

BEFORE THE LAND USE BOARD OF APPEALS MAR 31 3 19 PM '81
OF THE STATE OF OREGON

HOFFMAN INDUSTRIES, INC.)
)
Petitioner,)
)
vs.) LUBA No. 80-132
) LUBA No. 80-153
)
CITY OF BEAVERTON; BEAVERTON) FINAL OPINION
URBAN RENEWAL AGENCY: METRO-) AND ORDER
POLITAN SERVICE DISTRICT,)
)
Respondents.)

Appeal from the City of Beaverton.

Charles S. Tauman, Portland, filed the Petition for Review and argued the cause of Petitioner. With him on the brief were Willner, Bennett, Bobbitt & Hartman.

Eleanore S. Baxendale, Beaverton, filed the brief and argued the cause for Respondent City of Beaverton.

Andrew Jordan, Portland, filed the brief and argued the cause for Respondent Metropolitan Service District.

REYNOLDS, Chief Referee; COX, Referee; BAGG, Referee; participated in this decision.

REMANDED 3/31/81

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 REYNOLDS, Chief Referee.

2 NATURE OF THE PROCEEDINGS

3 Petitioner Hoffman Industries appeals what it characterizes
4 as two land use decisions of the City of Beaverton related to
5 the establishment of a recycling center. The decisions
6 involved (1) an administrative use determination that a
7 recycling center is a permitted use within the Beaverton IP
8 (Industrial Park) Zone (LUBA No. 80-132), and (2) a
9 determination that the recycling center meets the applicable
10 site and design review standards for the City of Beaverton
11 (LUBA No. 80-153). In the Notice of Intent to Appeal in LUBA
12 No. 80-132, petitioner states that the administrative use
13 determination was made by the city on September 29, 1980.
14 Petitioner contends in its Notice of Intent to Appeal in LUBA
15 No. 80-153 that the site and design review approval was given
16 on October 27, 1980.

17 The record returned by the City of Beaverton concerning
18 these consolidated cases, however, contains only one written
19 order, that entered on October 27, 1980, and specifically
20 mentioned in the Notice of Intent to Appeal in LUBA No.
21 80-153. The city notes in the index to the original record
22 submitted in LUBA No. 80-132 that:

23 "There is no order on an administrative use
24 determination appeal;..."

25 The October 27, 1980, written order, however, does state in
26 Finding No. 9 that:

1 "The application conforms to the requirements of
2 Ordinance No. 2050. This recycling center is a proper
3 use in the IP Zone as determined by the council on
4 September 29, 1980."

5 Although separate appeals have been filed, there is only
6 one written order which this Board may review. Accordingly,
7 the Board treats the order of October 27, 1980, as the "land
8 use decision" within the meaning of Oregon Laws 1979, ch 772
9 which petitioner has sought to have reviewed.

10 STATEMENT OF FACTS

11 Respondent Metropolitan Service District (Metro) applied to
12 the City of Beaverton for permission to design, construct and
13 operate a recycling center on certain property adjacent to
14 property owned by petitioner. The application stated that such
15 a use was permitted in the IP zone in which the property was
16 located. The recycling center was considered by the Facilities
17 Review Committee of the City of Beaverton under the assumption
18 that the use was a permitted use under the zoning ordinance.
19 The Facilities Review Committee approved the site plan for the
20 project. Metro then applied for site and design approval
21 before the Board of Site and Design Review of the City of
22 Beaverton. Approval was granted subject to certain conditions.

23 Just prior to the granting of approval by the Board of Site
24 and Design Review, petitioner requested the planning director
25 to make an "administrative use" determination as to whether the
26 proposed use was a permitted use in the IP zone. The planning
27 director determined that the use was permitted within the IP

1 zone.¹

2 Petitioner appealed both the site and design review
3 decision and the administrative use determination to the city
4 council. The city council determined that the use was
5 permitted within the IP zone and gave final approval to the
6 site design review plan. As previously indicated, the city
7 council simply stated in the order of October 27, 1980, that
8 the recycling center is a proper use in the IP zone. It did
9 not adopt or incorporate by reference into the order the
10 written determination of the planning director.²

11 OPINION

12 Petitioner attacks both the city's determination that the
13 recycling center is a permitted use within the IP zone and the
14 determination that the site and design review criteria have
15 been met by the applicant, Metro.

16 Administrative Use Determination

17 Petitioner argues that the administrative use determination
18 was improper is that the city failed to comply with sec 11 of
19 Ordinance No. 2050. Ordinance No. 2050 provides:

20 "Authorization for similar uses. The planning
21 director may authorize that a use, not specifically
22 named in the allowed uses be permitted if the use is
23 of the same general type and is similar to the allowed
24 uses; provided, however, that the planning director
25 may not permit a use already allowed in any other
26 zoning district of ths [sic] ordinance. In making
such an authorization the planning director may
request of the party proposing a particular use to
provide information necessary to make a proper
determination, including information as to clientele,
number and working hours of employees, expected
traffic generation, and characteristics of the use's

1 activities. The decision of the planning director
2 shall be in writing on a form prescribed for
3 this purpose..." (Emphasis added)

4 Petitioner contends there is no dispute that a recycling center
5 is not named as a permitted use within the IP zone and that
6 whether the use should be allowed depends upon whether a proper
7 determination is made that a recycling center "is of the same
8 general type and is similar to the allowed uses" within the IP
9 zone.

10 Petitioner's first assignment of error is in two parts.

11 First, petitioner argues that the city violated Ordinance No.
12 2050 because it did not require the information listed in the
13 ordinance be provided prior to making a determination that the
14 proposed use was similar to allowed uses. In other words, the
15 planning director and ultimately the city did not require
16 information concerning clientele, employees, traffic,
17 characteristics of the activities which the use involves and
18 additional considerations. Second, petitioner argues that,
19 based upon the information which is in the record, a recycling
20 center is of the same general type and similar to a salvage
21 yard, a conditional use in the IP zone, as opposed to any
22 permitted use within the IP zone.³ This error is important
23 to petitioner because had the city determined the proposed use
24 was only conditionally allowed, the city would have been
25 required to determine, after a hearing, that the use was
26 appropriate in the area. A permitted use requires no such
determination or hearing.

1 The city argues that we must defer to its interpretation of
2 its ordinance unless we determine that the city's
3 interpretation was improper. As a corollary to this assertion,
4 the city argues we cannot reverse the city's interpretation
5 just because we happen to prefer the interpretation advanced by
6 petitioner. The city contends petitioner is urging the Board
7 to reverse the city's decision on the basis that petitioner's
8 interpretation is the "more reasonable" interpretation, rather
9 than on the basis that the city's interpretation is
10 unreasonable.

11 Concerning petitioner's first point about the lack of
12 findings concerning clientele, traffic, etc., the city argues
13 that the ordinance makes the production of such information by
14 the applicant permissive by the use of the word "may" in
15 reference to the planning director's duty to require that such
16 information be produced. Because the planning director is
17 under no legal obligation to require that such information be
18 produced, such information need not be produced and findings
19 need not be made, according to the city.

20 Concerning the second aspect of petitioner's argument, the
21 city argues that the planning director determined a recycling
22 center was similar to two uses listed as permitted uses in the
23 IP zone: manufacturing, fabricating, processing, packing or
24 storage and public services and utility uses. The city argues
25 this determination is reasonable and supported by substantial
26 evidence in the record.

1 The city contends that a recycling center is
2 distinguishable from a salvage yard primarily on the basis of
3 the type of material involved. Salvage yards typically involve
4 large, bulky items (i.e., vehicles) whereas recycling centers
5 tend to involve small household items such as glass jars, tin
6 cans and newspapers. The city even argues that a recycling
7 center as opposed to a salvage yard is intended to reduce
8 traditional solid waste disposal.

9 Respondent Metro mirrors, for the most part, the city's
10 arguments, but goes one step further. Metro invites the Board
11 to draw upon its own experience for purposes of contrasting

12 "the site design and operational functions of the
13 proposed center as indicated in the record with their
14 own recollections of various salvage yards. What
15 leaps to mind might be the typical, muddy auto
16 wrecking yard with stacks of rusty car bodies piled
high over the characteristic slat-board fence covered
with painted advertising. Though petitioner would
have us believe that such a use is similar in some way
to the proposal, it is he who strains the argument."

17 Discussion

18 The parties have argued at length in this case as to the
19 proper scope of this Board's review of the city's
20 administrative use determination. Respondents' position seems
21 to be that the city council was engaged in a legislative
22 function of interpreting its ordinance and that so long as that
23 interpretation is reasonable this Board should not interfere.
24 Petitioner, relying upon Fifth Avenue Corporation v. Washington
25 County, 282 Or 591, 581 P2d 50 (1978,) contends that the city
26 council's interpretation of its ordinance is entitled to some

1 weight unless it is clearly contrary to the express language
2 and intent of the ordinance. Petitioner argues this is the
3 proper scope of review regardless of whether the city council's
4 interpretation of its ordinance is characterized as a
5 quasi-judicial or a legislative function.

6 We need not reach the ultimate issue of what this Board's
7 proper scope of review is in this case. We conclude that the
8 city council was engaged in a quasi-judicial function when it
9 heard petitioner's appeal of the planning director's
10 administrative use determination. As a result, a statement of
11 findings of fact and reasons was required. We conclude that
12 the city council's order that the recycling center was a proper
13 use in the IP zone is not adequate in that it fails to contain
14 findings of fact and an explanation of why the facts found led
15 the city to the conclusion which it made. Having failed to
16 comply with this requirement for a quasi-judicial preceeding,
17 this Board must reverse the city's decision.

18 In Neuberger v. City of Portland, 288 Or 155, 603 P2d 771
19 (1979), the Supreme Court was faced with a question of whether,
20 for purposes of the Writ of Review statute (ORS 134.040, 1979
21 Replacement Part) a rezoning of land in the City of Portland
22 was legislative or quasi-judicial in nature. The Court
23 summarized its holdings in previous cases involving the same or
24 a similar issue, such as Strawberry Hill Fourwheelers v. Benton
25 County Board of Commissioners, 287 Or 591, 601 P2d 769 (1979).
26 Referring to that case, the Supreme Court said:

1 "As we pointed out there, our land use decisions
2 indicate that when a particular action by a local
3 government is directed at a relatively small number of
4 identifiable persons, and when that action also
5 involves the application of existing policy to a
6 specific factual setting, the requirement of
7 quasi-judicial precedures has been implied from the
8 governing law.

9 "Although both of these factors are frequently
10 present in the cases in which we have held or assumed
11 that quasi-judicial functions were exercised, each is,
12 as we noted in Strawberry Hill, a separate indicator
13 of the possible need for adjudicatory procedures. The
14 reasons, moreover, are different in each instance."
15 288 Or 155 at 162.

16 Continuing to refer to the Strawberry Hill decision, the
17 Supreme Court stated three general criteria which can be used
18 separately or together to determine whether a particular
19 decision requires quasi-judicial procedures:

20 1. When specific facts must be determined in
21 order that pre-existing criteria may be applied;

22 2. When a relatively small number of persons is
23 directly affected; and

24 3. Whether the process is bound to result in a
25 decision.

26 Using the above three criteria we can only conclude that the
27 city council's determination in this case that the recycling
28 center is a permitted use within the IP zone is quasi-judicial
29 in nature.

30 1. Application of pre-existing criteria.

31 City of Beaverton Ordinance No. 2050, sec 11 provides, in
32 pertinent part, as follows:

33 "Authorization for similar uses. The planning
34 director may authorize that a use, not specifically
35 named in the allowed uses be permitted if the use is

1 of the same general type and is similar to the allowed
uses;..."⁴

2 Ordinance 2050 sets forth various uses which are permitted
3 outright, conditionally permitted and prohibited within the IP
4 zone. Some of these uses, such as a salvage yard, are
5 specifically defined in the zoning ordinance.

6 The city has already clearly expressed its intent in
7 Ordinance 2050 that uses not named in that ordinance will be
8 permitted only if a certain condition is met, i.e. that the use
9 be of the same general type and be similar to one of the named
10 allowable uses within the zone. In determining whether that
11 condition is fulfilled, the governing body is not making policy
12 but simply determining whether the policy already expressed in
13 the ordinance will be satisfied if a particular use is
14 determined to be permitted. In other words, existing criteria
15 must be applied by the city in making its determination.

16 Moreover, in order to know whether a particular use is of
17 the same general type or similar to other uses requires a
18 determination of facts relative to the characteristics of the
19 proposed use and the characteristics of the other comparative
20 uses. The city has in its ordinance listed some criteria which
21 may be used in making this factual determination, i.e.
22 information as to clientele, number and working hours of
23 employees, expected traffic generation and the characteristics
24 of the activities which the use involves. Because, therefore,
25 the city must determine certain facts pertaining to the
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1 characteristics of the proposed use as well as uses named in
2 the ordinance before it may apply pre-existing criteria, we
3 conclude that the first factor set forth in Neuberger has been
4 met in this case.

5 2. Small group of people directly affected.

6 The importance of the city's administrative use
7 determination in this case is that it has a great bearing on
8 whether a recycling center will be located at the particular
9 location proposed. The city's interpretation of its ordinance
10 was that the recycling center was a permitted use within the IP
11 zone. The effect of this is that the only city review required
12 prior to construction of the center is for site and design
13 purposes. This review includes consideration of the adequacy of
14 public and private facilities, traffic considerations with
15 respect to ingress and egress on the site, whether there is a
16 safe and efficient circulation pattern within the boundaries of
17 the site, whether adequate means have been provided for
18 maintenance and replacement of facilities, etc. In essence,
19 the site and design review process enables the city to place
20 conditions upon the use to promote the good of the area and the
21 community as a whole.

22 Site and design review does not, however, include a review
23 as to whether the proposed use is a proper use for the area.
24 That is the function of the conditional use procedure. Section
25 99.3 of Ordinance 2050 provides as follows:

26 "In order to grant a Conditional Use Permit, the

1 Planning Commission shall make findings of fact to
2 support the following conclusions:

3 "A. The proposed conditional use will
4 comply with the purpose of this section and
with all the applicable provisions of this
ordinance.

5 "B The proposed development will com-
6 ply with Comprehensive Plan.

7 "C. That the location, size, design
8 and functional characteristics of the pro-
9 posed use are such that it can be made rea-
10 sonably compatible with and have a mininum
11 impact on the livability and appropriate
12 development of other properties in the sur-
13 rounding neighborhood." (Emphasis added).

14 If a proposed conditional use cannot be made "reasonably
15 compatible with and have a minimum impact on the livability and
16 appropriate development of other properties in the surrounding
17 neighborhood" then the conditional use cannot be allowed. This
18 is a consideration which is not involved in the site design and
19 review process.

20 The distinction between the site and design review process
21 and the conditional use process is important to residents in
22 the area surrounding the proposed use. One such "resident" is
23 petitioner Hoffman Industries. It makes a great deal of
24 difference to people such as petitioner who are opposed to a
25 proposed use within their neighborhood or area whether that use
26 is a permitted use or a conditional use. If it is a
conditional use, these people have an opportunity to appear
before the city and testify as to the inappropriateness of this

1 use in their neighborhood. This testimony has a bearing on
2 whether the proposed use will be allowed in that neighborhood
3 at all. If, on the other hand, the proposed use is determined
4 to be a permitted use, while residents of the area may still be
5 allowed to testify as to the appropriateness of the use in
6 their neighborhood, this testimony will not go to the question
7 of whether the use should be allowed at all but only to the
8 question of what conditions should be placed on the proposed
9 use to make it less inappropriate for the neighborhood or area.

10 The effect, therefore, of a determination whether a
11 proposed use is a permitted use or a conditional use has an
12 impact on a few people, (those in the area or neighborhood) as
13 compared to the community at large. The requirements of
14 quasi-judicial procedures must, therefore, be implied

15 "****to provide the safeguards of fair and open
16 procedures for the relatively few individuals
17 adversely affected, in lieu of the political
18 safeguards on which our system relies in large scale
19 policy choices affecting many persons. 287 Or at
20 603-04."

21 Neuberger v. City of Portland, 288 Or 155 at 162.

22 3. The necessity of a decision.

23 The third criterion mentioned in Neuberger v. City of
24 Portland, supra, is whether the process is bound to result in a
25 decision. This criterion is viewed by the Supreme Court as an
26 important criterion in some cases for determining whether the
27 decision making process required quasi-judicial procedures.

28 The administrative use determination involved in the
29 present case is authorized by section 4.2 of Ordinance 2050 of

1 the City of Beaverton. That section provides as follows:

2 "A. The Planning Director shall have the initial
3 authority and responsibility to interpret all terms,
4 provisions, and requirements of this ordinance. A
5 person requesting such an interpretation shall do so
6 in writing and upon forms to be provided by the
7 Director.

8 "B. If the person requesting an interpretation
9 disagrees with the Director's interpretation he may
10 appeal that interpretation to the Planning Commission
11 at its next appropriate regularly scheduled meeting.
12 If the person requesting the interpretation disagrees
13 with the Planning Commission interpretation he may
14 appeal that interpretation to the city council at its
15 next appropriate regularly scheduled meeting.****"

16 The above ordinance does not expressly state that once a person
17 requests an interpretation of a provision of the city's zoning
18 ordinance that the person is entitled to a decision. We
19 believe, however, that any reasonable person reading this
20 ordinance would conclude that if a person requested an
21 interpretation from the planning director, received that
22 interpretation and then appealed the interpretation to the
23 planning commission and to the city council, the person filing
24 the appeal would be entitled to a decision from the city
25 council. Accordingly, we conclude that the third criterion set
26 forth in Neuberger v. City of Portland, supra, i.e. that the
27 process is bound to result in a determination, is satisfied by
28 sec 4.2 of Ordinance 2050.

29 In Neuberger v. City of Portland, supra, the Supreme Court
30 implied at least that not all three of the above discussed
31 criteria must be present in order that a local governing body
32 be required to follow quasi-judicial procedures in its decision

1 making. However, in this case, all three criteria have been
2 met. We come to the conclusion, therefore, that the city
3 council's determination on appeal as to whether a recycling
4 center is a permitted use within the IP zone was a
5 quasi-judicial proceeding and that this proceeding had to
6 culminate in a written order setting forth the findings of fact
7 relied upon by the city and an explanation of reasons why the
8 findings made by the city led it to the conclusion which it
9 reached. Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or
10 3, 1569 P2d 1063 (1977); Fasano v. Washington County, 264 Or
11 574, 507 P2d 23 (1973).

12 As previously discussed, the only written order of the City
13 of Beaverton which states the result of the appeal on the
14 administrative use determination is the order of October 27,
15 1980, which, with respect to the administrative use, merely
16 states that the proposed use is a permitted use within the IP
17 zone. No statement of facts relied upon by the city or
18 explanation of reasons for this conclusion exists in that
19 written order.

20 We have consistently held that where findings of fact and a
21 statement of reasons are required to be set forth in a written
22 order, but are not, this Board cannot perform its function of
23 review. See: City of Ashland v. Bear Creek Valley Sanitary
24 Authority, ___ Or LUBA ___ (LUBA No. 80-094, 1980). In the
25 present case, without a statement of facts and a statement of
26 reasons explaining why the facts found led the city council to

1 the conclusion which it reached, we run the grave risk that in
2 reviewing the city's determination we will be simply
3 substituting our judgment for that of the city as to the
4 important facts and will review the city's conclusion without
5 the benefit of a complete statement of the city's reasons why
6 it believed the facts found led it to the conclusion which it
7 reached. In this case, we believe it is a close question
8 whether the use proposed by the applicant Metro is of the same
9 general type and is similar to the permitted uses in the IP
10 zone or whether the proposed use is similar to or of the same
11 general type as a salvage yard which is a conditional use in
12 the IP zone. In such a case the necessity of findings and
13 reasons is critical for our review:

14 "The dispositive question of law on review under
15 this section is whether the agency action is within
16 the legislative policy which inheres in the statutory
17 term. An agency interpretation may be given an
18 appropriate degree of assumptive validity if the
19 agency was involved in the legislative process or if
20 we infer that it has expertise based upon
21 qualifications of its personnel or because of its
22 experience in the application of the statute to
23 varying facts. Judicial deference, however, is not
24 automatic or unreasoning. If a statute must be
25 interpreted to determine its applicability to the
26 facts of a contested case, then it is necessary for
27 the agency to express in its order, to the degree
28 appropriate to the magnitude or complexity of the
29 contested case, its reasoning demonstrating the
30 tendency of the order to advance the policy embodied
31 in the words of the statute. Explicit reasoning will
32 enable the court on judicial review to give an
33 appropriate degree of credence to the agency
34 interpretation. [Citations omitted]***" Springfield
Education Association v. The School District, 290 Or
217 at 227-228.

26 We must remand the city's administrative use determination

1 because there is no order containing adequate findings of fact
2 and a statement of reasons so that this Board can conduct any
3 meaningful review of the city's determination.

4 SITE AND DESIGN REVIEW

5 We do not reach the issue of the adequacy of the city's
6 order granting site and design approval to Metro's proposed
7 recycling center. Because this matter must be remanded to the
8 city and the result of that remand may ultimately be that a
9 recycling center is not approved as an appropriate use within
10 the IP zone, our review of the site and design approval may
11 accomplish no valid purpose. In addition, we are concerned
12 about the prejudicial effect which our review of the site and
13 design approval may have on any further proceedings conducted
14 before the city on remand concerning the administrative use
15 interpretation. Accordingly, we elect not to review at this
16 time that portion of this case pertaining to site and design
17 approval by the City of Beaverton.

18 Remanded.

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1 FOOTNOTES

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Her written discussion stated:

4 "A broad review of the industrial chapter of the
5 ordinance indicates three possible section [sic] under
6 which a recycling center could be allowed: 1) Section
7 53.1, allowing manufacturing, fabricating, processing,
8 packing or storage (emphasis added); 2) Section 53.3,
9 public service or utility uses, or 3) salvage yards.
Recycling centers, per se, are not listed anywhere in
the ordinance; however, recycling receptacles or
charity drop boxes are permitted in any commercial or
industrial zone (Section 79.19).

10 "A recycling center is nothing more than a site
11 containing recycling receptacles for received [sic]
12 recyclable materials. Recyclable materials are those
13 which can be reused again and again for [sic]
14 reprocessing, but which cannot be reused short of
15 reprocessing. This is contrasted with salvaging,
16 which is the saving from waste of any goods or
17 property than can be put to use (without
18 reprocessing). [Based upon Websters Second College
19 Edition, Copyright 1979].

20 "Salvage yards typically involve the handling of
21 large, bulky items out-of-doors (Sec. 5.73) and thus
22 are almost always objectionable from an aesthetic and
23 often noise standpoint.

24 "Recyclable materials, including those proposed
25 for recycling at the Beaverton Recycling Center are
26 normally small household items, such as newspapers,
27 glass, and cans, which can be easily contained and
28 screened from view, and except for the potential of
29 litter, are not objectionable [sic].

30 "It's the Planning Director's interpretation
31 therefore, that the Beaverton Recycling Center [sic]
32 be an allowable outright permitted use in the I.P.
33 zone based upon Section 79.19 and Section 5[sic].
34 Furthermore, the center will be operated as a public
35 service (Section 53.3), as it will be operated by a
36 public agency for use by the general public and,
37 potentially, a publicly franchised collection service."

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2 The motion which was approved by the city council, as reflected in the written transcript, stated:

"I would move that the administrative determination as presented be upheld and the people be denied." Tr 77.

While it could be argued that the intent of this motion was to adopt the determination of the planning director as that of the city council, the written order adopted on October 27, 1980, did not do so. It is the written decision of the city which is the city's final decision, which controls and which we review, not the content of oral motion.

3 A salvage yard is defined in Beaverton Ordinance No. 2050, sec 5.73, as:

"A place out of doors where waste, discarded or salvage materials are bought, sold, exchanged, bailed, packed, disassembled or handled, including vehicle wrecking yards, building wrecking yards, used lumber yards, and places of storage of salvaged building, wrecking, instructional materials and equipment, but not including rummage, yard or garage sales of no more than four (4) days duration. Three or more dismantled or inoperable vehicles on one lot shall constitute a salvage yard."

4 All parties have, we believe, assumed that the city council as well as the planning director is confined to this ordinance provision for purposes of determining whether the proposed recycling center is a permitted use within the IP zone. We make the same assumption.