

LAND USE
BOARD OF APPEALS

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

SEP 22 2 34 PM '80

1
2
3 JERRY GAYKEN)
4 Petitioner,) LUBA NO. 80-057
5 vs.) FINAL OPINION AND ORDER
6 CITY OF PORTLAND,)
7 Respondent.)

8 Appeal from City of Portland.

9 Jerry Gayken, Portland, filed a petition for review and
10 argued the cause on his own behalf.

11 Ruth Spetter McKillip, Portland, filed a brief and argued
12 the cause for Respondent City of Portland.

13 Frank Josselson, Portland, filed a brief and argued the
14 cause for Respondent Simpson Housing Corporation. With him on
15 the brief were Lang, Klein, Griffith & Hallmark.

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

18 Affirmed.

9/22/80

19
20 You are entitled to judicial review of this Order.
21 Judicial review is governed by the provisions of Oregon Laws
22 1979, ch 772, sec 6(a).
23
24
25
26

1 COX, Referee.

2 NATURE OF PROCEEDINGS

3 Petitioner is contesting Respondent City of Portland's
4 granting of a rezone from A2.5 to A0. Respondent Simson has
5 sought the zone change to enable it to construct a 71 unit
6 federally assisted housing project for low income elderly and
7 handicapped persons. The decision was made on April 24, 1980
8 by City Ordinance No. 149508. Said ordinance also granted
9 Simpson two variances, one to provide 18 as opposed to the
10 required 71 parking spaces, another to eliminate the
11 requirement of an off-street loading berth.

12 STANDING

13 Neither respondent contests petitioner's standing.

14 ALLEGATIONS OF ERROR

15 Petitioner is appearing in propria persona and does not set
16 forth specific allegations of error. His arguments tend to
17 fall into the following categories:

18 1. The decision was in violation of Statewide Planning Goal
19 8 which is to satisfy the recreational needs of the citizens of
20 this state and visitors.

21 2. The decision is in violation of a Portland Planning
22 Commission's document entitled "Buckman Neighborhood Rezoning."

23 3. The decision violates city housing policy governing
24 location of public housing.

25 4. The city failed to give proper notice that variances
26 were at issue as well as the requested zone change.

1 5. The decision is spot-zoning, creating an island of
2 non-conforming use.

3 6. The rezone is in violation of Fasano criteria in that
4 the need and other available property tests were not met.

5 FACTS

6 This appeal is of Portland City Ordinance No. 149508 which
7 rezoned one-half of Respondent Simson Housing Corporation's
8 property from A2.5 residential apartment (low density
9 apartment) to AO apartment residential (high density
10 apartment). The remainder of the project site is zoned AO.
11 The zone change was sought to enable Simpson to construct a
12 seven-story 71 unit HUD-assisted housing project for low-income
13 elderly and handicapped persons.

14 Simpson applied for the zone change July 30, 1979.
15 Following a public hearing on January 14, 1980, the city
16 hearings officer learned that petitioner had not been
17 notified. The hearings officer reopened the matter on January
18 21, 1980 at which time petitioner testified. Petitioner
19 appealed the decision of the hearings officer to the Portland
20 City Council. Public hearings were held on March 13, March 26
21 and April 24, 1980, before the City Council, following which
22 the Council adopted the contested ordinance. Ordinance number
23 149508 incorporates by reference the report and recommendations
24 of the city's hearings officer with the addition of two
25 conditions not found in the hearings officer's recommendation.

26 The requested development, known as Hawthorne East, is a

1 HUD section 8 rent subsidized housing project. Hawthorne East
2 is to be located at the intersection of Southeast 16th and
3 Hawthorne Blvd. in Portland. Hawthorne Blvd. is a major
4 arterial street from Southeast Portland to downtown. The
5 vicinity of the project consists of mixed single and
6 multi-family residential as well as commercial uses. The
7 project site is presently occupied by a four-plex, a duplex,
8 and two single family residences.

9 The site is served by two Tri-Met bus routes running to
10 downtown Portland every 10 minutes and is roughly 1300 feet
11 from both a large park and a full-service grocery store.
12 Portland has no comprehensive plan either adopted or
13 acknowledged. Under a proposed draft plan, the site is
14 classified as high-density residential and this project would
15 require a conditional use permit.

16 The City Council granted two variances in addition to the
17 zone change. One was from a code requirement for an off-street
18 loading berth. The other variance was from a code requirement
19 of one parking space per apartment unit. The City Council
20 found that given the characteristics of low-income elderly
21 housing, one parking space per four units (18) would be
22 adequate.

23 DECISION

24 Did the decision violate Statewide Planning Goal No. 8?

25 Statewide Planning Goal No. 8 is as follows:

26

1 "Goal: To satisfy the recreational needs of the
citizens of the state and visitors.

2
3 "The requirements for meeting such needs now and
in the future shall be planned for by governmental
4 agencies having responsibility for recreation areas,
facilities and opportunities: (1) in coordination
5 with private enterprise; (2) in appropriate
proportions and (3) in such quantity, quality and
6 location as is consistent with the availability of the
resources to meet such requirements. State and
7 federal agency recreation plans shall be coordinated
with local and regional recreational needs and plans."

8 Petitioner's position on Goal 8 seems to be that he is
9 opposing any plan for the neighborhood area which "violates
10 LCDC Goal 8 by proposing greater densities without adding
11 amenities at the same time." In addition, petitioner asserts
12 that it is "highly unlikely a person of limited mobility would
13 travel the 1300 feet to the park." The petitioner then cites
14 the Board to Goal 8, Guideline No. 7 which states:

15 "Planning and provision for recreation facilities
and opportunities should give priority to areas,
16 facilities and uses that (a) meet recreational need
requirements for high density population centers, (b)
17 meet recreational needs of persons of limited mobility
and finances, (c) meet recreational needs
18 requirements while providing the maximum conservation
of energy both in the transportation of persons to the
19 facility or area and in the recreational use itself,
(d) minimize environmental deterioration, (e) are
20 available to the public at nominal cost, and (f) meet
needs of visitors to the state."

21
22 Petitioner relies on the above quoted guideline and
23 especially parts (a) and (b) thereof as support for his
24 allegation of error. The hearings officer found and his
25 finding was adopted by the city council that 1300 feet is a
26 reasonable and satisfactory distance in light of the

1 circumstances for the residents of the proposed structure to
2 travel for park and recreation facilities. Hawthorne East is
3 supported by the Gray Panthers and the Housing Section of the
4 Bureau of Planning for City of Portland. Both those groups
5 indicate that the distance from the park is not an unreasonable
6 one. The record also indicates that Hawthorne East will
7 include onsite landscaped open areas where the residents may
8 walk, sit and otherwise recreate without leaving the premises.
9 In fact, the variances granted by the city were designed to
10 allow for additional recreational amenities on the sight by
11 reducing the amount of land necessary to be set aside to meet
12 standard city code parking and loading berth requirements.

13 In addition, the planning guideline cited by the petitioner
14 even if violated, which this Board finds it was not, is not
15 grounds for reversal of a local jurisdiction's decision. As
16 ORS 197.015(9) states in pertinent part:

17 "*** Guidelines shall be advisory and shall not
18 limit state agencies, cities, counties and special
districts to a single approach."

19 Based on the foregoing, petitioner's allegation that the
20 city's decision violated statewide goal no. 8 is dismissed.

21 BUCKMAN NEIGHBORHOOD REZONING DOCUMENT

22 Petitioner alleges the action by the city is in violation
23 of city policy adopted in 1977 when the Buckman Neighborhood
24 was the subject of an ordinance rezoning several square miles
25 in southeast Portland to low density residential uses. The
26 document to which petitioner is referring was prepared by the

1 Portland Planning Commission as a recommendation for treatment
2 of the Buckman Neighborhood area. The intent, as set forth on
3 page 5A of the that document was:

4 "The intent of this policy is to promote the
5 maintenance and reinvestment in existing residential
6 structures and to insure that new development will be
compatible with the present lower density character of
the neighborhood."

7 In addition, it was the policy recommendation by the
8 Portland Planning Commission to:

9 "Preserve and stabilize the existing mixture of
10 residential uses and insure the quality of future
development."

11 The recommendations from the Planning Commission were
12 considered by the City of Portland and on April 20, 1977, the
13 city passed Ordinance No. 143509 which rezoned certain property
14 in the Buckman Neighborhood area. The rezoning did not
15 entirely eliminate all AO zoning. Nowhere in the adopted
16 ordinance was the Buckman Neighborhood Rezoning recommendation
17 material incorporated verbatim nor was it referred to as the
18 policy of the City of Portland regarding that neighborhood. It
19 is more accurate to characterize that document as merely a
20 recommendation for a zone change to the City Council. ORS
21 227.190 provides for city planning commissions to make such
22 recommendations. Petitioner does not cite this Board to any
23 authority which suggests that recommendations are, in fact,
24 policy and, therefore, must be complied with to their letter by
25 the city council when they have not been adopted verbatim as
26 part of the controlling ordinances.

1 Based on the foregoing, this allegation of error is
2 dismissed.

3 Does the decision violate city housing policy governing
4 public housing?

5 Of the various allegations of error offered by petitioner,
6 this one gives the Board the most concern. Petitioner alleges
7 that the contested ordinance violates the city housing policy
8 governing the development and location of public housing. The
9 Housing Policy for Portland adopted by the City Council on
10 March 29, 1978 by City Ordinance 145472 contains the following
11 as one of its objectives:

12 "To provide clear criteria for the siting of
13 public housing."

14 The above quoted objective then is elaborated on as follows:

15 "Site selection for public housing shall be
16 based on a weighted set of criteria which include:
17 (1) For Elderly: a full service grocery within 1000
18 feet, availability of local transit, pharmacies,
19 parks, beauty parlors, restaurants, banks and other
20 commercial sources; (2) For Families: a full service
21 grocery within one-half mile, availability of local
22 transit, parks, schools, swimming pools, community
23 centers, commercial service area, bowling alleys,
24 \$1.00 movies, day care centers.

25 "No sites will be selected where: no full
26 service grocery exists; no vacant land is available;
no Tri-Met services are available; or where other
public housing projects exist. Family projects will
not be located where schools are racially or
economically impacted." (Emphasis added).

27 Petitioner alleges that since the nearest full-service
28 grocery is 1300 feet from the site and since the project site
29 contains four structures, the above cited criteria are violated

1 and the decision must be reversed. Respondents reply that
2 petitioner is incorrect for two reasons. First, the
3 respondents argue in their briefs that the criteria cited by
4 petitioner is for "public housing" and that what is really
5 being proposed is federally assisted private housing which is
6 controlled by another city policy. Second, respondent's argued
7 at oral argument that even if the "public housing policy"
8 referred to by petitioner controls the specific criteria cited
9 by petitioner are items to be weighed by the city in making its
10 final decision and are not standards to which the city must
11 religiously adhere.

12 In support of their first argument, respondents cite the
13 Board to testimony by Bob Willoughby, representing the housing
14 sections of the Portland Bureau of Planning and the Portland
15 Development Commission before the city council on appeal of the
16 hearings officer's decision. In essence, Mr. Willoughby stated
17 that when "federally assisted private housing" for the elderly
18 is involved, the above cited "public housing criteria" is not
19 the policy of the city. Rather, when considering "federally
20 assisted private housing" it is, according to Willoughby, the
21 policy of the city that a full-service grocery store shall be
22 within one-half mile of the site and no prohibition exists to
23 prevent building on land already occupied by structures.

24 In his decision the hearings officer did not apply the
25 criteria Mr. Willoughby was referring to. Instead, the
26 hearings officer applied the "public housing" policy criteria.

1 (supra). The city council did not amend or otherwise change
2 the hearings officer's written opinion as regards which policy
3 controls when it adopted verbatim the hearings officer's
4 decision. Consequently, this Board is left with a decision by
5 the city council which does not refer to Mr. Willoughby's
6 testimony or imply that the hearings officer was wrong in using
7 the "public housing" criteria rather than the federally
8 assisted private housing criteria. Therefore, this Board can
9 only conclude it is the policy of the City of Portland as
10 regards the subject project, that the criteria set forth in the
11 "public housing policy" govern. We, therefore, disagree with
12 respondents first argument.

13 As regards the respondents' alternative position that the
14 above set forth criteria are items to be weighed by the city in
15 making its final decision and not standards requiring religious
16 adherence, this Board agrees. It is clear that in adopting the
17 hearing's officer's decision the city council considered the
18 contested items as merely matters for consideration and not
19 mandatory standards. As the hearings officer's report states:

20 "*** Although many of the City's Housing Policies
21 and Objectives are met, others are not. While one can
22 legitimately conclude that this proposal is not
23 'perfect,' it is consistent with the Zoning Code and
24 comprehensive planning of the City as well as the
underlying land use planning standards and LCDC
goals. The proposal is consistent with the public
(sic)(as opposed to private) need."

25 This conclusion is consistent with the ordinance which
26 states "Site selection *** shall be based on a weighted set of

1 criteria ****" Further, to accept petitioner's allegation that
2 these are specific standards requiring religious adherence
3 would make it impossible to build a public housing project for
4 families in an area where \$1.00 movies are not available.

5 As regards petitioner's allegation that there is no vacant
6 land in the building site a review of the plat maps in the
7 record does indicate some vacant land in the project site.
8 For the above stated reasons the petitioner's allegation of
9 error based on an alleged failure to follow the housing policy
10 ordinance of the City of Portland is denied.

11 Failure to give notice that variances were to be considered.

12 Respondents agree with petitioners' allegation that notices
13 of hearing before the hearings officer did not state variances
14 were to be considered. The respondents argue that the error,
15 however, was harmless and is not grounds for this Board to
16 reverse the city's decision. This Board agrees with
17 respondent. Oregon Laws 1979, ch 772, sec 5(4) provides that:

18 "(4) The board shall reverse or remand the land
19 use decision under review only if:

20 "(a) The board finds that the city, county or
21 special district governing body:

22 "* * *

23 "(B) Failed to follow the procedure applicable
24 to the matter before it in a manner that prejudiced
25 the substantial rights of the petitioner;" (Emphasis
26 added).

25 The record reveals petitioner addressed at the hearing
26 before the hearings officer matters that are the subject of

1 both variances. He referred to the Bureau of Traffic
2 Engineer's report on the variances and used the term variance
3 when he said at page 221 of the record, after discussing the
4 variance issues of loading berth elimination and parking space
5 reduction:

6 "The Bureau of Traffic Engineering notes here,
7 that with the Variance, the Zone Change and Variance,
8 that there's no guarantee of future uses of this
9 structure."

9 In addition, any possible prejudice the petitioner could
10 continue to complain of was rectified when petitioner's notice
11 of appeal to the city council complained about a variance to
12 the loading berth standard and alleged a defect in the hearings
13 officer's notice. Furthermore, during the city council's
14 hearing of petitioner's appeal, petitioner argued against
15 granting of the variances.

16 Petitioner has had his day in court on this issue and there
17 is no basis from which this Board can conclude that substantial
18 rights of the petitioner have been prejudiced.

19 Is the decision spot zoning?

20 Petitioner argues at page 3 of his brief that:

21 "This seems to be a case of spot-zoning, creating
22 an island of non-conforming use. The existing AO site
23 is 9500 sq. ft., the zone change addition would add
24 10,000 sq. ft. to the spot."

24 First, the zone change does not create a non-conforming
25 use. If granted, the zone change would allow for the use
26 proposed as a permitted use. This action does not constitute

1 spot zoning, but rather is more appropriately termed as a
2 single-tract zone change. See e.g. Sunnyside Neighborhood v.
3 Clackamas Co. Comm., 280 Or 3, 569 P2d 1063 (1977); Tierney v.
4 Duris, 21 Or App 613, 536 P2d 435 (1975). The action of the
5 city is merely one of enlarging the existing AO zone and does
6 not constitute an action which singles out a small parcel of
7 land for a use classification totally different from that of
8 the surrounding area. Anderson, American Law of Zoning, sec
9 5.08 (1976). The surrounding area contains other AO zones as
10 well as commercial and low density apartment zones.

11 Is Fasano criteria applicable?

12 Petitioner argues that

13 "This zone change appears to violate Fasano
14 criteria to justify a legal zone change. The greater
15 the departure from the present land use patterns, the
16 greater the burden of proof on the applicant. ***
17 'Fasano' also states proof must show that the public
18 interest will best be served by changing the
19 classification of this particular property as compared
20 with other existing available property. The city has
21 numerous available existing vacant AO zoned sites
22 which could be appropriately utilized for a structure
23 of this height mass and density. There does not
24 appear to be a shortage of AO zoned land which would
25 require A2.5 land to be spot zoned to AO. If the
26 purpose of this structure is to supply a regional need
for a particular type of housing then no argument
seems compelling to select this site for spot zoning
when other existing vacant AO land is available such
as near Lloyd Center and Downtown."

23 The petitioner seems to be asserting that the need and
24 other available property tests set forth in Fasano have not
25 been met and that, therefore, the decision of the city must be
26 reversed. Petitioner cites this Board to no legislative-based

1 sources that would impose the need and other available property
2 tests upon the applicant in this zone change. The Supreme
3 Court in Neuberger v. City of Portland, 288 Or 155 (rehearing
4 on other grounds 288 Or 585 (1980)) overruled Fasano v.
5 Washington County, 264 Or 574 (1973) as regards that portion of
6 Fasano which requires addressing of need and other available
7 property. The Supreme Court in Neuberger held that unless the
8 requirement to show either public need or a comparison of other
9 available property is specifically set forth in a statutory or
10 LCDC requirement, those items do not need to be addressed.
11 Neuberger, 288 Or 155, 170 (1979). This Board knows of no
12 statutory or LCDC requirement imposing upon the applicant or
13 the City of Portland in this situation the burden of dealing
14 with either public need or a comparison of other available
15 property. Therefore, the petitioner's allegation is
16 dismissed.

17 The remaining statements by petitioner in his brief are
18 best categorized as merely petitioner's opinions relating to
19 the projects' overall merits. This Board has no authority to
20 reverse a local jurisdiction's decision because a petitioner
21 disagrees with the wisdom of the governing body's action.

22 Affirmed.¹

23

24 ¹ On September 9, 1980 LCDC issued a determination in
25 agreement with that portion of this opinion relating to
26 the violation of Goal 8.