BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

URBAN RESOURCES, INC., Petitioner, v. CITY OF PORTLAND, Respondent.	LUBA No. 81-136 FINAL OPINION AND ORDER

Appeal from City of Portland.

Roger A. Nelson, Portland, filed the Petition for Review and argued the cause on behalf of Petitioners.

Kathryn S. Beaumont, Portland, filed the brief and argued the cause on behalf of Respondent City of Portland.

Carol J. Buehrens, Portland, filed the brief and argued the cause on behalf of Respondent Southwest Hills Residential League.

BAGG, Referee; REYNOLDS, Referee; COX, Referee; participated in this decision.

REMANDED 4/26/82

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

Petitioner appeals denial of an application to construct a 13 unit planned unit development within the City of Portland.

FACTS

Petitioner filed an application for a conditional use to allow planned unit development of 13 units on a 3.05 acre parcel. The parcel is zoned R-10, a low density single-family residential zone, and the zoning allows for and is presently platted to accommodate 8 single-family detached dwellings. Grant of a planned unit development permit would allow the development as envisioned by petitioner.

The application was heard by the city's hearings officer on June 1, 1981. The hearings officer approved the conditional use permit in a written order accompanied by findings issued on June 17, 1981. That decision was reviewed and affirmed by the city planning commission in a "Notification of Planning Commission Action" issued on September 10, 1981.

The approval was appealed by the Southwest Hills Neighborhood Association (SWHRL) and Mr. Jay Rosacker. The city council conducted a hearing on the matter on November 18, 1981. The hearing was continued to November 19 at which time a motion by Councilmember Schwab to deny the planned unit development passed by a 3 to 1 margin. The motion made no reference to the findings of the hearings officer. Councilmember Schwab's motion was

> "based on the fact they have not complied with, I mean, they didn't meet the specifications of 33.106 and based on the traffic and some of the other items we discussed yesterday." Record at 12.

A letter was written by George Yerkovich, auditor of the City of Portland, to the various parties to the appeal stating:

> "The City Council Thursday, November 19, 1981, denied approval for Conditional Use Application of Urban Resources, Inc., to construct a 13-unit PUD on lots 1 through 8, Winterwood, located on the east side of S.W. Fairmont Blvd." Record at 3.

Additionally, there is what we understand to be a cover sheet signed by the auditor which bears the tally of the votes of the city council and bears a stamp stating "APPEAL GRANTED." The record does not reveal any written order or any written findings to support the city's action.

ASSIGNMENTS OF ERROR

Petitioner makes the following assignments of error:

> "1. The City Council erred by adopting an Order which was not supported by relevant factual evidence and which was inconsistent with the planning and zoning provisions of the Portland Municipal Code."
>
> "2. The City Council erred by adopting an Order which was not accompanied by a statement setting forth its findings and the reasons for the decision it reached."

Petitioner asks that LUBA reverse the decision of the city council. We understand petitioner to believe reversal of the city council order will work to reinstate the order of the hearings officer as reviewed and affirmed by the planning commission.

Respondent SWHRL states that it is "satisfied with the

proceedings below and the ruling adopted by the City Council." Respondent SWHRL asks that if the case is remanded, "it should be for the limited purpose of allowing the City to properly draft and enter its findings."

Respondent City of Portland argues that LUBA has no jurisdiction to hear the appeal. The city argues that a decision is final for the purposes of review under 1979 Or Laws, ch 772, sec 4(1), (2) as amended by Or Laws 1981, ch 748, when it is reduced to writing and signed by a member of the decision-making body.[1] The city cites Thede v Polk County, 1 Or LUBA 339, 344 (1980) in support of this proposition. The city argues that a local governing body's decision must be included in a written order which contains findings explaining the governing body's action. 1000 Friends of Oregon v Clackamas County, 3 Or LUBA 203, 207-208 (1981). The city states that the council's action includes no document entitled order or findings and is therefore insufficient to constitute a land use decision.

As an alternative, the city argues that if the Board finds that it does have jurisdiction to hear the appeal, the appropriate response would be to remand the matter to the city for further proceedings. The further proceedings, presumably, would include the city's findings leading it to conclude that the planned unit development should be disallowed. The city is particularly anxious to have LUBA direct the city as to whether a new evidentiary hearing on the land use request is required,

or whether the city "may simply ratify its prior decision and adopt findings and an order to support that decision."

In reply to the city, Respondent SWHRL expresses concern that there be no reopening of any proceedings before the city council. Respondent SWHRL states the city council lacks the power to set aside its decision in the absence of expressed statutory authority to do so. Respondent SWHRL claims that the principle of res judicata is applicable. "Any other result would allow the developer but not the neighborhood the opportunity to a start anew if it didn't get what it wanted." In other words, Respondent SWHRL believes there has been a complete ajudication of the matter, and reopening the case other than for the very limited purpose of supplying findings of fact is impermissible.

In 1000 Friends of Oregon v Clackamas County, 3 Or LUBA 203 (1981), we held that a "decision is not final for the purpose of counting days to appeal until it is in writing and accompanied by the necessary findings."[2] We also held that the "action" referred to in ORS 215.442, and which we understood to be synonymous with "land use decision," is not complete without a written order accompanied by findings.

> "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." 1000 Friends, 3 Or LUBA at 210.

We based the holding on our analysis of statewide planning Goal 2, which we understood to require findings, and on ORS 215.416(6) requiring a "brief statement" of the reasons for a land use decision.[3] Our order was affirmed in Bryant v Clackamas County, 56 Or App 422, ___ P2d ___ (1982). The Court of Appeals held a decision is not final for appeal purposes until the notice required in 215.476(7) is given to all parties to the proceeding. The Court declined to decide the issue of whether ORS 215.416(6) required that the findings of a hearings officer be reduced to writing before counting the days to appeal.

In Windward Condominium Association v City of Gearhard, ___ Or LUBA ____ (LUBA No. 81-124, March 15, 1982), we remanded a decision that was memorialized only in a letter from the city administrator to the petitioner's attorney. There were no supporting findings, and we concluded that the letter was "not a final action of the city council." In a footnote, we stated that "the proper disposition of this appeal should be dismissal, rather than remand, because without findings adopted by the city council there is no final decision." The case was remanded simply because the parties did not raise the issue of our jurisdiction as has been raised here.

Our holdings are not entirely consistent on the issue of what form a decision must take in order to be "final" for appeal purposes. In McCrystal v Polk County, 1 Or LUBA 142 (1980) and Dupont v. Jefferson County, 1 Or LUBA 136, aff'd,

Hoffman v. Dupont, ___ Or LUBA ___, 49 Or App 699, 621 P2d 63 (1981), we held that findings were necessary for our review, and failure to adopt findings was grounds for remand. We made no reference to jurisdiction or possible dismissal of the cases for lack of an appealable order. We believe clarification of this issue is needed.

The 1000 Friends v Clackamas County case probably went too far to the extent it held that no appealable "decision" exists without a written order accompanied by written findings. A distinction exists between no land use decision taken and a land use decision made that does not meet legal requirements. The former circumstance vests no jurisdiction in LUBA, the latter circumstance vests jurisdiction and may result in reversal or remand. In the present case, the city council did move and vote to "grant" an appeal of a hearings officer and planning commission decision allowing a planned unit development. That decision appears in the minutes of the city council meeting, and the motion making the decision included a statement of reasons for the decision. See the motion of Commissioner Schwab, supra. The decision was memorialized in a letter by the city auditor and a cover sheet or filing document also endorsed by the city auditor. We are not told whether there is authority in city ordinance or charter requiring the city auditor to sign documents for the city council, but this practice has not been challenged as in violation of city charter or code provisions. We can only presume that the city

auditor was acting within his delegated authority, 3 McQuillin, Municipal Corporation, Sec. 12.126 (3d ed 1973). We recognize that our rule defines a final decision or determination as one that has been reduced to writing and which "bears the necessary signatures of the governing body." However, we recognize that the local jurisdiction may delegate the signature duty (if any) to whomever it wishes.

Because of the cover sheet signed by the auditor, the motion and vote of the city council and the fact that the city contemplates no further act to complete its consideration of the petitioner's application, we believe the city made a final decision within the meaning of 1981 Or Laws, ch 748. However, the city's exercise was legally flawed because it lacked adequate written findings.[4] Rather than state that we have no jurisdiction to review the attempted decision, it is our view that we do have jurisdiction to consider the decision and whether it met applicable legal standards. It is clear from the record in this case that the decision did not meet applicable legal standards. The city made no findings of fact.

Petitioner Urban Resources, Inc. wants us to reverse the decision. We disagree and believe a remand as was used in Hoffman v Dupont, supra, to be the better course. In our view, a reversal is warranted where the city made an error of law and not where the city simply failed to complete its responsibilities under the law. See Hill v Union County Court, 42 Or App 883, 601 P2d 905 (1979); Couglin v Mc Elroy, 42 Conn

444, 444A, 743, 744 (1899); "remand" and "reverse" in Blacks Law Dictionary (Rev 4th Ed, 1968). Also, we decline to adopt the view of Respondent SWHRL and limit the city's duty on remand to the entry of findings. Laudahl v. Polk County, 2 OR LUBA 149, 150 (1980). In Heilman v City of Roseburg, 39 Or App 71, 591 P2d 390 (1979), the Court noted that there was no order made contemporaneously with or after fact finding. The findings that were entered in that case did not "in any express or implied way suggest deliberate ratification of an earlier tentative decision." Heilman, 39 Or App at 75. In the present case, were the city to simply adopt findings, it would conceivably break the rule announced in Heilman that the findings precede the decision. That is, the findings or the basis in fact for the decision must come first. Therefore, we believe on remand the city will be required to make findings of fact and from those findings of fact make a decision. It is conceivable that the city might reach a different decision once it carefully examines the facts in the record.[5]

We do not subscribe to the view of Respondent SWHRL that the city council should be estopped to rehear the conditional use request after remand from this Board. Presumably, we could limit the issues on remand, but we decline to do so. See Lemke v Lane County, 3 Or LUBA 11 (1981). See 3 Anderson, American Law of Zoning, Section 20.52 (2d ed, 1977).

This matter is remanded to the City of Portland for proceedings consistent with this opinion.

FOOTNOTES

[1] "'Land use decision' means:

"(a) A final decision or determination made by a local government or special district that concerns the adoption, amendment or applicaton of:

"(A) The goals;

"(B) A comprehensive plan provision; or

"(C) A land use regulation; or

"(b) A final decision or determination of a state agency other than the commission with respect to which the agency is required to apply the goals." ORS 197.015(10).

This definition was part of Oregon Laws 1979, ch 772 and now appears in ORS Ch 197 as cited. See footnote _____ in Wyatt v. Antelope, ____ Or LUBA _____ (LUBA No. 82-024, 1982).

LUBA Rules 3(c) states:

"'Final decision or determination' means a decision or determination which has been reduced to writing and which bears the necessary signatures of the governing body."

[2] The case was about timeliness of filing an appeal.

[3] See ORS 227.173 to 227.180. The statutes control city planning and zoning hearings and review and mirror the provisions in ORS chapter 215 upon which our opinion was based. The appeal at issue was from a decision of a hearings officer to the Board of Commissioners. We view the issue of the necessary prerequisite for finality of a decision to be the same whether a hearings officer or a Board of Commissioners' decision is at issue.

[4] It is important to note that the city does not argue that it has not completed its consideration of the matter. See Bettis v. Roseburg, 1 Or LUBA 174 (1980).

[5] Presumably, the city could take additional evidence if it needed to in order to provide itself with a sufficient basis in fact from which to make a decision. See Feitelson v. Salem, 2 Or LUBA 168 (1981).

We recognize that the motion of Councilmember Schwab includes a reason for the decision. We do not know whether her announced reason has a sufficient basis in fact in the record. In any case, we do not decide whether the reasons stated in Councilmember Schwab's motion would be sufficient to support the decision.