 on local governments that an avenue of appeal be provided for  
19 or against approval or denial of a minor partitioning. We do  
20 not accept the city's argument that as the choice to regulate  
21 minor partitions is up to the city, the city can limit appeals  
22 any way it wishes. In our view, once the city has sought to  
23 control minor partitions, the appeals provided for in the  
24 statute must become part of the city code.

25           Given our view that ORS 92.046(3) requires a local  
26 jurisdiction to have an indiscriminate route of appeal for both

1 those satisfied and dissatisfied with a partitioning action, it  
2 remains for us to see if petitioners followed a course that  
3 preserved their right to bring this complaint to the Land Use  
4 Board of Appeals.

5 Petitioner admitted at the hearing before this Board that  
6 it knew of the February 29, 1980 grant of the minor partition  
7 within 30 days of the decision. Petitioner also was familiar  
8 with city ordinances regarding appeals from city land use  
9 decisions, or at least it should have been. Petitioner chose  
10 to attempt to force the city to conduct an appeal on the  
11 matter, rather than appealing immediately to this Board or  
12 taking both actions simultaneously. The city and Respondents  
13 Fuhrman Land Co., LFC, Inc. HTK, Inc., DWK, Inc., and Dean  
14 Loney argue that petitioner should have taken the action  
15 immediately to the Land Use Board of Appeals instead of trying  
16 to make the city utilize a procedure it did not have.

17 While this thesis would most certainly preserve  
18 petitioner's right of appeal to us, it was not necessary.  
19 Petitioner had a right to rely on the city's compliance with  
20 state law governing appeals with partitioning actions. ORS  
21 92.046(3) (supra) requires that an appeal route be made  
22 available. Petitioner had a right to rely on that statute.

23 "It is well settled in this state that a general law  
24 enacted by the legislature and applicable alike to all  
25 cites 'is paramount and supreme over any conflicting  
26 charter provision or ordinance of any municipal city  
or town.' Burton v. Gibbons, 148 Or 370, 36 P2d 786  
(1934) and authorities therein cited." State ex rel  
Slasel v. Chandler, 180 Or 28, 34, 175 P2d 448 (1946).

1 Petitioner's attempt to make the city exercise what petitioner  
2 believes to be petitioner's rights under the law was not  
3 error. When the city finally refused petitioner's overtures on  
4 June 4, petitioner filed a timely appeal with the Land Use  
5 Board of Appeals on June 23.

6 The City of Portland's refusal to hear petitioner's appeal  
7 of its February 29, 1980 partitioning approval was an error.  
8 The basis of our ruling is our holding that the city's  
9 ordinance impermissibly limits review of minor partitionings to  
10 applicants. We do not rule here on other matters petitioner  
11 seeks to appeal; i.e, the city's "approval" of the condominium  
12 plat and the "illegal subdivision" complained of in the  
13 February 25, 1980 letter to the city from the petitioner  
14 herein.

#### 15 Motions

16 The motion to dismiss on the ground that the decision  
17 appealed is not a final land use decision within the Board  
18 Rules 3(C)(E)(1) is denied. The refusal to hear a case  
19 certainly involves a matter of procedure that can control the  
20 outcome of a land use decision. As such, it is subject to  
21 review under that portion of Oregon Laws 1979, ch 772 that  
22 allows the Board to review for errors and procedure where the  
23 substantial rights of the petitioner have been prejudiced.

24 The motion to dismiss on the ground that the notice of  
25 intent to appeal should have been filed within 30 days of the  
26 date the minor partition was approved is denied pursuant to our

1 discussion in assignment of error no. 2 above.

2       The motion to dismiss this appeal because the petitioner  
3 does not have standing since only an applicant can make an  
4 appeal a minor partitioning, is denied in keeping with the  
5 holding in this opinion.

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

1 FOOTNOTES

2  
3 

---

1

4 Petitioners have sought to appeal not only the city's  
5 refusal to hold a hearing on the merits, but also the land use  
6 actions approving a partitioning, a condominium approval and an  
7 allegedly illegal subdivision. The city denies it has the  
8 power to approve a condominium. The city also claims no  
9 subdivision approval was ever given. To the city, the only  
10 possible issue on the merits is a partitioning approval given  
11 on February 29, 1980

12 No documents offered by any party showed city approval of a  
13 subdivision. If an illegal subdivision existed or exists,  
14 without formal action by the city approving it, the  
15 petitioner's complaint would be to circuit court against the  
16 developers. The LUBA reviews only local government decisions,  
17 not acts between private parties.

18 This Board issued an order on certain objections to the  
19 record on November 21, 1980. That order denied petitioner's  
20 request to supplement the record with information on the  
21 various approvals giving rise to the dispute. The Board  
22 characterized the case as one of denial of a hearing by the  
23 city rather than the approval of a condominium, a subdivision  
24 or a minor partitioning. The Board limited the record in the  
25 case to information the city council had before it when it  
26 decided not to hear the commissioner's complaint.

17 

---

2

18 We note respondents have not challenged petitioner's  
19 failure to allege facts showing petitioner's capacity to bring  
20 this appeal as a representative of the members of the  
21 association.

22 We also note that petitioner has failed to allege how  
23 petitioner or its members have been adversely affected by any  
24 act (or alleged at) other than the denial of a hearing on the  
25 minor partitioning approval. Petitioner has cited us to  
26 portions of the record to show standing to attack the alleged  
subdivision and condominium approval. This reference is not  
sufficient because it fails to comply with Oregon Laws 1979, ch  
772, sec 4(6)(a) requiring facts showing standing to be alleged  
in the petition. The reference also fails as none of the  
documents to which we are referenced show an injury to  
petitioner's members as a result of the complained of actions.  
Petitioner claims the members of the Association may lose their  
homesites, but petitioner does not explain how this loss will

1 occur by any act of the city. What is described is a series of  
2 acts by landowners, leaseholders and developers that may affect  
3 petitioner. The record discloses the possibility petitioner's  
4 members will lose their leases; that possibility appears to  
5 exist notwithstanding the city's action. There is no showing  
6 of how the city's acts will contribute to this injury by  
7 putting petitioner in a position any more tenuous than  
8 petitioner now experiences.

9 We must stress, however, that even if petitioner had  
10 alleged sufficient facts to show how it had been injured by the  
11 various land use decisions petitioner claims were made by the  
12 city, we would not address the merits of the decisions here.  
13 Our opinion is limited to the city's refusal to hold a hearing  
14 on the minor partitioning appeal. We will not review here what  
15 the city has not reviewed below. See assignment of error no. 1  
16 infra.

17  
18  
19  
20  
21  
22  
23  
24  
25  
26

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

MAR 16 2 32 PM '82

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

WATERY LANE HOMEOWNERS )  
ASSOCIATION, )  
 )  
Petitioner, )  
 )  
v. )  
 )  
CITY COUNCIL OF THE )  
CITY OF PORTLAND, )  
FUHRMAN LAND CO., LFC, INC., )  
HTK, INC., DWK, INC., and )  
DEAN LONEY, )  
 )  
Responents. )

LUBA NO. 80-066  
CA NO. A20623

\* \* \* \* \*

Submitted on reversal and remand from the Oregon Court of Appeals, March 8, 1982.

Judicial review from the Land Use Board of Appeals.

IT IS HEREBY ORDERED that the previous opinion dated March 11, 1981 is vacated and this appeal is hereby dismissed consistent with the opinion and order of the Court of Appeals in Fuhrman Land Co. et al v. Watery Lane Association, \_\_\_ Or App \_\_\_, \_\_\_ P2d \_\_\_ (1982).

Dated this 15th day of March, 1982.