

100

LAND USE  
BOARD OF APPEALS

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

DEC 31 9 25 AM '86

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

GEORGE and FLOR CONSTANTINO, )  
VICTOR and NORMA PRITCHARD, )  
Petitioners, )  
vs. )  
CITY OF HINES, )  
Respondent. )

LUBA No. 86-048  
FINAL OPINION  
AND ORDER

Appeal from City of Hines.

George and Flor Constantino and Victor and Norma Pritchard filed the petition for review. Flor Constantino argued.

William D. Cramer, Burns, filed a response brief and argued on behalf of Respondent. With him on the brief were Cramer and Cramer.

KRESSEL, Referee; DuBAY, Chief Referee; Bagg, Referee; participated in the decision.

REMANDED 12/31/86

You are entitled to judicial review of this Order.  
Judicial review is governed by the provisions of ORS 197.850.

1 Opinion by Kressel.

2 NATURE OF THE DECISION

3 Petitioners appeal a conditional use permit allowing  
4 establishment of a home occupation (beauty/barbershop) in a  
5 residence.

6 FACTS

7 Richard and Mary Boushey are the contract purchasers of a  
8 residence at 150 Woodland in the City of Hines. The property  
9 is zoned Single Family Residential (RS). In this zone a "home  
10 occupation" is classified as a conditional use. Section  
11 11.020(6), Hines Zoning Ordinance. The ordinance lists various  
12 home occupations and includes the following general definition:

13 "8. Practitioners of any art, craft or profession of  
14 a nature to be conveniently, unobtrusively and  
15 inoffensively pursued in a family dwelling." Section  
1.130(26)(B)(8), Hines Zoning Ordinance.

16 The Bousheys applied for a conditional use permit to  
17 establish a beauty/barbershop in the residence.<sup>1</sup>

18 Petitioners, who live nearby, opposed the application.

19 The planning commission denied the application. However,  
20 the denial was overturned on appeal to the city council.

21 FIRST ASSIGNMENT OF ERROR

22 Petitioners first allege that the Bousheys did not have a  
23 sufficient interest in the property to apply for the permit.  
24 They point out that the Bousheys are contract purchasers of the  
25 residence and that the contract is conditioned on approval of  
26 the home occupation. Petitioners' theory is that the Bousheys

1 could not apply for the permit because their contract allows  
2 them to back out of the transaction should the permit be denied.

3 Section 8.010 of the Hines Zoning Ordinance provides:

4 "The application for establishment, expansion or  
5 alteration of a conditional use shall be made on a  
6 form provided by the Planning Commission for such  
7 purpose. The application shall be complete as to all  
8 matters requested thereon, and may be filed only by  
9 one or more of the following persons:

10 "A. The property owner.

11 "B. A purchaser thereof under a duly executed written  
12 contract when he states that he is the contract  
13 purchaser on the application and the seller consents  
14 in writing to such application;

15 "C. A lessee in possession of the property and the  
16 owner consents in writing to such application; or

17 "D. The agent for any of the foregoing when duly  
18 authorized in writing and the agent states on the  
19 application that he is the duly authorized agent."

20 The record shows that the Bousheys are contract purchasers  
21 of the property and that the seller's agent consented to the  
22 application. This evidence is sufficient to satisfy Section  
23 8.010B of the ordinance. We find nothing in the city ordinance  
24 barring a permit application by one whose contractual right to  
25 purchase property is contingent on permit approval.

26 The first assignment of error is denied.

#### SECOND ASSIGNMENT OF ERROR

Petitioners next direct our attention to testimony in the  
record indicating that the home occupation may lower property  
values and create traffic problems in this hilly residential  
area. They claim the testimony was pertinent to certain

1 approval criteria in the zoning ordinance and that the city  
2 failed to consider the testimony.

3 We sustain this assignment of error, although for reasons  
4 slightly different from those petitioners assert.

5 Petitioners incorrectly rely on the criteria in the  
6 ordinance governing variances. As respondent points out, the  
7 application is classified under Section 11.020(6) of the  
8 ordinance as a conditional use. The ordinance sets forth  
9 specific approval criteria for a conditional use. Section  
10 8.060. An application for a conditional use is not subject to  
11 the separate criteria for a variance.

12 Although petitioners' reliance on the variance criteria is  
13 misplaced, their claim that the final order is flawed because  
14 it does not address the neighborhood impacts of the proposal is  
15 valid. Under the criteria governing a conditional use, as well  
16 as the previously quoted definition of "home occupation," the  
17 neighborhood impact of a proposal is a critical issue.

18 According to Section 8.060 of the ordinance, a conditional  
19 use requires findings:

20 "A. That such conditional use, as prescribed [sic]  
21 by the applicant, will be in harmony with the  
22 purpose and intent of the zone and, with any  
condition imposed, satisfies the considerations  
mentioned in Section 8.

23 "B. That the granting of a conditional use permit  
24 will be consistent with the goals and policies  
expressed in the Hines Comprehensive Plan.

25 "C. That all conditions imposed are authorized by  
26 Section 8.050."

1 Section 8.060 A requires that a conditional use be in  
2 harmony with the purpose and intent of the zone in which it is  
3 located. The purposes and intent of the RS zone are set forth  
4 in Section 11.000 of the ordinance. They are:

5  
6 "1. To protect and preserve areas which will be  
7 developed with single family detached dwellings  
8 and characterized by a high ratio of home  
9 ownership.

10 "2. To stabilize and protect the essential  
11 characteristics of residential environments.

12 "3. To promote and encourage a suitable environment  
13 for activities associated with family life."

14 Petitioners' concerns about the potential impacts of the  
15 proposal on the character of the residential area are relevant  
16 under these conditional use standards. Thus, the council was  
17 obligated to address the concerns in the final order. Norvell  
18 v. LGBC, 43 Or App 849, 604 P2d 896 (1979).

19 The challenged permit decision does not include any  
20 findings of fact or conclusions of law. These are required by  
21 ORS 227.173(2) and numerous decisions of the appellate courts.  
22 See, e.g., Fasano v. Board of Comm of Washington Co., 264 Or  
23 574, 507 P2d 23 (1973); South of Sunnyside Neighborhood League  
24 v. Board of Comm. of Clackamas Co., 280 Or 3, 569 P2d 1063  
25 (1977). As a result of this omission, we do not know the  
26 factual and legal bases for the city's decision.

Respondent claims that the necessary findings and  
conclusions can be inferred from facts in the record. However,

1 this argument overlooks the fact that LUBA is a reviewing  
2 tribunal not a factfinder. We cannot perform our review  
3 function until the local decisionmakers explain, in a written  
4 order, what facts are pertinent to the application and why  
5 those facts justify the decision. Hoffman v. DuPont, 49 Or App  
6 699, 706, 621 P2d 63 (1980)

7 The second assignment of error is sustained. The decision  
8 must be remanded to the city for entry of findings of fact and  
9 conclusions of law demonstrating compliance with the criteria  
10 governing the proposed home occupation. ORS 227.173(2).

11 THIRD ASSIGNMENT OF ERROR

12 Petitioners allege that the city's decision is part of a  
13 pattern of uncritical allowance of home occupations in the RS  
14 zone. We read this argument to restate the contention that the  
15 challenged decision fails to satisfy the governing criteria.  
16 Our discussion of that contention in the previous assignment of  
17 error is sufficient.

18 The decision is remanded for entry of findings of fact and  
19 conclusions of law demonstrating that the application complies  
20 with the governing criteria. Among other points, the findings  
21 must address petitioners' claim that the proposal will create  
22 hazardous traffic conditions or harm the residential character  
23 of the area.<sup>2</sup>

24 Remanded

25

26

FOOTNOTES

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

---

1

The application proposed to "...enclose existing garage and set up small, 1-operator hair styling shop in garage area." Record at 35.

---

2

We do not imply that the application will in fact create traffic hazards or harm the residential area in any way. Rather, we simply hold that those issues must be addressed in a written order adopted by respondent.

1 CERTIFICATE OF MAILING

2 I hereby certify that I served the foregoing Final Opinion  
3 and Order for LUBA No. 86-048, on December 31, 1986, by mailing  
4 to said parties or their attorney a true copy thereof contained  
in a sealed envelope with postage prepaid addressed to said  
parties or their attorney as follows:

5 George & Flor Constantino  
6 609 W. Pettibone  
7 PO Box 486  
8 Hines, OR 97738

William D. Cramer  
Legal Counsel  
PO Box 646  
Burns, OR 97720

Victor & Norma Pritchard  
150 Woodland  
PO Box 953  
Hines, OR 97738

Gene & Gayle Mackey  
PO Box 91  
Hines, OR 97738

Eric R. & Nancy P. Thomson  
PO Box 137  
Burns, OR 97720

Margaret & Bill Myers  
PO Box 402  
Burns, OR 97720

12  
13 Dated this 31st day of December, 1986.

14  
15   
16 Elizabeth E. Sheridan  
17 Management Assistant  
18  
19  
20  
21  
22  
23  
24  
25  
26