

LAND USE  
BOARD OF APPEALS

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

MAY 5 4 58 PM '80

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3 IAN AND MARTHA BRYDON, )  
4                   Petitioners, )  
5                   vs.                    ) )  
6 CITY OF PORTLAND and )  
7 MONTMORE HOME OWNERS )  
8                    Respondent.        ) )

LUBA NO. 79-008

FINAL OPINION AND ORDER

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11                   Appeal from City of Portland.

12                   Timothy P. Alexander, Beaverton, argued the cause and filed  
13 the petition for review for Petitioners Brydon.

14                   Ruth Spetter, Portland, argued the cause and filed the  
15 brief for Respondent City of Portland.

16                   John Holden, Portland argued and filed a brief for  
17 Respondent Montmore Home Owners Association.

18                   Reversed and Remanded.

5/5/80

19                   BAGG, Referee; Reynolds, Chief Referee; Cox, Referee;  
20 participated in the decision.

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

2 STATEMENT OF THE CASE

3 This case is about a subdivision denial by the City of  
4 Portland. The petitioners allege that the City failed to make  
5 adequate findings of fact and statements of reasons to support  
6 its decision; that it made a decision that was not supported by  
7 substantial evidence in the record; that it failed to follow  
8 the proper procedure in a manner that prejudiced the  
9 substantial rights of the petitioner and that its decision is  
10 unconstitutional as a violation of Or Const, Art I, § 18 of the  
11 Oregon Constitution.

12 STANDING

13 Standing of petitioners has not been challenged.

14 Petitioners have standing to bring this proceeding.

15 FACTS

16 The Montmore Subdivision was granted preliminary plat  
17 approval by the City of Portland in 1964. In 1966, the plat  
18 was amended by combining lots and adding additional land to  
19 form a single parcel designated as Lot 12, Block C. Record  
20 133-138. The developer proposed to make Lot 12 into a  
21 homeowner's park. However, the plat was recorded without any  
22 reference to that proposal or to any requirement that Lot 12 be  
23 made a park, whether public or private. Record 133, 81-82.

24 Petitioners submitted a proposal to subdivide Lot 12 into  
25 five single family residential lots. Record 157-160. The  
26 hearings officer for the City of Portland considered the

1 request in August of 1979 and found that a similar request in  
2 1971 "was denied on the strength of the previous commitments to  
3 dedicate the property as a homeowners park, and the intention  
4 of the planning commission to condition the platting on that  
5 taking place." Record 82. The hearings officer also found  
6 that an agreement existed in 1973 between owners of Lot 12 and  
7 the Montmore Home Owners Association to allow construction of  
8 one single family dwelling on that particular site. There is  
9 nothing in the record to show that the agreement was made part  
10 of the subdivision plat or that the City of Portland ever  
11 became a signator to that agreement. Record 83, 144. After  
12 discussing the pros and cons of the case and finding a number  
13 of points to support the applicant's position, the hearings  
14 officer concluded that his decision was nonetheless  
15 "predetermined in that a condition existed that the site was to  
16 be a park." Record 87.

17 The city council considered the case on October 31, 1979  
18 and upheld the ruling of the hearings officer. Record 15.  
19 There is an entry in the record bearing a stamp showing the  
20 October 31, 1979 date and reading "appeal denied." There are  
21 no other written findings, and no other notification of city  
22 action to be found in the record.

23 FIRST ASSIGNMENT OF ERROR

24 The first assignment of error alleges that

25 The City Council failed to make written findings  
26 of fact, statements of reasons, or conclusions of law  
to support its decision."

1 This assignment of error states an accurate condition of  
2 fact. The city argues, however, that the city council adopted  
3 the hearings officer's recommendation. At the hearing, Mayor  
4 McCready did say

5 "[A]n 'aye' vote would uphold the ruling of the  
6 hearings officer and deny the subdivision request."  
Record 15.

7 However, there is nothing in writing incorporating or  
8 specifically adopting the findings and order of the hearings  
9 officer. It is now well established that a party to a  
10 quasi-judicial land use decision in this state is entitled to a  
11 statement of reasons supporting the decision. Heilman v.  
12 Roseburg, 39 Or App 71, 591 P2d 390 (1979); ORS 215.416(6). If  
13 the city agreed in total with the hearings officer, it should  
14 have incorporated his opinion in an order of its own. The  
15 failure to make findings is sufficient in and of itself for us  
16 to reverse the decision and remand it for findings.

17 SECOND ASSIGNMENT OF ERROR

18 The second assignment of error alleges that the city made a  
19 decision that was not supported by substantial evidence in the  
20 whole record. The petitioner asserts that the findings in the  
21 hearings officer's report "strongly favor approval of  
22 applicant-petitioner's request, detailing conformance with all  
23 applicable ordinances, zoning restrictions, the proposed  
24 comprehensive plan, and the city housing policy." Petition for  
25 Review at 5. Respondent City asserts that the matter is really  
26 one of the city council's choice between "policies." The city

1 argues that while the subdivision might create additional  
2 housing, approval of the request would also mean approval of a  
3 willful disregard of city imposed condition.

4 The problem with the city's argument is that though  
5 evidence of a desire to impose a condition on Lot 12 exists in  
6 the record, no official action imposing that condition appears  
7 to ever have been taken. There is nothing in the record to  
8 show that the Montmore plat was amended to include the  
9 condition. The city has cited no authority and we have found  
10 none to suggest that conditions may be imposed on subdivisions  
11 where they are not set forth on the plat. A "plat" under  
12 Oregon law is the document that

13 "(9) 'Plat' includes a final map, diagram,  
14 drawing, replat or other writing containing all  
15 dedications, provisions and information concerning a  
subdivision."

16 and it is on that document that such conditions should  
17 appear.<sup>1</sup> See also Bienz v. City of Dayton, 29 Or App 761,  
18 566 P2d 904 (1977); Commonwealth Properties v. Washington  
19 County, 35 Or App 387, 582 P2d 1384 (1978).

20 It appears that there is no factual basis upon which to  
21 conclude that the city was bound as a matter of law to a  
22 condition that Lot 12 be made a park.

23 To the extent that petitioner argues there is no evidence  
24 in the record from which to conclude that a legally binding  
25 condition exists on the City of Portland, the assignment of  
26 error is sustained.

1        THIRD ASSIGNMENT OF ERROR

2            Petitioner's third assignment of error alleges a violation  
3 of procedure in that "the city council hearings officer refused  
4 to consider new evidence or a change in circumstances, such  
5 that petitioners were not allowed a full and fair hearing  
6 because the result was pre-determined." Petitioners argue that  
7 because the hearings officer held that his decision was  
8 "pre-determined," changes in the area's need for parks and the  
9 city housing policy were not considered by the hearings  
10 officer. Petitioner argues that he, therefore, was not given  
11 an opportunity to present evidence and obtain an impartial  
12 decision. It is petitioner's view that he should be allowed to  
13 introduce evidence of current conditions and circumstances.

14            Respondent replies that the petitioner did, in fact, have a  
15 full and fair hearing before the hearings officer and before  
16 the city council. Our review of the record shows that the  
17 petitioners had an opportunity to present their arguments  
18 relative to the existence of the park and Lot 12 before the  
19 city council. A review of the transcript of the city council  
20 hearing of October 31, 1979, appearing at pages 3 through 15 of  
21 the record shows extensive discussion of the issue. There is  
22 no claim of improper notice or an inability to raise any issue  
23 before the hearings officer or the city council, and it would  
24 appear that petitioner's argument is really one directed more  
25 at the merits of the decision than petitioner's ability to  
26 present his case.

1 Without a more specific allegation of procedural error  
2 directing at some other aspect of the hearing afforded  
3 commissioner, we do not find a violation of procedure "in a  
4 manner that prejudiced the substantial rights of the  
5 petitioner." Oregon Laws 1979, ch 779, § 5(4)(a)(B).

6 FOURTH ASSIGNMENT OF ERROR

7 Assignment of error no. 4 alleges a violation of art I, sec  
8 18 of the Oregon Constitution on the ground that "private  
9 property shall not be taken for public use without just  
10 compensation." It is petitioner's argument that as the city  
11 refused to purchase the land that it apparently has designated  
12 as a park, the city has precluded petitioners from economically  
13 feasible uses and, therefore, deprived the petitioners of their  
14 property.

15 The city responds by saying that the Oregon Constitution  
16 provides that private property shall not be taken for a  
17 "public" use without just compensation. The city says that the  
18 property has been set aside for private and not public use, as  
19 the property was designated as homeowners park and not a public  
20 park. Additionally, respondent points to portions of the  
21 record in which the city has indicated no interest in the  
22 property as a city park. Respondent's Brief at 11. Record  
23 105. Further, an agreement was made with the Home Owners  
24 Association that the city wishes to recognize as valid,  
25 allowing one additional dwelling unit to be placed on Lot 12.  
26 The city argues that that one additional dwelling unit would be

1 a substantial and beneficial use of the property, vitiating  
2 petitioners' allegation of improper taking. Respondent's Brief  
3 at 12.

4 It is the Board's view that the facts of this case do not  
5 show a validly existing condition that the property be  
6 designated for use as a park, whether the use be public or  
7 private. Without a clear showing that the property has in fact  
8 been designated as a park and without knowing the circumstances  
9 of the designation, how it was made and whether the park is for  
10 public or private use or both, the Board cannot begin to  
11 evaluate this assignment of error.

12 Assignment of error no. 4 is denied.

13 DECISION

14 The decision of the City of Portland is reversed and  
15 remanded to the city for action consistent with this opinion.

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FOOTNOTE

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Perhaps if some document were brought to our attention and it could be argued that the document had the same force and effect as a plat, our decision might be different.