

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

LAND USE  
BOARD OF APPEALS  
May 19 5 01 PM '86

S & J BUILDERS, LTD.,

Petitioner,

vs.

CITY OF TIGARD,

Respondent.

LUBA No. 86-004

FINAL OPINION  
AND ORDER

Appeal from City of Tigard.

Jack L. Orchard, Portland, filed the petition for review and argued on behalf of petitioner. With him on the brief were Ball, Janik & Novack.

Timothy V. Ramis, Portland, filed a response brief and argued on behalf of Respondent City of Tigard.

D. William Venable, Beaverton, filed a response brief and argued on behalf of Respondent Williams. With him on the brief were Bomarito and Henderson, P.C.

BAGG, Referee; KRESSEL, Chief Referee; DUBAY, Referee; participated in the decision.

AFFIRMED

05/19/86

You are entitled to judicial review of this Order.  
Judicial review is governed by the provisions of ORS 197.850.

1 Opinion by Bagg.

2 NATURE OF THE DECISION

3 Petitioner appeals the denial of its request for a  
4 comprehensive plan and zone change from Commercial Professional  
5 (C-P) to Commercial General (C-G) for its property in the City  
6 of Tigard.

7 FACTS

8 The 5.4 acre site is presently zoned C-P, a designation  
9 which allows professional offices, but does not permit the  
10 wide-variety of businesses, including retail sales, permitted  
11 in the C-G zone.<sup>1</sup>

12 The property is at the intersection of Southwest Scholls  
13 Ferry Road and Southwest North Dakota Street. The City of  
14 Beaverton city limits are immediately across Scholls Ferry  
15 Road. The site is north of and adjacent to a 15 and one-half  
16 acre parcel also owned by petitioner which houses a 305 unit  
17 apartment complex. The site is also adjacent to a retail  
18 shopping center known as the Greenway Town Center. If the  
19 requested changes were approved, the subject property would  
20 house additional commercial retail space as part of a second  
21 phase of the Greenway Town Center.

22 A similar application was before the city in February,  
23 1985. After approval by the planning commission, the city  
24 council heard the application on an appeal and reversed the  
25 planning commission in April, 1985. Petitioner filed an appeal  
26 with this board, and pursuant to a request by the city, the

1 matter was remanded to the city on August 10, 1985. S & J  
2 Builders v. City of Tigard, (LUBA No. 85-035, August 17, 1985).

3 The city council took up the remand on September 9, 1985.  
4 At that hearing, petitioner stated that only traffic impacts  
5 from the proposal required further inquiry. The petitioner  
6 took this position because the city had stated, in the findings  
7 adopted May 6, 1985, that all other approval criteria had been  
8 satisfied.

9 At the close of the September 9 hearing, council voted to  
10 deny the petitioner's application, but the denial was based on  
11 additional criteria which city council members believed were  
12 unsatisfied. Petitioner stated again that it understood the  
13 only issue properly before the council was transportation. The  
14 council then voted to continue the matter to prepare findings.

15 On September 16, 1985 the council reopened deliberations.  
16 The council concluded not only that additional criteria should  
17 be applied, but additional public hearings should be held. On  
18 September 27, 1985, petitioner was notified in writing of the  
19 added approval criteria.<sup>2</sup>

20 Petitioner submitted new application materials (under  
21 protest), and after a city council hearing on November 25,  
22 1985, the city council voted to deny the requested plan and  
23 zone change. Findings were prepared, but the council referred  
24 them to the city attorney for revision. New findings were  
25 approved by the council on January 6, 1986. The city's order  
26 of denial became effective January 16, 1986.

1 FIRST ASSIGNMENT OF ERROR

2 "The City is required to consider Petitioner's  
3 application based upon the standards specifically  
4 adopted by the City in the original proceedings on the  
5 application."

6 Petitioner claims the city announced the appropriate  
7 approval criteria prior to the order of remand by this board.  
8 Those criteria did not include the issues later relied upon to  
9 deny the application. Petitioner asserts the original  
10 announced criteria form the only "legal" basis to evaluate the  
11 application. Petition for Review at 17-18. Addition of other  
12 criteria, later used to deny petitioner's application, amounted  
13 to an ad hoc process of the kind specifically invalidated in  
14 Sun Ray Dairy v. OLCC, 16 Or App 63, 517 P2d 289 (1973),  
15 according to petitioner.

16 Further, petitioner argues the city's action violates ORS  
17 227.178(3). Petitioner claims this statute prohibits changing  
18 land use approval criteria "in mid-stream during the processing  
19 of an application." Petition for Review at 19. ORS 227.178(3)  
20 provides:

21 "(3) If the application was complete when first  
22 submitted...and the city has a comprehensive plan and  
23 land use regulations acknowledged under ORS 197.251,  
24 approval or denial of the application shall be based  
25 upon the standards and criteria that were applicable  
26 at the time the application was first submitted."  
(Emphasis added) Petition for Review at 19.

27 We find no error as alleged. The remand order to the city  
28 did not address the merits of the case. The remand did not  
29 direct any particular action by the city. Under such an order,

1 we believe the city was free to undertake a complete review of  
2 the case. See OAR 661-10-080(D).

3 In addition, all of the criteria existed in the city's  
4 comprehensive plan and zoning ordinance prior to and after the  
5 first application by S & J Builders. No ordinance criteria  
6 were changed, but the city did change it's mind as to which of  
7 the existing ordinance criteria would be applicable to the  
8 applicant's proposal. The applicant was informed by letter of  
9 the changes 28 days prior to the scheduled hearing. Petitioner  
10 requested that a later hearing be held, and the matter was  
11 rescheduled giving the petitioner another 28 days to prepare  
12 for the hearing. Petitioner had ample time to address all  
13 criteria noted in the city's letter.

14 Under these circumstances, we find the city was free to  
15 choose the approval criteria. The choice involved no  
16 deprivation of petitioner's due process rights, and no  
17 violation of ORS 227.178(3).<sup>3</sup>

18 The first assignment of error is denied.

19 SECOND ASSIGNMENT OF ERROR

20 "Assuming that the City Council had a right to adopt  
21 additional approval criteria following remand of the  
22 case, the new and additional approval criteria were  
23 adopted on an ad hoc basis and were inconsistent with  
24 approval criteria utilized for other land use actions  
25 of the type similar to Petitioner's request."

26 In this assignment of error, petitioner complains that the  
city's additional approval standards were imposed ad hoc  
exclusively for use in evaluating S & J Builders' proposal.

These changes "raise significant due process issues." Petition for Review at 22. Petitioner cites prior city council orders concerning plan and zone changes which petitioner says show the city applied different approval standards to S & J Builders than to other applicants with similar proposals. See Petition for Review at pp. 24-25.

We are not persuaded that petitioner's substantial rights have been violated.<sup>4</sup> Even if we were to agree that the five cases cited by petitioner show a course of conduct far different from that applied to petitioner's application, petitioner is not relieved from the burden of showing compliance with all applicable criteria. This petitioner may not use past city errors to prevent the city from finding an applicable criterion unsatisfied.<sup>5</sup> See Archdiocese of Portland v. Washington Co., 254 Or 77, 458 P2d 682 (1969); City of Eugene v. Crooks Co., 55 Or App 351, 637 P2d 1350 (1981); 43 Op. Att'y Gen. (1984).

The second assignment of error is denied.

### THIRD ASSIGNMENT OF ERROR

"The City Council lacks an adequate basis for denial of Petitioner's application as evidenced by the reasons given for the decision and the findings documenting the denial decision."

Petitioner claims that the written order does not reflect reasons for denial given orally at the November 25 hearing. Notwithstanding petitioner's complaint, we believe the matter for our review is the city's written order. The reviewable

1 decision is not what individual council members may have stated  
2 from time to time during the course of hearings, but is the  
3 final written order. See Citadel Corporation v. Tillamook, 9  
4 Or LUBA 61, aff'd 66 Or App 965, 675 P2d 1114 (1984); Bennett  
5 v. Linn County, \_\_\_ Or LUBA \_\_\_ (LUBA No. 85-073, January 16,  
6 1986).

7 Petitioner next attacks each of the reasons given for  
8 denial of the permit. Petitioner's complaint is that each of  
9 the city's findings is not supported by substantial evidence in  
10 the record.

11 A. NEED TEST

12 According to petitioner, the city required petitioner to  
13 demonstrate a long-term need for additional C-G zoned  
14 property. Petitioner claims there is no basis in the city's  
15 comprehensive plan or development code for such a requirement.  
16 In addition, petitioner argues the city erred in finding that  
17 there were existing empty retail spaces along Scholls Ferry  
18 Road because petitioner's application was neither for a  
19 particular type of commercial use, nor for an immediate  
20 development.

21 Although petitioner believes the city relied on a need  
22 test, the city's order does not discuss any need criterion.<sup>6</sup>  
23 We do not understand the city's order to say that the proposal  
24 should be denied because it is not needed. We conclude that  
25 petitioner's attack is misplaced in that it does not explain  
26 how the city has violated its plan and ordinance or any other

applicable criteria. See our discussion under Assignment of Error No. 3(C), infra.

B. TRANSPORTATION ISSUES

The city found the zone change will negatively impact Scholls Ferry Road and exacerbate existing traffic difficulties. Petitioner argues this finding is erroneous and is not supported by a traffic study prepared as part of the original application process and updated for the hearing after remand. The study concludes the traffic impacts would result in a level of service no different from the existing level of service on Scholl's Ferry Road. See Record at 28, 206-210. In other words, providing the property is developed as proposed, there would be no adverse traffic impacts and therefore no violation of any applicable criterion according to petitioner.<sup>7</sup>

Petitioner goes on to argue that not even the city's comprehensive plan inventories show Scholls Ferry Road as a highway of major congestion (in contrast to Highway 217, Interstate 5, and Highway 99W). Petitioner explains that the city's fear of congestion on Scholls Ferry Road is based on the mistaken assumption that under the present C-P zoning, the property would be developed for office use, and under C-G zoning, the property would be developed for intensive retail use. Petitioner states it is impossible to pinpoint the mix of uses or impacts which may actually occur. Uses in the C-G zone include those which do not generate as much traffic as certain



1 other uses in the C-P zone, notes petitioner.

2 The city's order relies on locational criterion  
3 12.2.1(2)(B)(2)(a) of the Tigard Comprehensive Plan. This  
4 provision requires that the General Commercial area or an  
5 expanding existing General Commercial area must not create  
6 congestion or traffic safety problems.

7 The city found petitioner's traffic study unreliable. The  
8 study was based on the premise that offices would be built and  
9 a small convenience store sited in the property. The city  
10 notes, however, that there is no analysis showing traffic  
11 impacts if the store is not built. The city uses this fact to  
12 posit that without the store, the traffic impacts under the C-P  
13 zone might be considerably less than those anticipated with  
14 development at C-G levels.

15 The city also faults the study because (1) it did not  
16 include a count of actual traffic volumes in the area, and (2)  
17 it failed to consider the effect of improvements to Sorento  
18 Road, an improvement that the city thought might contribute to  
19 traffic problems on Scholls Ferry Road.

20 The city concludes that it

21 "cannot determine from the evidence submitted whether  
22 the conclusion that this change in zone would produce  
23 no additional traffic safety problems is reliable."  
24 Record at 10.

25 The only evidence cited in the findings showing that a  
26 traffic hazard does indeed exist is found in opponent's  
27 testimony and photographs. According to the city, this evidence

1 shows that "traffic conditions in the area are very congested  
2 and hazardous." Record at 9.

3 It is not our function to reweigh the evidence to determine  
4 whether we would reach the same result reached by the city.

5 Our job is only to determine whether the city's findings are  
6 supported by substantial evidence. ORS 197.835(8)(a)(C).

7 Here, the city noted the evidence showing the traffic hazard,  
8 and explained why it found petitioner's evidence about traffic  
9 impacts was not reliable. It need do no more. Goracke v.

10 Benton Co., 74 Or App 453, \_\_\_ P2d \_\_\_ (1985); Morse v. Clatsop  
11 Co., 12 Or 1UBA 70 (1984).

12 We conclude that the city's finding is supported by  
13 substantial evidence and we find no error as alleged. We note  
14 that in a typical denial case, the proponent must prove the  
15 denial was erroneous as a matter of law. Jurgenson v. Union  
16 County Court, 42 Or App 505, 600 P2d 1241 (1979). See also  
17 Maracci v. City of Scappoose, 26 Or App 131, 552 P2d 552 (1976).

18 C. CHANGE IN NEIGHBORHOOD

19 Petitioner next attacks the city's finding that petitioner  
20 failed to show how change in circumstances warranted a change  
21 in zoning designation. Section 18.22.040 of the Tigard  
22 Municipal Code states, in part, that:

23 "A recommendation or a decision to approve, approve  
24 with conditions or to deny an application for a  
25 quasi-judicial amendment shall be based on all of the  
26 following standards:

"(1) \*\*\*\*\*.

1           "(2) \*\*\*\*\*.

2           "(3) \*\*\*\*\*.

3           "(4) Evidence of change in the neighborhood or  
4           community or a mistake or inconsistency in  
5           the comprehensive plan or zoning map as it  
6           relates to the property which is the subject  
7           of the development application."

8           Petitioner insists changes have indeed occurred in the  
9           neighborhood. Petitioner states that two other parcels in the  
10          immediate vicinity have been redesignated as suburban office  
11          use and, as a result, any need for additional professional  
12          office space can be met at those parcels. Petitioner  
13          introduced evidence showing the property is not economically  
14          suited for office and space development. Petitioner adds that  
15          it is unlikely that the parcel will be used for office space.  
16          Petitioner points to a 22 acre parcel within a half a mile of  
17          petitioner's property which is to be sold as residential land.  
18          Additional residential use in the area will, according to  
19          petitioner, "focus the need for sub-regional commercial  
20          opportunities in the area...." Petition for Review at 44.

21          According to petitioner, the city ignores the enlargement  
22          of the Scholls Ferry Road and Southwest North Dakota Street  
23          intersection, and signalization of that intersection. These  
24          improvements change traffic patterns in the area, according to  
25          petitioner, and provide a link between the City of Beaverton  
26          and Tigard not existing at the time the comprehensive plan was  
27          adopted. The net result of this changed traffic pattern will,  
28          according to petitioner,

1 "be to increase the necessity of utilizing the subject  
2 property for a broad range of commercial uses because  
3 of the 'draw' of the signalized intersection and its  
4 cross-city linkage." Petition for Review at 45.

5 Lastly, petitioner notes that it introduced evidence  
6 showing that the area is deficient in "commercial  
7 opportunities." Also, the nearby 305 unit apartment complex  
8 includes new residents who need "further commercial  
9 opportunities."

10 The city noted petitioner's evidence of change but  
11 concluded the changes did not justify approval of the  
12 application. The city adds that the submitted information and  
13 analysis confirms the need to retain the C-P designation,  
14 rather than change it to the C-G designation. The city also  
15 said petitioner presented no analysis of sales volume and  
16 drawing power for adjacent retail uses and that the record  
17 shows empty stores in the community. The city concludes that  
18 the commercial analysis presented by the developer shows a need  
19 for the shopping center such as the one in existence, but does  
20 not prove that changes in the area establish a need for  
21 rezoning the site to C-P zone.

22 As noted earlier, the proponent of the land use change has  
23 a heavy burden. Jurgenson v. Union County Court, supra. The  
24 city's analysis adequately explains why the changes noted by  
25 petitioner do not justify the proposed rezoning.

26 D. PROCESS FOR ADOPTING FINDINGS

Petitioner makes the following argument:

1 "As extensively noted throughout this brief, the  
2 process utilized by the City Council in adopting the  
3 January, 1986 findings was designed to accomplish one  
4 purpose: to find reasons to support a denial of  
5 Petitioner's application. Based upon the record,  
6 there is no doubt that the City Council starting with  
7 its April, 1985 hearings and continuing through the  
8 September and November, 1985 hearings reached its  
9 decision first and decided its reasons later. This  
10 violates the requirement that the decision must flow  
11 from the findings and not vice versa. Heilman v.  
12 Roseburg, 39 Or App 71, 591 P2d 390 (1979).

13 Petitioner's reliance on Heilman is misplaced. In Heilman,  
14 the city council voted to deny the application and asked the  
15 city attorney to prepare findings. No formal order of denial  
16 was made after the vote. The court noted that

17 "there is no order made contemporaneously with or  
18 after the fact-finding and [sic] the findings  
19 themselves do not in any express or implied way  
20 suggest a deliberate ratification of an earlier  
21 tentative decision." Heilman, 39 Or App at 75.

22 City council minutes of September 9, 1985 show the city  
23 council had grave doubts about the merits of the application.  
24 The minutes of the November 25, 1985 hearing show the city  
25 council asked that the findings be redrafted. A new set of  
26 findings was drafted and submitted for council review at a  
hearing on January 6, 1986. The minutes show the council  
considered this last draft of findings, including an order of  
denial, and approved the combined document at the January 6  
meeting.

We believe these circumstances show that the city's  
decision was made on January 6, 1986. Unlike in Heilman, the  
city did not commit itself to any particular course of action

at any particular meeting, as it reviewed findings at each of the various hearings in which the matter was considered.<sup>8</sup>

We find no error as alleged.

The third assignment of error is denied.

The decision of the City of Tigard is affirmed.

FOOTNOTES

1

The uses allowed in the C-P zone include such civic uses as postal services and libraries, and such commercial uses as restaurants, business equipment sales, professional offices, and "convenient sales and personal services (not to exceed 10 percent of the total square footage within the office complex)." In contrast, the C-G district permits all of the uses allowed in the C-P district, plus automobile repair, general retail sales, sports and entertainment facilities and transient lodging. Further, conditional uses permitted within the C-G zone include a variety of additional commercial and service uses. See Tigard Community Development Code, Sec. 18.62 and 18.64.

2

The letter, including citation to approval criteria, preceeded the scheduled hearing by 28 days. Petitioner then submitted a new application and asked for a continuance on October 25, 1985. A continuance was granted and a new hearing scheduled for October 25. See Respondent's Brief at 5 & 6. All the approval criteria existed in the ordinance at the time the application for the plan and zone change was filed.

3

Petitioner argues that the city's first order setting forth what the city believed to be applicable approval criteria constitutes "the law of the case" in that the city made a concession that petitioner's first application met most approval criteria. See The Matter of Heater's Estate, 24 Or App 777, 547 P2d 636, 1976. We do not believe the law of the case doctrine applies. As noted, the city's first order, issued May 6, 1985, was appealed to this board and remanded. Our order of remand was not specific as to the issues the city was to consider. Our order simply "reinvested" the city with jurisdiction over the matter of the plan and zone change. See OAR 662-10-070(b)(4). There was, then, no "law" existing in the case which the city was obliged to follow on remand. Compare this case with Portland Audubon Society v. Clackamas Co., \_\_\_ Or App \_\_\_ (LUBA No. 85-032, April 28, 1986).

4

We understand petitioner to claim it has been denied equal protection of the law under the city's approval

1 policies.

2  
3 5

4 We note that none of the plan and zoning change requests  
5 cited by petitioner as evidence of discriminatory practice by  
6 the city involves changes from the C-P zone to the C-G zone.  
7 We believe it would be necessary for petitioner to compare  
8 criteria utilized in C-P to C-G zone changes in order to prove  
9 that other similar applications were treated differently than  
10 petitioner's application. Tribbet v. Benton Co., 2 Or LUBA 161  
11 (1981).

12  
13 6

14 There is, however, a discussion of a study attempting to  
15 justify more shopping center space. The discussion, however,  
16 does not reference any "need" approval criterion. See Record  
17 at 13. The discussion is relevant, however, to the city's  
18 requirement that a proponent of a change show a change in  
19 circumstances since plan adoption.

20  
21 7

22 The traffic study assumed (as does the applicant) that the  
23 following actions would be taken along with development of the  
24 property: ( 1) extension of Southwest North Dakota to the City  
25 of Tigard; (2) expansion of Scholls Ferry Road and the  
26 Southwest North Dakota Street intersection; (3) signalization  
of that intersection; and 4) the addition of a right-turn phase  
on the signal.

During the course of the hearing, the city council was  
informed that the intersection improvements had been installed  
and that the signal at Scholls Ferry Road and Southwest North  
Dakota would be operational sometime in 1986.

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28 8

29 The city did not provide the notice of decision required by  
30 ORS 227.173 until after it had issued its findings on January  
31 6.



CERTIFICATE OF MAILING

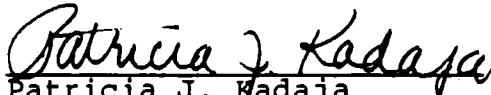
I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 86-004, on May 19, 1986, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

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Dated this 19th day of May, 1986.

  
Patricia J. Kadaja  
Administrative Assistant