BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

1000 FRIENDS OF OREGON, the assumed name of the Oregon Land Use Project, Inc., PETER MCDONALD and SHIRLEY WENNERBERG, Petitioners, v. CLACKAMAS COUNTY, CHARLES CLOCK, MICHAEL C. CLOCK, LON N. BRYANT, DON JAEGER and JUNE JAEGER, Respondents.	LUBA NO. 81-031 FINAL OPINION AND ORDER

Appeal from Clackamas County.

Richard P. Benner, Portland, filed a petition for review and a reply brief and argued the cause for Petitioners.

Timothy Ramis, Portland, filed a brief and argued the cause for Respondents Clock. With him on the brief were O'Donnell, Rhoades, Gerber, Sullivan & Ramis.

Lon N. Bryant, Wilsonville, filed a brief and argued the cause for himself as respondent.

Don and June Jaeger, Wilsonville, filed a brief on their own behalf.

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

Remanded 7/01/81

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).

BAGG, Referee.

NATURE OF THE DECISION

Petitioners appeal an order of the Board of Commissioners of Clackamas County dismissing petitioners' appeals of minor partition grants numbered 313-979-B, 314-979-B, 315-979-B, 316-979-B, and 326-979-B. Petitioners ask that LUBA remand the matter to the county for a hearing on the merits of petitioners' appeals.

STANDING

Respondent Lon Bryant challenges the standing of 1000 Friends of Oregon and of all petitioners because, as he asserts, the action complained of is not a "land use decision" within the meaning of Oregon Laws 1979, ch 772, sec (3). Because of our discussion infra concluding that the order of Clackamas County is, in fact, a land use decision, we find the petitioners have made sufficient allegations to confer standing upon them.

FACTS

These five minor partitions involve lands in Clackamas County west of Wilsonville and north of the Willamette River. Soils on the subject properties are predominantly SCS Class I-IV, and the properties fall within Douglas Fir Site Class II. The properties in total amount to some 157 acres.

Under the provisions of the Clackamas County subdivision ordinance, the Clackamas County Planning Department denied the partitions on the grounds the partitionings violated Statewide

Goals 3 and 4. The decision of the Planning Department was appealed by the applicants to the Clackamas County hearings officer. The hearings officer approved partition numbers 313, 314 and 326 in an oral decision accompanied by oral "findings" addressing Statewide Goals 3 and 4 on February 27, 1980. On April 18, he entered a written order which included a notice on the face of the order reading "Last Date to Appeal: April 28, 1980." On May 14, he made similar oral "findings" along with an oral approval of partition numbers 315 and 316. On July 7, he entered a written order with a similar notice specifying the last date to appeal would be July 23.[1]

Apparently relying on the statement by the hearings officer in his written order, petitioners appealed the first set of partitions to the Board of Commissioners on April 28, 1980 and the second set of partition on July 14, 1980.

On March 3, 1981, the Board of County Commissioners entered order no. 81-424 denying all of the appeals. The county relied on the following provisions of its subdivision ordinance:

> "The decision of the Hearings Officer shall be final unless notice of review from an aggrieved party is received by the Planning Director within thirty (30) days of the oral decision on the proposed subdivision or major partition, or ten (10) days of the action on the proposed minor partition." Article VIII, section I(2.0)(Record 388).
>
> "Actions on minor partitions may be appealed to the Hearings Officer within ten (10) days of the Planning Division action. Action by the Hearings Officer may be appealed to the Board of County Commissioners within ten (10) days of the oral decision of the Hearings Officer." Article III, section I (1.0) (Record 387).

As all of the appeals were filed more than 10 days after the hearings officer orally announced his decision, the county concluded the appeals were filed late.

ASSIGNMENTS OF ERROR

Petitioners make three separate assignments of error. The first assignment of error alleges that the order of dismissal violates Statewide Planning Goal No. 2. The argument relies on petitioner's belief that Goal 2 requires written findings at the time the decision is made. The second assignment of error alleges a violation of ORS 215.416(5) and ORS 215.422. ORS 215.416 allows counties to delegate responsibility for contested case hearings and permit reviews to planning commissions and hearings officers. The county is given authority to establish its own rules for the handling of the cases, and the county may give final authority to the Planning Commission or the hearings officer. ORS 215.416(5) provides any approval or denial under the county's contested case and permit handling scheme must be accompanied by a "statement" explaining the decision. Petitioner uses these statutory provisions to claim that the "statement" is equivalent to "findings" which must be in writing. Petitioner also claims that these findings must come at the same time as the decision. Petitioner argues ORS 215.422 is violated by the county's scheme of "authorizing" hearings officer action (a decision) without written findings. The county scheme requires, in effect, the hearings officer's decision to be

appealed before the decision is final, i.e. reduced to writing. Petitioer argues this authrization deprives petitioner of their right to appeal guaranteed by ORS 215.422.

The third assignment of error argues that the notice of the decision required in ORS 215.416(7) must come prior to the expiration of the time for appeal in order to give petitioners enough time to file an appeal.

Our discussion of the first two assignments of error is interdependent. We believe that Goal 2 and ORS 215.416(6), read together, require that land use decisions become "final" only when reduced to writing and supported by findings. ORS 215.422 allows an "aggrieved" person to appeal the decision. We do not believe a person is "aggrieved" until the decision is final. The time for appeal, then, may only begin to run when the decision is final, and a local ordinance providing that the time for appeal will run from a time an oral decision is made is violative of Goal 2, ORS 215.416(6) and ORS 215.422. We do not reach the third assigment of error because of our holding regarding Goal 2, ORS 215.416 and ORS 215.422.

ARGUMENT AS TO GOAL 2

As mentioned above, the basis for petitioner's argument is that as Goal 2 requires "an adequate factual base" for land use decisions, written findings must accompany the decision. Petitioners cite 1000 Friends of Oregon v. City of Milwaukie, LCDC No. 79-002 as authority for this proposition. Mixed into this argument is the assertion that Goal 2 requires the written

findings be made at the same time as the "decision."

Respondent Clock notes that 1000 Friends of Oregon v. City of Milwaukie, only required "statement of findings and reasons showing compliance with applicable goals." Final Opinion and Order at page 7. The case and Goal 2, claims Respondent Clock, are silent on the specific procedure that a county may use to trigger the running of the time for appeal. The matter of "findings" and when an appeal time runs are two different issues in respodents' view. Respondents note that petitioners had notice of the time the oral decision was to be announced and further say that at the time of that decision, the hearings officer announced the reason for his decision. The "factual base" required by Goal 2 was, therefore, included in the oral statement of the hearings officer, according to Respondent Clock. If not included in that statement, the factual base was certainly present in the written decision made by the hearings officer.[2]

In quasi-judicial land use decisions, we have repeatedly held that Goal 2 requires findings explaining the decision. Kerns v. Pendleton, 1 Or LUBA 1 (1980). Further, we have treated as acceptable only findings included in a written order. Dupont v. Jefferson County, 1 Or LUBA 136 (1980), aff'd; Hoffman V. Dupont, 49 Or App 699 (1981). Without written findings, potential petitioners are not allowed an adequate inquiry of the "factual base" of the decision. Indeed, Goal 2 itself requires this "factual base" to be in

writing. The goal mandates "[t]he required information shall be contained in the plan document or in supporting documents." LCDC Goal 2. "Documents" can only mean written materials. As Goal 2 applies to all land use decisions, the only way that "information" will be preserved in a quasi-judicial action is in the form of written findings.[3] Without written findings, we can not perform our review function. Dupont, supra. Courts and reviewing bodies can not ascertain whether applicable criteria have been met unless adequate findings explaining the decision are made.[4] Sunnyside Neighborhood v. Clackamas Co. Comm., 280 OR 3, 20-21, 569 P2d 1063 (1977); Gulf Holding v. McEachron 39 Or App 675, 593 P2d 1202 (1979); Brice v. Portland Metro Boundary Comm., 2 Or LUBA 245 (1981).

We also believe the findings and the decision must come at the same time. The decision is not final until factual support in the form of written findings is available to the parties. In other words, we do not believe it is permissible for a local government to make an order and later, if an appeal is filed, beef up the order with supporting facts. Heilman v. Roseburg, 39 Or App 21, 591 P2d 390 (1979).[5]

We believe Goal 2's requirement of written findings for quasi-judicial decisions is consistent with the case law in Oregon. The Court of Appeals has recently considered the matter of the necessity for findings in a review of the Dupont case supra. In that case the Court upheld our order requiring a county to prepare findings showing compliance with applicable

land use criteria. The Court said

> "We hold that the requirement of adequate findings sufficient for review is the same in an appeal to LUBA as it was when the appeal procedure was by way of writ of review. A complete review of the subdivision proposal must be made at the local level to determine if it meets the state land use goals and if it is in compliance with the County's own comprehensive plan, Alexanderson v. Polk County Commissioners, 289 Or 427, ____ P2d _____ (1980); Meeker v. Board of Commissioners, 287 Or 665, 601 P2d 804 (1979); Sunnyside Neighborhood League v. Clackamas County Commission, 280 Or 3, 569 P2d 1063 (1977); 1000 Friends v. Benton County, 32 Or App 413, 575 P2d 651 (1978); Commonwealth Properties v. Washington County, 35 Or App 387, 582 P2d 1384 (1978), and the local governing body must make its own findings of fact and an order, Heilman v. City of Roseburg, 39 Or App 71, 591 P2d 590 (1979), sufficient for review. Sunnyside, supra; Bienz v. City of Dayton, 29 Or App 761, 566 P2d 904 (1977). We affirm LUBA's remand to the County Commission for this purpose." (Emphasis added) Hoffman v. Dupont, 49 Or App 699, 705-706, ____ P2d ____ (1981).

We view this case to hold that an order is required, not just the memorialization of a vote in the minutes of a meeting or in somebody's memory. The order should be in writing if it is to adequately apprise the parties of the reason for the decision. An oral order by a hearings officer, or the adoption of a motion by the Board of Commissioners is "a mere expression of a view upon which an order issues to make it effective." Balacek v. Board of Trustees, etc., 26 NY2d 419, 425 (1941) as cited in Jaqua v. Hartley, 243 Or 27, 33, 411 P2d 247 (1966).

We conclude the goal requires written findings. These findings must accompany the "order" to be reviewable. Our conclusion does not end the inquiry, however, as to when the time for appeal of a hearings officer's decision to a county

governing body may begin. The time for appeal is a different issue from whether Goal 2 requires the order be accompanied by written findings. We find nothing in Goal 2 which addresses the issue of when an appeal may be filed. We do believe, however, that the goal's requirement for factual support for the decision exists, in part, so a citizen and a reviewing body may test the adequacy of the decision. We believe that means the facts must be present and reviewable by a potential petitioner in time for the petitioner to file an appeal. We hold that the decision is not final for the purpose of of counting days to appeal until it is in writing and accompanied by the necessary findings.

ARGUMENT AS TO ORS 215.416(6) and ORS 215.422

ORS 215.402 et seq. establish procedures counties must follow to hear applications for permits and decide contested cases. Under ORS 215.416, the county has given express authority to establish its own rules for the handling of permit and contested cases. However, ORS 215.416(6) provides

> [a]pproval or denial of a permit shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth."

Petitioners argue that this "brief statement" must be in writing. The statement is essential, claims petitioners, "to apprise the parties of the ground for the decision, to enable an aggrieved party to state the grounds for appeal of a

hearings officer decision, and to provide a basis for review by the governing body." Petition for Review at 8. Petitioners also claim the statute contemplates the statement explaining the decision is to come at the same time as the decision.

Respondents assert the "brief statement" required by the statute was made by the hearings officer when he made his decision. The statute does not require the "brief statement" to be in writing and, in fact, the legislative history of House Bill 2944 in the 1977 session of the Oregon Legislature suggests that written findings were not even contemplated by the legislature, allege respondents.

Even if respondents are correct about the legislative history, we believe the language that was adopted and appears in the statute clearly requires that the "brief statement" shall go along with the approval or denial of a permit. We do not believe "accompanied by" on the statute can mean anything other than "at the same time."

We have already found above that the decision itself must be in writing or in the form of a "order." If the "brief statement" means the "findings," then it must be in writing. If the "brief statement" means something separate, then perhaps the county is required to issue a "brief statement" in addition to findings. We view this latter reading of the statute to result in near absurdity. The legislature knew findings were required. Surely it would be a useless task to require a "brief statement" to be given orally at the time the decision

is final along with the required written findings. We conclude the "brief statement" refers to the written findings that must be issued at the time the decision is made. We further conclude the statute requires these written findings to accompany a written decision.

Petitioners assert that ORS 215.422 is broken by the scheme in Clackamas County in that an effective appeal is not possible. ORS 215.422 states

> "(1) A party aggrieved by the action of a hearings officer may appeal the action to the planning commission or county governing body, or both, however the governing body prescribes. The appellate authority on its own motion may review the action. The procedure and type of hearing for such an appeal or review shall be prescribed by the governing body.
>
> "(2) A party aggrieved by the final determination may have the determination reviewed in the manner provided in sections 4 to 6, chapter 772, Oregon Laws 1979.

We agree with petitioners. We do not believe the "action" referred to in ORS 215.442 is complete without the written "order" accompanied by findings. The appeal, if there is to be one, is from the written order and not an oral announcement. Balacek, supra; Bienz, supra; Bettis v. Roseburg, 1 Or LUBA 174 (1980).[6] Without written findings accompanying the decision, the petitioners can make no effective appeal or, indeed, exercise their judgment as to whether to make an appeal. Further, a party is not "aggrieved" within the meaning of 215.422 until he or she is given the written decision. The time to appeal then, must be calculated from the time the

written decision is available to petitioners.

Basis for Dismissal Urged by Respondents

Respondent Clock and Respondent Lon Bryant argue that the decision is not a land use decision within the meaning of Oregon Laws 1979, ch 772, sec 3. Respondents rely on Fisher v. Colwell, 51 Or App 301 (1981). In that case, the Court of Appeals stated:

> "[A]t the time of this proceeding, the City of Portland had not adopted a comprehensive plan and, thus, did not have an acknowledged plan for application to land use decisions. Consequently, jurisdiction cannot be based on subsection (a)(B) or (C) or (b)." The subsections referred to are within section 3 of Oregon Laws 1979, ch 772. Slip Opinion at 4.

Because Clackamas County does not have an acknowledged plan, and because respondent believes LCDC Goal 2 does not require written findings or control the time for appeal, this Board lacks jurisdiction to consider the matter.

We disagree. Oregon Laws 1979, ch 772, sec 3(1)(a)(c) allows this Board to review a final decision concerning the application of "a zoning, subdivision or other ordinance that implements a comprehensive plan * * * *" The law does not limit the plan and ordinance to an "acknowledged" plan and ordinance. Clackamas County does have a comprehensive plan and Clackamas County does have a subdivision ordinance. Because the ordinances are not acknowledged does not mean the Board lacks jurisdiction. The Colwell case rested upon a situation wherein the City of Portland had no formal comprehensive plan,

let alone an acknowledged plan, and wherein no allegations of LCDC goal violations were made. Those facts are readily distinguishable from the facts in this case.

Respondent Lon Bryant argues that the Land Use Board of Appeals is not validly created and was created in violation of the Oregon Constitution. Respondent Bryant's argument is based upon his belief that sections 1-6(a) of Oregon Laws 1979, ch 772 are in violation of the doctrine of separation of powers in Article III, Sec I and Article VII, Sec I, amended, of the Oregon Constitution. We believe this argument to have been settled in the case of Baxter v. Monmouth, 1 Or LUBA 180 (1980), and we reject respondent's assertion.

Respondent Lon Bryant next argues that the petitioners have failed to exhaust their administrative remedies within Clackamas County and that this proceeding should be dismissed. It is not clear to us what administrative remedies existed within Clackamas County. Apparently Respondent Bryant urges that since petitioners were too late in the filing of their appeal before the county commissioners, they have failed to exhaust their administrative remedies. Of course, the issue of the timeliness of the appeals within Clackamas County is an issue in this case which we have discussed earlier. We find for petitioners on this issue.

Lon Bryant next asserts that petitioners broke LUBA Rule 4(A)(5) in that petitioners failed to file a legally sufficient notice of intent to appeal. This matter was taken up in an

order of the Board dated April 27, 1981. The Board stands by its earlier order.

This matter is remanded to Clackamas County for further proceedings consistent with this opinion.

FOOTNOTES

[1] We do not know why this date was chosen. It is more than the 10 days to appeal provided in the April 18 written order.

[2] Respondent Clock cites Hitchcock v. McMinnville City Council, 47 Or App 897, 615 P2d 409 (1980) in support of his proposition. In that case, the Court of Appeals held that the time for filing a writ of review was to be measured from the time the McMinnville City Council voted to deny a zone change application. The court said that no action other than the vote of the City Council to leave the zoning on the property was necessary or contemplated. We note that the petitioners asserted in that case that the time for filing a writ of review should begin at the time the written minutes of the City Council's meeting were approved. We do not see in the Hitchcock opinion any discussion of whether a written decision in the form of an order should have been filed. Hitchcock involved a denial. Here, the hearings officer granted a permit. Under Duddles v City of West Linn, 21 Or App 310, 535 P2d 583, rev den (1975), time to challenge a permit begins when the ordinance granting the permit is passed, not when the local body announces its decision. We note the Hitchcock case is under appeal to the Supreme Court. Contrast Hitchcock with Hoffman v. Dupont, 49 Or App 699, 705-706, ____ P2d ____ (1981).

[3] In a legislative proceeding, the "findings," are in the "plan or supporting documents." See Gruber v. Lincoln County, ___ Or LUBA ____ (LUBA No. 80-088).

[4] It is in the interest of local governments to make findings in writing. If Goal 2 is a standard against which land use decisions may be measured, and if the only facts that may later be reviewed in an appeal are those which have been announced orally at the time of the decision, then we feel local governments will lose nearly every case appealed. Most often, a decision involves application of several ordinance provisions. Unless the hearings officer or the Board of Commissioners is prepared to give a lengthy discertation on the facts found and conclusions made, the decision will probably fail for lack of adequate findings showing compliance with all applicable criteria. One can imagine the chaos surrounding an oral decision in a complex land use case. We also shudder at the possibility of reviewing a transcript to try to see what facts were "found" by a governing body in such a case.

We note in this case that the hearings officer's findings in his written decisions were far more detailed than those made orally.

[5] We note in the footnote in Heilman, supra, that the Court of Appeals apparently viewed the "final order" similarly.

> "There is an arguable analogy to judicial proceedings where a judge decides and then requests that findings be prepared. The order in such a case, however, is only tentative. The findings of a judge normally conclude with a formal order. It is the final order, not the earlier oral order, which has legal effect. State v. Swain/Goldsmith, 267 Or 527, 517 P2d 684 (1974)." Heilman v. City of Roseburg, 39 Or App 71, 75, fn 5.

[6] ORS 92.046 governing procedures for approval of minor partitions applies also in this case. That statute calls the "action" an "approval or disapproval." The statute requires a minimum ten day appeal period to the governing body. Again, we view the "approval or disapproval" to be final only when in writing. Thus, while ORS 215.416 allows the county to set the procedures for appeal from a hearings officer's decision, it can not require that an appeal be filed less than 10 days from the date the hearings officer gives his "approval or disapproval," that is, his written order.

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

1000 FRIENDS OF OREGON, the assumed name of the Oregon Land Use Project, Inc., PETER MCDONALD and SHIRLEY WENNERBERG, Petitioners, v. CLACKAMAS COUNTY, CHARLES CLOCK, MICHAEL C. CLOCK, LON N. BRYANT, DON JAEGER and JUNE JAEGER, Respondents.	LUBA NO. 81-031 PROPOSED OPINION AND ORDER

Appeal from Clackamas County.

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

Remanded 6/10/81

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).

STATE OF OREGON INTEROFFICE MEMO

TO: MEMBERS OF THE LAND CONSERVATION AND DEVELOPMENT COMMISSION

DATE: 6/9/81

FROM: THE LAND USE BOARD OF APPEALS

SUBJECT: 1000 FRIENDS V. CLACKAMAS COUNTY
LUBA No. 81-031

Enclosed for your review is the Board's proposed opinion and final order in the above captioned appeal.

This case involves appeal procedures. The county dismissed appeals of minor partitioning grants made by a hearings officer. The dismissals resulted from the petitioner's failure to file appeals of the hearings officer's decisions with the Board of Commissioners within ten days of the oral decision of the hearings officer. Petitioners claim that the time for appeal should run from the time a written decision is entered, notwithstanding a county ordinance that very clearly provides that the time for appeal runs from the time of the oral decision.

The case is before you became petitioners allege that Goal 2 requires written findings contemporaneously with the decision. Petitioner concludes that "[i]f Goal 2 requires written findings, then a dismissal, based upon a failure to appeal within ten days after an oral decision violates Goal 2." The petitioners claim the dismissal deprives them of "their Goal 2 right to written findings * * * *"

We do not believe Goal 2 controls the time to appeal. We do find that Goal 2 requires written findings in a quasi-judicial land use decision. We use the assertion that Goal 2 requires written findings and the provision of ORS 215.416 and 215.422 together reverse the county's decision.

A number of cases in Oregon have held that a potential petitioner is entitled to know the reasons for a land use decision. We believe that Goal 2 requires the reasons for the decision to be in writing, and we also believe that petitioners cannot properly know whether or not they are to appeal until they have all the findings in front of them. To say that the decision may be made orally and the time to appeal may run before petitioners are fully apprised of the "factual base" of the decision in writing is to deny the petitioners an effective right of appeal, in our view.

The Board is of the opinion that oral argument would not assist the commission in its understanding or review of the statewide goal issues involved in this appeal. Therefore, the Board recommends that oral argument before the commission not be allowed.

BEFORE THE
LAND CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF OREGON

1000 FRIENDS OF OREGON, Petitioner(s), v. CLACKAMAS COUNTY, Respondent.	)	LUBA 81-031 LCDC Determination

The Land Conservation and Development Commission hereby approves the recommendation of the Land Use Board of Appeals in LUBA 81-031, concerning allegations of Statewide Goal violations.

DATED THIS ~~June~~ 29th DAY OF June, 1981.

FOR THE COMMISSION:

W. J. Kvarsten, Director
Department of Land
Conservation and Development

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