

LAND USE
BOARD OF APPEALS

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

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WINDWARD CONDOMINIUM ASSOCIATION,)
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 Petitioner,)
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 v.)
)
 CITY OF GEARHART, a municipal)
 corporation,)
)
 Respondent.)

LUBA NO. 81-124
FINAL OPINION
AND ORDER

Appeal from City of Gearhart.

Nicholas D. Zafiratos, Astoria, filed a brief and argued the cause for petitioner. With him on the brief were Zafiratos & Roman and Richard J. Brownstein of Gilbertson, Brownstein, et al., Portland.

Thomas E. Sweeney, Cannon Beach, filed a brief and argued the cause for Respondent City of Gearhart. With him on the brief were Sweeney & Casterline.

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

Remanded. 3/15/82

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 COX, Referee.

2 Petitioner challenges the Gearhart City Council decision
3 establishing a dune hazard line on property owned by Jack and
4 Maryann Fleck and located within the Gearhart city limits. The
5 establishment of the dune hazard line in the location chosen by
6 the City would allow some building to take place on the Fleck
7 site. Petitioners claim the entire site should be restricted
8 from building.

9 ALLEGATIONS OF ERROR

10 Petitioner assigns the following as error:

- 11 1. "The City Council erred in not adopting the
12 proper and complete Findings of Fact and
13 Conclusions of Law in accordance with the Fasano
14 ruling."
- 15 2. "The City Council erred in adjourning into an
16 unauthorized executive session to discuss the
17 matter on appeal."
- 18 3. "The findings adopted by the City Council are not
19 based on reliable, probative and substantial
20 evidence showing compliance with Section 3.1021
21 of the Zoning and Development Ordinance of the
22 City of Gearhart and with the Comprehensive Plan."

23 FACTS

24 Jack and Maryann Fleck appeared before the Gearhart
25 Planning Commission and requested a determination of what, if
26 any, of their property would be developable pursuant to
27 Gearhart Zoning Ordinance Section 3.1021.¹ Under provisions
28 of Section 3.1021 the Flecks were required to obtain a
29 determination, through "site specific investigations by a
30 qualified individual such as an engineering geologist" of where

1 the established dune hazard line would be on their property.
2 Section 3.1021 prohibits residential developments, and
3 commercial and industrial buildings in areas oceanward from the
4 established dune hazard line.

5 The Planning Commission, after its hearing, recommended to
6 the Gearhart City Council that the hazard line be established
7 at approximately the 32 foot contour line which is
8 approximately 150 feet west of the Fleck's east property line.

9 Both the Flecks and petitioner herein, Windward Condominium,
10 appealed that decision to the City Council. The City Council
11 on August 18, 1981 held a public hearing on both appeals.

12 Subsequent to the public hearing, a portion of which was closed
13 to the public as being subject of an "executive session," the
14 hearing was then closed. On October 7, 1981, the City Council
15 apparently made a decision that it was going to accept the
16 recommendation from the Planning Commission. The only written
17 memorialization of the city's decision occurred on October 9,
18 1981 when the Gearhart City Administrator caused to be sent to
19 the Windward Condominium Association's attorney the following

20 letter:

21 "The City Council of the City of Gearhart considered
22 the appeal of a Planning Commission decision
23 pertaining to the Fleck property on Wednesday, October
24 7, 1981.

25 "After reviewing the data received at the August 18,
26 1981 Public Hearing, it was the unanimous decision of
the council to deny the appeal, by adopting the dune
hazard line at 150 west of the east property line, as
recommended by the Gearhart Planning Commission.

1 "If I can be of any further assistance to you, please
do not hesitate to contact me at City Hall.

2 "Sincerely,

3 "CITY OF GEARHART
4 "Bruce F. Maltman
"City Administrator"

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6 DECISION

7 First Assignment of Error

8 Petitioner first asserts that the City Council erred in not
9 adopting findings of fact and conclusions of law as required by
10 state law. We agree and remand the decision to the City of
11 Gearhart for further consideration not inconsistent with this
12 opinion.

13 Respondent argues that its action should be characterized
14 as legislative and not quasi-judicial. As a result of the
15 action being legislative, respondent concludes that "few
16 standards actually limiting discretion govern lawmaking." As
17 such, we take respondent to be contending that it did not have
18 to comply with the findings requirement set forth initially in
19 Fasano v. Washington County, 264 Or 574, 507 P2d 23 (1973) as
20 argued by petitioner. We conclude, however, that the City
21 Council was engaged in a quasi-judicial function when it heard
22 Windward Condominium Association's and the Fleck's appeals from
23 the Planning Commission determination. In Neuberger v. City of
24 Portland, 288 Or 155, 603 P2d 771 (1979), the Supreme Court was
25 faced with a question of whether, for purposes of the writ of
26 review statute, a rezoning of land in the City of Portland was

1 legislative or quasi-judicial in nature. The court summarized
2 its prior holdings in cases involving the same or a similar
3 issue. Referring to Strawberry Hill 4-Wheelers v. Benton
4 County Bd. of Comm'rs, 287 Or 591, 601 P2d 769 (1979), the
5 Supreme Court said:

6 "As we pointed out there, our land use decisions
7 indicate that when a particular action by a local
8 government is directed at a relatively small number of
9 identifiable persons, and when that action also
10 involves the application of existing policy to a
11 specific factual setting, the requirement of
12 quasi-judicial procedures [sic] has been implied from
13 the governing law.

14 "Although both of these factors are frequently present
15 in the cases in which we have held or assumed that
16 quasi-judicial functions were exercised, each is, as
17 we note in Strawberry Hill, a separate indicator of
18 the possible need for adjudicatory procedures. The
19 reasons, moreover, are different in each instance."
20 288 Or 155 at 161-162.

21 The Supreme Court then proceeded to outline three general
22 criteria which when applied to a particular fact situation
23 indicate a quasi-judicial proceeding is taking place:

- 24 1. Whether specific facts must be determined in
25 order that pre-existing criteria may be applied;
- 26 2. Whether a relatively small number of persons is
directly affected;
3. Whether the process is bound to result in a
decision.

See Hoffman v. Beaverton, 2 Or LUBA 411 (1981). Using these
three criteria, we can only conclude that the Gearhart City
Council's determination in this case was governed by the rules
applicable to quasi-judicial proceedings. Section 3.1021 of
its zoning ordinance requires the City Council to deal with the

1 Fleck property on a "site by site basis through site specific
2 investigation." As a result of that site investigation, it
3 must determine whether the site is 1) subject to ocean flooding
4 hazard and 2) wind erosion to the site and adjacent properties
5 is minimal. The City Council heard this case on appeal from
6 the Planning Commission which had been requested by the Flecks
7 to make a specific determination as to where the flood hazard
8 line would be on their property. As such, the process was
9 bound to result in a decision. On appeal, not only did the
10 Flecks contest the location of the line by the City Planning
11 Commission, but the petitioners herein also contested the line
12 location. Again, the City Council was placed in a position
13 where the process it was following was "bound to result in a
14 decision." Only a relatively small number of persons who are
15 either owners of the property that was subject to the decision
16 or neighbors who would be impacted by the property's use would
17 be affected by the decision.

18 As a result of the decision being quasi-judicial in nature,
19 case law and statutory law in the State of Oregon require that
20 the city's findings contain certain information. This Board
21 has held in numerous cases, consistent with holdings of the
22 Oregon Supreme Court and Court of Appeals, that before an
23 adequate review of a land use action can be made on appeal,
24 sufficient findings of fact must exist. Findings are important
25 only insofar as they relate to the objectives and policies to
26 which the deciding jurisdiction is committed by state law,

1 statewide goals or its comprehensive plan. Consequently,
2 findings should not only identify those objectives or policies
3 but also describe how and why the proposed action will, in
4 fact, serve the objectives or policies. Sunnyside Neighborhood
5 v. Clackamas County, 280 Or 3, 569 p2d 1063 (1977).

6 Here we have no findings at all. The only indication of a
7 final decision being made by the Gearhart City Council is
8 contained in a letter from the City Administrator. That is not
9 a final action of the City Council. There is no indication
10 that the City Council acted to ratify the letter nor that the
11 City Council even reviewed the letter before it went out.²

12 Even if we were to accept the City Administrator's letter
13 as the final decision and, as respondent argues, an indication
14 of incorporation by reference of the Planning Commission's
15 findings of fact, the result of our opinion in this case is the
16 same. The Planning Commission's findings³ do not pass
17 muster. The findings are merely conclusions or recitations of
18 the standards to be applied. As the Court of Appeals held in
19 Hill v. Union County, 42 Or App 883, 886, 601 P2d 905 (1979),
20 when it refused to review for substantial evidence the county
21 court's denial of a subdivision approval:

22 "None of the eight 'findings of fact' relied upon by
23 the defendants are actually findings of fact. They
24 include recitations of evidence like those which we
25 held in Graham v. Oregon Liquor Control Commission, 20
26 Or App 97, 53 P2d 858 (1975) to be inadequate as
findings of fact; conclusions as to the law and as to
ultimate facts for which the underlying facts are
neither given nor apparent from the record; and a

1 reference to the 'principles set forth' in a decision
2 of this court, clearly not a finding of fact. [sic]"

3 See generally B & L Holding v. Corvallis, 1 Or LUBA 115 (1980),
4 Davis v. Nehalem, 4 Or LUBA 1 (1982).

5 For the above stated reasons, we remand this matter to the
6 City of Gearhart for further consideration not inconsistent
7 with this opinion. In light of the nature of this opinion and
8 the lack of findings, we do not address petitioner's other
9 assignments of error.

10 Remanded.

FOOTNOTES

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Section 3.1021 states:

4 "Residential developments and commercial and industrial
5 buildings are prohibited in areas oceanward of the
6 established dune hazard line appearing on maps at City
7 Hall. For the areas between the north end of the City Park
8 at approximately 7th Street north to the southern end of
9 the Palisades Development, the extend [sic] of ocean
10 flooding hazard and wind erosion hazard shall be
11 established on a site by site basis through site specific
12 investigations by a qualified individual such as an
13 engineering geologist. In establishing the extent of ocean
14 flooding on the site, the same criteria used in The
15 Stability of Coastal Dunes study shall be employed.
16 Development will only be permitted on that portion of the
17 site, if any, that the site investigation has established
18 as not subject to ocean flooding hazard and where the
19 impacts of wind erosion to the site and adjacent properties
20 will be minimal. The site investigation shall be
21 undertaken at the developer's expense and the City shall
22 submit the report to the United States Soil Conservation
23 Service and may submit it to the State Department of
24 Geology and Mineral Industries, or other agency, for
25 evaluation. The individual employed shall be subject to
26 approval as to qualification by the City prior to the site
27 investigation."

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18 From a technical standpoint, the proper disposition of this
19 appeal should be dismissal, rather than remand, because without
20 findings adopted by the city council there is no final
21 decision. The city administrator's letter does not comply with
22 applicable legal requirements. See Oregon Laws 1979, ch 772,
23 sec 5(4). See Heilman v. Roseburg, 39 Or App 71, 591 P2d 390
24 (1979), 1000 Friends v. Clackamas County, 3 Or LUBA 203 (1981),
25 Thede v. Polk County, 1 Or LUBA 339 (1980). Since the
26 petitioner did not raise this as an issue but rather couched
its attack as one against the "findings," we will discuss the
inadequacy of those findings.

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"Dune Hazard Line-Jack & Maryann Fleck

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- "1) The Dune Hazard Line complies with the state wide planning goal number 18, beaches and dunes, by prohibiting residential construction on the active foredune.
- "2) The Dune Hazard Line approximates the 32' contour line which is approximatly 150' west of the east property line.
- "3) The flood and erosion hazard line are west of the 150' established hazard line.
- "4) The line complies with the comprehensive plan by considering the rate of erosion together with the anticipated life of the structure.
- "5) The line was established in compliance with section 3.1021 of the Zoning and Development Ordinance plus reports received from the United States Soil Conservation Service and the Department of Land Conservation and Development."