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

RAYMOND BUCKLEY, DENNIS L. )  
BUCKLEY and JOE BRUGATO, a )  
joint venture known as )  
BUCKLEY'S MOUNTAIN VIEW )  
PARK, )  
Petitioners, )  
  
vs. )  
  
CITY OF NEWBERG and STUART )  
H. LINDQUIST, )  
Respondents. )

LUBA NO. 80-101  
  
FINAL OPINION  
AND ORDER

Appeal from City of Newberg.

Robert E. Swift, Newberg, filed a brief and argued the cause for Petitioners.

Richard Faus, Newberg, filed a brief and argued the cause for Respondent City of Newberg.

William J. Keys, Portland, filed a brief and argued the cause for Respondent Stuart H. Lindquist.

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

Reversed 2/09/81

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 STATEMENT OF THE CASE

3 Petitioners seek reversal of the City of Newberg's August  
4 4, 1980 ordinance relating to mobile home parks and  
5 subdivisions as outright permitted uses in an R-1 (Low Density  
6 Residential) zone. The contested ordinance enacts a moratorium  
7 on all mobile home parks and subdivisions in an R-1 zone. The  
8 ordinance also has in it a section entitled "Exclusion" which  
9 allows:

10 " \* \* \* a nonconforming use with a landscape site  
11 review by staff to Chehalem Mobile Home Park Estates  
12 (MHP-1-80, Yamhill County Tax Lot No. 3207-2100) based  
13 on the findings of fact that are attached as Exhibit  
14 B."

13 STANDING

14 Standing is not an issue in this case.

15 FACTS

16 Newberg Zoning Ordinance 1968, adopted July 2, 1979,  
17 allowed mobile home parks and subdivisions as an outright  
18 permitted use in both R-1 (Low Density Residential) and R-2  
19 (Medium Density Residential) zones. On June 2, 1980, at a  
20 regular meeting of the Newberg City Council, petitioner Brugato  
21 requested that the City Council consider revision of Ordinance  
22 No. 1968. The request was based upon concern that mobile home  
23 parks were a permitted use requiring only staff approval  
24 without allowing input from neighbors who may be affected by  
25 the placement of mobile homes near their property. The request  
26 was referred by the city council to the Newberg Planning

1 Commission for a recommendation.

2 After public hearing the Newberg Planning Commission on  
3 June 17, 1980, recommended to the city council that a  
4 moratorium be enacted immediately on the processing of all  
5 requests for mobile home subdivisions and parks until such time  
6 as the Newberg Zoning Ordinance No. 1968 could be amended.

7 On July 7, 1980 and July 15, 1980, additional hearings were  
8 held. On July 15 the planning commission recommended to the  
9 city council that mobile homes not be allowed in R-1 zones  
10 until a sub-district classification could be designed to allow  
11 for their placement in that zone. In addition, it recommended  
12 that mobile homes continue to be allowed as an outright use in  
13 an R-2 zone.

14 On August 4, 1980, the city council passed Ordinance No.  
15 20-26 which amended Ordinance 1968 by prohibiting mobile home  
16 parks and subdivisions in R-1 zones. As part of the amendment,  
17 the Council added an "exclusion" which excluded the Chehalem  
18 Mobile Home Park Estates from the effect of Ordinance 20-26.

19 The findings supporting the action to place the moratorium  
20 on the mobile home parks are separate and distinct from the  
21 findings supporting the "exclusion". Petitioners do not  
22 challenge the moratorium on mobile home parks in R-1 zones.  
23 They address their challenge only to the decision to exclude  
24 the Chehalem Mobile Home Park from the moratorium's effect.

25 DECISION

26 In total, the findings regarding the exclusion state:

1 "1. A formal application for approval of  
2 Chehalem Mobile Home Park Estates was submitted to the  
3 Planning Department on April 10, 1980.

4 "2. Since the date of the original application,  
5 the applicant, Stuart Lindquist has actively pursued  
6 completion of the project. The preliminary plans have  
7 now been updated for the third time in an attempt to  
8 conform to the zoning and mobile home park design  
9 requirements in force.

10 "3. Processing of the application for a mobile  
11 home park by City staff occurred prior to the  
12 initiation of any public hearings relating to adoption  
13 of this ordinance.

14 "4. The applicant of Chehalem Mobile Home Park  
15 Estates did properly submit appropriate material  
16 constituting an application for approval of a mobile  
17 home park in accordance with the effective regulations.

18 "5. The City of Newberg finds that the applicant  
19 has spent substantial time and effort on the mobile  
20 home park project based upon applicable city  
21 regulations effective during time of processing the  
22 application.

23 "6. Therefore, to avoid undue hardship, nothing  
24 in this ordinance shall be deemed to require a change  
25 in plans, construction or use of the following  
26 described parcel for a mobile home park referred to as  
27 Planning Department file #MHP-1-80; with the exception  
28 that the development of the site shall be in  
29 accordance with the site review provisions (Sect 612  
30 through 620) of the Newberg Zoning Ordinance and any  
31 other plan ordinance, regulation or policies effective  
32 immediately prior to the effective date of this  
33 ordinance."

34 Petitioners allege the City of Newberg cannot declare a  
35 non-existent mobile home park to be a non-conforming use when  
36 and if it comes into existence in the future. Respondent  
37 defines a non-conforming use as

38 "A use of a building or land which lawfully existed on  
39 the effective date of this ordinance and which is not  
40 a use permitted in the district in which it is

1 located." Newberg Ordinance sec 10-3.254

2 Petitioners point to section 572 of the respondent's zoning  
3 ordinance which indicates that non-conforming uses must exist  
4 before the passage or amendment of the ordinance prohibiting  
5 them.

6 Newberg Ordinance sec 572 states:

7 "Purpose. Within the zones established by this  
8 ordinance, there exists lots, structures and uses of  
9 land and structures which were lawful before this  
10 ordinance was passed or amended, but which are now  
prohibited, regulated, or restricted under the terms  
of this ordinance and amendments.

11 \*\* \* \* \*

12 "To avoid undue hardship, nothing in this ordinance  
13 shall be deemed to require a change in plans,  
14 construction, or use of any building on which a  
15 building permit in accordance with the Newberg  
16 Building Code has been legally issued prior to the  
17 effective date or amendment of this ordinance, except  
18 that applications for extension of a building permit  
19 shall not be approved to exceed a period of one year  
20 from the date of adoption or amendment of this  
21 ordinance." (Emphasis added)

22 The record does not reveal that any building permit had  
23 been issued to Chehalem Mobile Home Park at the time of the  
24 passage of ordinance 20-26 (amendment of Ordinance 1968). The  
25 findings indicate that the applicant for Chehalem Mobile Home  
26 Park had merely submitted an application on April 10, 1980 and  
was involved in the processing of that application.

27 Respondents argue that the term non-conforming use was used  
28 by the city council in its most general sense to characterize  
29 the council's decision. They say the use of the term  
30 non-conforming use was meant to be a general shorthand term to

1 describe the end product of the council's action, not to  
2 describe in legal terms the process and procedure needed to  
3 establish a non-conforming use. This Board can only review the  
4 city's action based on the record before it and the plain  
5 meaning of the terms used in its written decision. The record  
6 indeed reveals confusion as to what the city was to call the  
7 action. The findings, however, indicate an attempt to fit it  
8 within the non-conforming use standards. As indicated above,  
9 the action does not comply with section 572 of the city's  
10 zoning ordinances.

11 Petitioners refer to the exclusion portion of the ordinance  
12 as being quasi-judicial and, therefore, requiring the due  
13 process protections set forth in Fasano v. Washington County,  
14 264 Or 574, 507 P2d 23 (1973). Respondents both argue that not  
15 only is the moratorium portion of the ordinance legislative,  
16 the exception is also the result of legislative action. As  
17 such, Applicant argues that the petitioner must show the  
18 decision to be arbitrary and capricious. Whether the action is  
19 the result of a legislative or quasi-judicial proceeding does  
20 not alter the result. Even if we were to label the action as  
21 legislative as the respondent suggests, there is no showing  
22 that the action benefits the public as a whole rather than just  
23 Chehalem Mobile Home Park. Anderson, American Law of Zoning,  
24 sec 5.09 (2nd Ed 1976). Since the action appears to benefit  
25 only Chehalem Mobile Home Park, we characterize the city's  
26 decision as fitting within the broad catchall category the

1 courts have labelled as "spot zoning." The Chehalem Mobile  
2 Home Park was singled out for special treatment. There is no  
3 finding or indication that all property similarly circumstanced  
4 was treated as was this mobile home park, and as such, the  
5 city's action was arbitrary.<sup>1</sup> The Supreme Court of Oregon  
6 addressed this problem in Smith v. Washington County, when it  
7 stated:

8 "Arbitrary, or spot zoning to accommodate the desires  
9 of a particular landowner is not only contrary to good  
10 zoning practice, but violates the rights of  
11 neighboring landowners and is contrary to the intent  
12 of the enabling legislation which contemplates planned  
zoning based upon the welfare of an entire  
neighborhood." Anderson, American Law of Zoning, sec  
5.09 (2d Ed 1976) quoting Smith v. Washington County,  
241 Or 380, 406 P2d 545 (1965).

13 Based on the foregoing, the portion of Ordinance 20-26  
14 excluding Chehalem Mobile Home Park from the requirements of  
15 the remainder of the ordinance is reversed. See Realty  
16 Investment Co. v. City of Gresham, \_\_\_ Or LUBA \_\_\_ (1980),  
17 (LUBA No. 80-085).

FOOTNOTE

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Taking respondent's arguments liberally, they seem to be asserting that some type of "special permit" action has taken place. Such an argument is inconsistent with their position that the City of Newberg was acting legislatively in granting the "exclusion" to Chehalem Mobile Home Park. A "special permit" is granted only after action by a local body in its quasi-judicial, as opposed to legislative, capacity. Special permits are granted pursuant to standards contained in zoning regulations. Anderson, American Law of Zoning, sec 19.04 (2d Ed 1976). Respondents have cited us to no standards in Newberg's zoning ordinance which govern the "exclusion action taken. The city cannot claim the act is legislative and thereby avoid using quasi-judicial procedural safeguards when granting what is a form of special relief from the general application of its ordinance.

CERTIFICATE OF MAILING

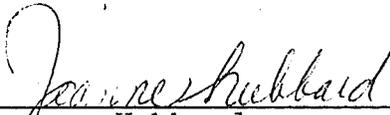
I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 80-101, on February 09, 1981, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

Robert E. Swift  
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Dated this 9th day of February, 1981.

  
\_\_\_\_\_  
Jeanne Hubbard  
Secretary to the Board