LAND USE
BOARD OF APPEALS
MAR 13 2 45 PM '81

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

3 IAN and MARTHA BRYDON,	)	
4 Petitioners,	)	
5 vs.	)	LUBA No. 80-156
6 CITY OF PORTLAND and MONTMORE HOME OWNERS 7 ASSOCIATION,	)	FINAL OPINION AND ORDER
8 Respondent.	)	

9

10 Appeal from the City of Portland.

11 Timothy P. Alexander, Beaverton, filed the Petition for Review and argued the cause for petitioners. With him on the 12 brief were Myatt & Bell.

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

14 John Holden, Portland, filed the brief and argued the cause for Respondent Montmore Home Owners Association. With im on 15 the brief were Wood, Tatum, Mosser, Brooke & Holden.

16 BAGG, Referee; REYNOLDS, Chief Referee; COX, Referee; 17 participated in this decision.

18 Reversed. 3/13/81

19

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

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1 BAGG, Referee.

2 NATURE OF THE PROCEEDINGS

3 This case is about a denial of a subdivision application
4 made by petitioners Ian and Martha Brydon to the City of
5 Portland. This same subdivision was the subject of Brydon v.
6 City of Portland, 1 Or LUBA 110, LUBA No. 79-008 (1980).

7 STANDING

8 Standing of petitioners has not been challenged.

9 FACTS

10 The Montmore subdivision was granted preliminary plat
11 approval by the City of Portland in 1964. In 1966, a
12 subcommittee of the Portland Planning Commission reviewed a
13 proposal to amend the plat. The amendment called for creation
14 of a new Lot 12, Block C. Part of the proposal included a
15 proposal to reserve Lot 12 for a private park. At the July 26,
16 1966 meeting of the subcommittee wherein the proposal was
17 considered, staff recommended that approval be made "subject to
18 the owner's commitment that Lot 12 be reserved and deeded to
19 the adjoining property owners in Montmore Addition as a private
20 park." The subcommittee approved the plat with that
21 condition. Other than the minutes of that subcommittee
22 meeting, however, no record of that condition exists in any
23 official document of the city. The condition does not appear
24 in a written order or on the plat.

25 In 1979 Petitioners, contract purchasers of the property,
26 submitted a proposal to divide Lot 12 into five single family

residential lots. The City of Portland denied that request on the ground that the condition to make Lot 12 into a private park had not yet been fulfilled and was still binding on the city. The hearings officer found his decision was "predetermined in that a condition existed that the site was to be made a park." Petitioners appealed that decision to the city council, and the city council upheld the decision of the hearings officer.

On appeal to this Board, the city's decision was overturned. In the Board's opinion of May 5, 1980, the Board said

> "though evidence of a desire to impose a condition on Lot 12 exists in the record, no official action imposing that condition appears to ever have been taken. There is nothing in the record to show that the Montmore plat was amended to include the condition. The city has cited no authority and we have found none to suggest that conditions may be imposed on subdivisions where they are not set forth on the plat. A 'plat' under Oregon law is the document that:
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> > "'(9) "Plat" [sic] includes a final map, diagram, drawing, replat or other writing containing all dedications, provisions and information concerning a subdivision.' [ORS 92.010(9)]
>
> and it is on that document that such conditions should appear. [Footnote and citations omitted]
>
> "It appears that there is no factual basis upon which to conclude that the city was bound as a matter of law to a condition that Lot 12 be made a park." 1 Or LUBA at 112."

The city moved for a clarification of the order, and the Board advised in its clarification that there were two errors committed by the city. The first was the city's failure to

1 make any findings and to adopt a final order, and the second
2 error was there were not sufficient facts in the record to show
3 "that a validly existing prohibition against future
4 subdivisions existed on the real property that was the subject
5 of this dispute." Order of Clarification at 2.[1] The Board
6 advised that the city was to take whatever action it felt
7 necessary to correct the error. The Board acknowledged that
8 there might be reasons to disallow the subdivision once more.
9 On reconsideration by the city in light of our decision,
10 the city again denied petitioners' application for a
11 subdivision of Lot 12. The denial was based upon the findings
12 of the city's hearings officer. Those findings detail the
13 existence of the motion and vote of the planning commission
14 subcommittee in 1966 and the chain of title for Lot 12. The
15 chain of title shows, according to the city, that the condition
16 exists on lot 12.[2]
17 The hearings officer found that the condition requiring use
18 of Lot 12 as a private park was imposed during the
19 quasi-judicial decision to approve the subdivision in 1966.
20 The failure to include the condition on the subdivision plat
21 was a "ministerial" failure according to the hearings officer.
22 He believed ample notice was provided to the public and
23 purchasers of the property of the restrictive condition on Lot
24 12; and if the city were to disregard the condition, persons
25 relying on the condition would be injured.
26 / /

1 ASSIGNMENT OF ERROR NO. 1

2 "The City Council made a decision that was not supported by any new evidence or documents as required
3 by the previous LUBA order; therefore, the issue of whether or not a valid condition was ever imposed is
4 res judicata, and the City is bound as a matter of law by the previous decision of LUBA." Petition for
5 Review at page 7. (Emphasis in original).

6 Petitioners assert that all of the elements of the claim of
7 res judicata are satisified because there has been

8 "a. Identity of parties;

9 "b. Opportunity for all parties to participate during the first proceeding;
10
11 "c. Substantially identical issues of law and fact in both proceedings;

12 "d. Failure to obtain judicial review." Petition for Review at page 7.
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14 Respondents claim res judicata is not applicable here
15 because the Board's order in the first case was not a
16 determination on the merits. Respondents say the Board's Order
17 of Clarification left open the door for the city's
18 reconsideration of its action, and the Board understood the
19 city would be required to "reopen the case" under the Board's
20 order. Also, the Board noted in a footnote in the opinion that
21 "[p]erhaps if some document were brought to our attention and
22 it could be argued that the document had the same force and
23 effect as a plat, our decision might be different." 1 Or LUBA
24 at 114. Respondents conclude that the remand called for more
25 than a simple ministerial act, and the LUBA order was not final
26 and could not be the basis for a claim of res judicata in a

later case.

The Board agrees that res judicata does not apply. The Board' order and the order of clarification return the case to the city for reconsideration. The Board anticipated, and the city was entitled to anticipate, a reopening of the case. What is on appeal to us now is a new determination. We do not believe res judicata applies where a case is returned for reconsideration. See: 3 Anderson, American Law of Zoning, sec 20.52 (2d ed, 1974).

First assignment of error is denied.

ASSIGNMENT OF ERROR NO. 2

> "The City Council made a decision that was not supported by substantial evidence in the whole record, in that the evidence clearly and convincingly indicates approval should have been granted on every basis other than the alleged condition previously found to be invalid." Petition for Review at page 11.

As he did in the first case, petitioner argues that all of the requirements of a subdivision approval have been met. The barrier to a grant of approval is the condition regarding Lot 12 which petitioner claims is not supported by substantial evidence in the record.

Respondents insist that the condition was validly imposed. Respondent Montmore Homeowners Association claims the act of including the condition on the plat was purely ministerial. Respondent relies on the order of the subcommittee of the planning commission, recorded in the minutes, allowing the subdivision with the condition that Lot 12 be deeded to the

1 property owners.[3]

2 The parties have advanced nothing to make the Board change
3 its mind regarding the imposition of this alleged condition on
4 the Montmore plat and on the City of Portland. The parties
5 have advanced no authority for the proposition that the city
6 may assume a private convenant among individuals and enforce
7 that assumption as though it were a city ordinance or, as in
8 this case, an approved plat condition. Though the petitioners
9 and respondents may have a dispute among themselves which could
10 well determine whether Lot 12 is developed, that dispute is not
11 something the city can referee and decide by passing on the
12 validity of the restrictions that were never adopted by the
13 city.

14 A denial of a requested land use action must be based on
15 standards and criteria in the applicable ordinance or on the
16 plat, the document that includes all conditions imposed on the
17 subdivision. Restrictive covenants between private parties do
18 not make up the law of the city and may not be used to deny the
19 request. 3 Anderson, American Law of Zoning, at sec 19.24.
20 The Board believes the plat speaks for the city as to what
21 conditions were imposed on the property. Other conditions that
22 might exist between property owners may certainly control
23 development, but they may not be deemed included in the plat
24 and enforced by the city absent a written amendment to the plat
25 so incorporating these other conditions.[4]

26 The second assignment of error is sustained.

ASSIGNMENT OF ERROR NO. 3

> "The City Council improperly construed the applicable law:
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> "a. The City Council refused to recognize the doctrine of res judicata as urged by petitioners;
>
> "b. The City Council incorrectly found that the condition was validly imposed."

Because of our ruling under assignment of error no. 1, we deny assignment of error no. 3 in as far as it asserts the city refused to recognize the doctrine of res judicata. We sustain part "b" of this third assignment of error as we agree for the reasons set forth in assignment of error number two, supra, that the city council did "incorrectly" find that the condition restricting development of Lot 12 was validly imposed.

ASSIGNMENT OF ERROR NO. 4

> "The City Council's decision constitutes a violation of Article, I. Section 18 of the Oregon Constitution, and is therefore invalid."

Petitioner argues that the city's refusal to allow the development "has precluded petitioners from all economically feasible uses, and tendered no compensation in return." Petitioner's brief at 16.

Respondents reply by saying that the Oregon Constitution provides that private property shall not be taken for a 'public' use without just compensation. The property has been set aside for private and not public use, as the property was designated as homeowners park and not a public park. Further, an agreement was made with the Home Owners Association that the

city wishes to recognize as valid, allowing one additional dwelling unit to be placed on Lot 12. Respondent says one additional dwelling unit would be a substantial and beneficial use of the property, vitiating petitioners' allegation of improper taking.

Petitioner queries how the city can demand that the property be a private park at one moment and a site for a dwelling at another.

We do not reach the merits of this assignment of error as we do not find a valid condition restricting development to exist on Lot 12.

CONCLUSION

The decision of the City of Portland is reversed.

FOOTNOTES

[1] The Order of Clarification was entered after expiration of ninety days from the date of the filing of the petition. All parties have treated that order as valid, and the Board does so here. See Faye Wright Neighborhood Planning Council v Salem, 1 Or LUBA 358 (1980), Order on Motion to Clarify, 9/25/80.

[2] Certain transfers of this property have taken place since 1966 when the planning commission stated its intent to impose the "park" condition on the property. The effect of those various transfers and of the language in deeds purporting to affect the transfers is not determined in this opinion. The Board views a dispute as to the effect of the deeds to be a dispute among the parties, and not one that can be decided by the Land Use Board of Appeals.

[3] The minutes of the subcommittee meeting did not appear in the record of the earlier Brydon case. So far as we can tell, these minutes are the only official city documents relative to the alleged condition contained in the present record and not included in the record in the previous case.

[4] Of course, the plat may incoporate by reference another official document that could include conditions. It is our belief, however, that the plat must clearly state or incorporate by reference all conditions.

We intimated in the first Brydon case that "some document" might be brought to our attention that had the same force and effect as the plat. We retract that statement to the extent it is inconsistent with our holding above.