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

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3 IRA S. FEITELSON, )  
4 Petitioner, ) LUBA NO. 80-113  
5 vs. ) FINAL OPINION  
6 THE CITY OF SALEM and ITS ) AND ORDER  
7 COMMON COUNCIL, )  
8 Respondents. )

9 M. Chapin Milbank, Salem, filed a brief and argued the  
cause on behalf of Petitioner.

10 William G. Blair, Salem, filed a brief and argued the caus  
on behalf of Respondents.

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

13 REMANDED 1/21/81

14 You are entitled to judicial review of this Order.  
15 Judicial review is governed by the provisions of Oregon Laws  
1979, ch 772, sec 6(a).

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1 COX, Referee.

2 NATURE OF PROCEEDING

3 Petitioner appeals Salem City Council's Resolution No.  
4 80-216 granting a conditional use permit for Applicant Robert  
5 and Mabel Nicklaus to build a duplex on a corner lot in a  
6 single-family residential zone. Resolution 80-216 is  
7 essentially a supplement to findings judicially declared  
8 inadequate in the case of Feitelson v. City of Salem, 46 Or App  
9 815 (1980). Petitioner seeks to have the matter remanded.

10 STANDING

11 Standing is not an issue in this case.

12 FACTS

13 This petition for review challenges a conditional use  
14 permit issued by the Common Council of the City of Salem to  
15 Robert and Mabel Nicklaus. The Nicklauses are owners of a  
16 parcel of land located at the southwest corner of Hope Avenue  
17 and Kenard Street, in the City of Salem. The land and the  
18 surrounding area is zoned RS (Single Family Residential).  
19 Duplexes are permitted in an RS zone only as conditional uses.  
20 They are allowed on corner lots of 7,000 square feet or more.  
21 The Nicklauses' property contains 9,800 square feet. There is  
22 already one duplex in the area. It was built in 1975 and is  
23 located on the corner opposite the Nicklauses' property. Since  
24 1975, all new construction in the vicinity has consisted of  
25 single-family homes.

26 In 1977, the previous owners of the property in question

1 applied for a conditional use permit. The hearings officer for  
2 the City of Salem denied the application on the grounds there  
3 was insufficient evidence of public need, that no evidence was  
4 introduced showing an attempt to develop the property as  
5 single-family residential, and that granting the conditional  
6 use would not be in harmony with the purpose and intent of the  
7 RS district. A year later the Nicklauses reapplied for a  
8 permit. The Planning Staff recommended that the conditional  
9 use be granted. The hearings officer denied the application  
10 because he found that there had been no change in circumstances  
11 within the last year which would justify a different  
12 conclusion; the findings of the 1977 decision were adopted.  
13 The Nicklauses sought review of this ruling before the Common  
14 Council.

15 Common Council granted the permit. Its decision was based  
16 on the following conclusions:

17 "(1) This large corner lot with 9,800 square feet  
18 across from an already constructed duplex appears well  
suited for duplex construction;

19 "(2) The development of duplexes in the housing  
20 market is an alternative to the ever increasing cost  
of constructing and maintaining single family  
21 dwellings;

22 "(3) The conditional use as described will be in  
23 harmony with the purpose and intent of the RS (Single  
Family Residential) district;

24 "(4) Granting of the conditional use permit is  
25 consistent with the goals and policy expressed in the  
Salem Area Comprehensive Plan."

26 Petitioner herein (Feitelson) appealed that decision to the

1 Circuit Court which affirmed the Common Council's decision  
2 after finding that there was reliable, probative and  
3 substantial evidence to support its conclusions. Petitioners  
4 appealed that decision to the Court of Appeals which in the  
5 case of Feitelson v. City of Salem, 46 Or App 815 (1980),  
6 reversed and remanded the Circuit Court's decision on the  
7 grounds that the Common Council failed to make sufficient  
8 findings with respect to the criteria set forth in the city's  
9 code. Specifically, the court found that there were no  
10 findings of a public need for increased multi-family housing in  
11 Salem or that a duplex is a good alternative to single-family  
12 homes. In addition, the Court found that the Common Council  
13 failed to explain why the conditional use will be in harmony  
14 with the purpose and intent of the RS district.<sup>1</sup>

15 Upon the reversal and remand from the Court of Appeals, the  
16 City of Salem interpreted the Court's decision to mean all that  
17 was wrong with its decision was the written findings were not  
18 complete enough. The council then reviewed the record of the  
19 proceedings which led to the initial decision. There were no  
20 additional public hearings held and the council's decision in  
21 Resolution 80-126 was based on the existing record. Resolution  
22 80-126, adopted on 8/25/80, is essentially a supplement to the  
23 findings which the Court of Appeals had found defective. The  
24 Resolution addresses the issues of public need and harmony with  
25 the district. On August 26, 1980, Petitioner Feitelson was  
26 notified of Resolution 80-216. On September 4, 1980, Mr.

1 Feitelson, sent a letter to the Mayor and City Council for the  
2 City of Salem. The letter requested that the Common Council  
3 rescind Resolution 80-216 and refer the matter back to the  
4 Salem hearings officer for additional hearings after proper  
5 notice to the public and parties involved. Mr. Feitelson  
6 complained about a lack of due process both from the point of  
7 view that the City Council had failed to notify him of its  
8 intent to reconsider the matter and that it had denied his  
9 right to be heard. The City Council denied Mr. Feitelson's  
10 request for a rehearing and the matter was appealed to this  
11 Board.

12 DECISION

13 Petitioner sets forth three assignments of error which  
14 taken together place before this Board the question of whether  
15 Respondent City of Salem was required to provide Petitioner  
16 Feitelson a hearing before it adopted Resolution 80-216. In  
17 order to answer the question, it is necessary to set forth  
18 pertinent portions of Resolution 80-216. Specifically, as  
19 regards the issue of need, the Resolution contains the  
20 following findings:

21       "\* \* \* We did, however, by these ordinances  
22       intend that conditional uses be considered as  
23       permitted uses, the 'public need' for which was  
24       thereby legislatively determined.

25       "We, therefore, find that by virtue of having  
26       permitted duplexes on corner lots of over 7,000 square  
27       feet in an RS district, we have legislatively and as a  
28       matter of public policy determined that public need  
29       exists.

1 "Going beyond that legislative decision, though  
2 we do not believe it legally necessary, the record in  
3 this case highlights several of the reasons behind the  
4 legislative decision, and presents further public need  
5 justification unique to this case.

6 "The city's professional planning staff, whom we  
7 regard as experts in the field of land planning and  
8 development, advise us in the staff report that, 'The  
9 development of duplexes in the housing market is one  
10 alternative to the ever increasing cost of  
11 constructing and maintaining a single family  
12 dwelling.' We take notice of the common knowledge  
13 that certain classes of citizens, notably the elderly  
14 and those of modest income including single adult  
15 families, have been effectively priced out of all but  
16 the least desirable single family neighborhoods. Yet  
17 in the Salem area the single family neighborhood has  
18 traditionally embodied both the majority of dwelling  
19 units and the most attractive living environments.

20 " \* \* \* \* \*

21 "It happens that the proponent's private desires  
22 mesh with and reflect a public need that we find to be  
23 genuine and substantial. In such a case as this, a  
24 duplex is a good alternative to a single family home,  
25 and we find from our own knowledge as elected  
26 officials knowledgeable of our community's capacities  
and needs, that in Salem - particularly in West Salem  
- this need has not been adequately met." (Emphasis  
added).

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28 Petitioner argues that he was denied due process because he  
29 was not allowed to speak and present evidence that would rebut  
30 the findings and basis thereof regarding the question of public  
31 need. Respondent on the other hand argues that the findings  
32 regarding need are within the "knowledge" of the City Council  
33 members and in reality are more in the nature of value  
34 judgments concerning broad issues, needs, concerns and  
35 conditions in the community at large. Respondent argues that  
36 the need findings are the sort of issues upon which political

1 candidates campaign and contain the type of information with  
2 which a council person is continually deluged in the course of  
3 making decisions as to the future of a city's growth,  
4 legislation, and public service.

5 As regards the question of whether petitioner was denied  
6 due process because he was not given notice of the city's  
7 decision to review the record and make additional findings, we  
8 find that the city was intially correct in deciding that such  
9 notice was not necessary. If upon review of the record, the  
10 City Council had been able to determine that sufficient facts  
11 were contained in the record upon which to make findings, no  
12 purpose would have been served in allowing additional input by  
13 the petitioner. Petitioner had his opportunity to make his  
14 case and must live with the record made at the prior hearing.

15 The problem with what occurred, however, is that the City  
16 made findings based on facts which do not appear in the record  
17 of prior hearings and to which the petitioner had no  
18 opportunity to respond or offer rebuttal. Instead of basing  
19 its need findings in the record, the City Council recited facts  
20 which were within its "knowledge." (See recitation of findings  
21 supra). At that point the petitioner should have been provided  
22 a fair opportunity to refute the matters of alleged  
23 "knowledge." Anderson, American Law of Zoning, 2nd Edition,  
24 sec 20.37, (1977). Petitioners due process was denied when  
25 after the council's "knowledge" was made known, it did not  
26 afford him an opportunity for rebuttal.<sup>2</sup> Such an act is a

1 deprivation of the due process of law. Hot Shoppes, Inc. v.  
2 Clouser, 231 F Supp 825 (D. D.C. 1964) As was held in the case  
3 of Hyman v. Coe, 102 F Supp 254, 257 (1952):

4 "If there be facts within the expert knowledge of  
5 the members of the board or acquired by personal  
6 inspection of the premises, these should be revealed  
at the hearing so that opportunity may be afforded to  
meet them by evidence or argument."

7 See also Thede v. Polk County, \_\_\_ Or LUBA \_\_\_ (1980), (LUBA  
8 No. 80-067).

9 In addition, the Common Council's finding that need was  
10 determined legislatively and as a matter of public policy is  
11 misplaced and is not sufficient to support the decision without  
12 reliance on the "knowledge" findings. Resolution 80-216 states:

13 "We did, however, by these ordinances intend that  
14 conditional uses be considered as permitted uses, the  
'public need' for which was thereby legislatively  
15 determined.

16 "We, therefore, find that by virtue of having  
17 permitted duplexes on corner lots of over 7,000 square  
18 feet in an RS district, we have legislatively and as a  
matter of public policy determined that public need  
exists.

19 Such an interpretation renders SRC 111.074(b)(2), (see  
20 footnote 1) which requires the proponent of a conditional use  
21 to show public need for the proposal, a nullity. Under such an  
22 argument anyone wishing to obtain a conditional use permit  
23 would merely have to point to the fact that the conditional use  
24 was allowed to prove need. If that were the case, SRC  
25 111.074(b)(2) would have no reason to exist. See Standard  
26 Supply Co. v. City of Portland, \_\_\_ Or LUBA \_\_\_ (1980) (LUBA



1 No. 80-018).

2 Therefore, for the above stated reasons, the decision of  
3 Respondent City of Salem as set forth in Resolution No. 80-216  
4 is remanded for further proceedings consistent with this  
5 opinion.

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FOOTNOTE

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"The Salem Revised Code provides that:

"(a) Proponent of the zoning proposal shall have the burden of proving the justification of his request. The more drastic the request, or the greater the impact of the request in an area, the greater is the burden upon the proponent.

"(b) The requested proposal must be supported by proof that:

"(1) It conforms to the Salem Area Comprehensive Plan or any other officially adopted plan that may be applied to the area in question;

"(2) There is a public need for the proposal;

"(3) The public need will be best served by granting the proposal; (if the proposal is for a zone change, proof must be submitted that the public need will be best served by changing the classification of the particular piece of property in question as compared with other property);

"(4) If other areas have been previously designated for use or development as requested in the proposal, then a showing of the necessity for introducing the proposal into an area not previously contemplated, and why the property owners there should bear the burden, if any, of introducing that proposal into their area.

"(c) The following criteria and factors are deemed relevant and material and shall be considered by the hearings officer in reaching his decision on a proposal:

"(1) Mistake in original comprehensive plan;

"(2) Change of conditions in the character of the neighborhood in which the use or development is proposed;

"(3) All facts relating to the question of the public health, safety and general welfare, including but not limited to the character of the area involved, its peculiar suitability for particular uses, the conservation of property values and the direction of building development.' SRC 111.074

1 "In addition, before granting a conditional use it must be  
2 found:

3 "(a) That the hearings officer has the power to  
4 grant the conditional use;

5 "(b) That such conditional use, as described by the  
6 applicant, will be in harmony with the purpose and intent  
7 of the district and, with any conditions imposed, satisfies  
8 the considerations mentioned in SRC 119.060.

9 "(c) That the granting of a conditional use permit  
10 will be consistent with the goals and policies expressed in  
11 the Salem Area Comprehensive Plan;

12 "(d) That all conditions imposed are authorized by  
13 SRC 119.060 (Ord No. 120-76). SRC 119.070." Feitelson v.  
14 City of Salem, 46 Or App 815, 818-820, (1980).  
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Petitioner, in his letter of September 4, 1980, while not  
specifically setting forth the basis for his request for a  
hearing, did indicate that he felt his due process rights had  
been denied him and that he had additional information which  
would have impacted the city's decision. The city denied the  
rehearing and by so doing, missed an opportunity to correct its  
error.