BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

OATFIELD RIDGE RESIDENTS RIGHTS, Petitioners, vs. CLACKAMAS COUNTY BOARD OF COUNTY COMMISSIONERS, Respondents.	LUBA No. 86-019 FINAL OPINION AND ORDER

Appeal from Clackamas County.

Gregory S. Hathaway, Portland, filed the petition for review and argued on behalf of petitioner.

Michael E. Judd, Oregon City, filed a response brief and argued on behalf of Respondent Clackamas County.

KRESSEL, Chief Referee; BAGG, Referee; DuBAY, referee, participated in the decision

REMANDED 08/13/86

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

Opinion by Kressel

NATURE OF DECISION

Respondent approved a conditional use permit allowing establishment of a residential care facility in a low density residential zone.

FACTS

The permit applicant is the Clackamas County Housing Authority. The proposal is to convert a dwelling into a residential care facility.[1] The facility will initially serve recovering alcoholics. Later, it will house chronically mentally ill persons.

The Board of County Commissioners held hearings on the application in January, 1986. A motion to approve the permit was passed at a meeting on February 5, 1986. However, the motion did not include or incorporate by reference any findings of fact or conclusions of law.[2]

On March 17, 1986, two members of the three member governing body signed an order approving the permit. The record does not indicate whether the members met to adopt the order or whether they signed it individually. It is clear, however, that the order was not adopted at a public meeting.

The signed order adopts a planning department report as Respondent's findings of fact and conclusions of law. The order adds certain other findings and conditions of approval.

FIRST ASSIGNMENT OF ERROR

Petitioners allege that several aspects of the county's

decision violate their rights to due process under the federal constitution. Petitioners were parties to the permit proceeding, and as such, had property rights protected by the Due Process Clause of the fourteenth amendment. Fasano v. Washington County, 264 Or ___, ___ P2d ___(1973); 1000 Friends of Oregon v. Wasco County, ___ Or App ___, ___ P2d ___ (Slip Op August 6, 1986). However, we are unpersuaded that those rights were deprived in this case.

The first claim is that Respondent was biased in favor of the application because it was filed by an agency of the county. Petitioners assert that Respondent's favorable attitude toward the project deprived them of a fair hearing.

Agency sponsorship of a project may or may not earn it the support of elected officials when they review it for conformance with land use requirements. The possibility that some may favor governmental progams does not disqualify the board for bias. The burden is on Petitioners to show clearly that the officials were incapable of making a decision on the basis of the evidence and argument, Schneider v. Umatilla County, 13 Or LUBA 281, 284 (1985).

There is no suggestion here that Respondent's members would derive private financial gain from approving the project. Nor is there any proof of an indirect financial interest, as was the case in 1000 Friends of Oregon v. Wasco County, supra. Petitioners allege only that Respondent was so committed to the project that it ignored their concerns about the impact the

facility would have on the neighborhood. However, the record indicates that neighborhood impact was considered. The fact that the issue was resolved against petitioners is not grounds for remand or reversal of the decision. We reject the bias claim.

The next claim is that Respondent approved the permit in the mistaken belief that it was legally required to do so by a recent decision of the United States Supreme Court.[3] We assume that Respondent's underlying argument is that the county failed to properly construe the applicable law. ORS 197.835 (8)(a)(D).

We reject this claim. Petitioners support it by citing certain comments by members of the governing body during a hearing on the permit. However, we look to the final order for the justification for the decision, not to comments made by individual commissioners. Citadel Corp., v. Tillamook County, 9 Or LUBA 61, 67 (1983), aff'd, 66 Or App 965, 675 P2d 1114 (1984). The final order evaluates the proposal in terms of the approval standards in the county zoning ordinance. It does not reflect the entitlement theory (i.e., the right to approval) that petitioners say was accepted by Respondent.

The final challenge in this assignment of error[4] raises another bias issue. Petitioners state that a member of the governing body who voted for approval also serves as a board member of the organization that will initially operate the facility. They argue that this member should have disqualified himself from the permit proceeding because of his association with the operator of the facility.

Again, there is no suggestion that the county commissioner would derive private economic gain from participating in the decision. His public involvement in a community organization associated with the proposal is not grounds for disqualification. Eastgate Theatres v. Board of Comm. of Washington County, 37 Or App 745, 754, 588 P2d 640 (1978).

The first assignemt of error is denied.

SECOND ASSIGNMENT OF ERROR

A motion to approve the permit was passed at a meeting of Respondent on February 5, 1986. Proposed findings of fact and conclusions of law were before the governing body at the meeting, but, as noted earlier, the motion did not refer to them. A written order adopting the proposed findings and conclusions, and adding certain other findings and conditions of approval, was signed by two commissioners on March 17, 1986.[5] The record does not indicate what procedure was followed for adopting the order, but it is undisputed that the order was not adopted at a public meeting.

Petitioners assign error to Respondent's failure to adopt the order at a public meeting. They allege that the order was adopted in a private meeting on March 17, 1986 in violation of the Open Meeting Law (ORS 192.630(2)) We sustain the challenge, but on a ground different from the one relied on by petitioners.[6]

In Heilman v. City of Roseburg, 39 Or App 71, 591 P2d 390 (1979) a zone change was denied by vote of the city council at a

public hearing. The vote did not refer to findings of fact or conclusions of law. Two weeks later, findings were formally adopted. However, the findings did not ratify the decision to deny the zone change. The Court of Appeals held that the vote constituted the city's decision and that the failure to include findings of fact and conditions of law in that decision was error. The court stated:

> "This was a quasi-judicial proceeding in which petitioners are entitled to findings, Fasano v. Washington County, 264 Or 574, 507 P2d 23 (1973), and the very heart of adjudication is that the determination of facts must be preliminary. Only after the facts are known, the adjudicator draws those conclusions which are suggested by those facts and issues an appropriate order. Here there is no order made contemporaneously with or after the fact-finding and the findings themselves do not in any express or implied way suggest a deliberate ratification of an earlier tentative decision. Therefore, if the error prejudiced the substantial rights of peititioners, ORS 34.040, the order to dismiss the writ of review must be reversed and the respondent's order of denial must be vacated.
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> "The trial court found, and we agree, that the evidence regarding the rezoning application was conflicting and that there was substantial evidence to support either a denial or approval of the application. We cannot say on review that the council's adoption of findings at the second meeting constituted a ratification of its previous decision, because the council held no discussion of the application and issued no order at the subsequent meeting. Where there are substantial conflicts in the evidence before the council, it is essential for the council to find facts before reaching its conclusion...." 39 Or App at 75-76.

The present case is factually dissimilar from Heilman in some ways, but the principle to be applied is the same. Here, as in Heilman, the decision preceded the findings. As already noted, the February 5th vote to approve the permit did not refer to or

incorporate findings of fact and conclusions of law. It therefore remained necessary for the governing body to justify its permit decision by adopting findings. ORS 215.416(7). Although the final order signed in March ratified the oral decision to approve the permit, we believe that order is without legal effect. The county concedes that it was not adopted at a commission meeting, but instead was signed privately by two commissioners. Such a privately executed order, not adopted at a meeting of the commission, cannot be considered a decision of the county commission. Murphy v. City of Albina, 22 Or 106, 111, 29 p. 353 (1892). Helberg v. Civil Service Comm., 10 Or App 62, 66, 498 P2d 789 (1972).

If the order signed on March 17, 1986 is disregarded, as we believe it must be, what remains is the vote of February 5th. That vote did not include findings. In light of Heilman, supra, and ORS 215.416(7), the decision must therefore be remanded.

The second assignment of error is sustained. A remand is necessary for adoption by the governing body of a final decision with findings of fact and conclusions of law. ORS 215.416(7).

THIRD ASSIGNMENT OF ERROR

Petitioners argue that the county failed to compare the site with others that might be suitable for the facility. They say that the governing body recognizied this as an important consideration during the hearings on the permit. However,

petitioners do not cite any portion of the county zoning ordinance or comprehensive plan requiring this sort of comparison. The permit decision was subject only to those standards set forth in the local ordinance and plan. Burlington Northern v. Jefferson County, 13 Or LUBA 274 (1985). We therefore find no error in the county's failure to make findings comparing the proposed site with other possible locations for the facility.

The third assignment of error is denied.

FOURTH ASSIGNMENT OF ERROR

Petitioners here rephrase their argument that Respondent misconstrued the law in light of a recent United States Supreme Court decision. They contend that Respondent shifted the burden of proof to the permit opponents in the mistaken belief that this was constitutionally required. However, the record does not support this contention. Rather, the record shows that the permit applicant was required to establish that the applicable standards were met. Beyond that, the record also shows that the two commissioners voting for approval believed (correctly) that they could not deny the permit based on unsubstantiated neighborhood fears. We find no error.

The fourth assignment of error is denied.

FIFTH ASSIGNMENT OF ERROR

The next claim is that the Respondent deprived petitioners of due process by not informing them of the locations of other residential facilities sponsored by the County Housing

Authority or the Mental Health Department. Petitioners' theory seems to be that this information was a sine qua non of a full and fair hearing. However, they do not support their claim with legal authority and we know of none that would justify remanding or reversing the decision for the reason they assert[7]. Under the circumstances, we proceed no further.

The fifth assignment of error is denied.

SIXTH ASSIGNMENT OF ERROR

In the final assignment of error petitioners claim that the findings adopted by the county do not address issues they raised during the public hearings on the permit. We have previously held that the procedure followed by the county in adopting the findings was defective. In the discussion below, however, we treat the findings as validly adopted, and we consider the merits of petitioners' challenge to their adequacy. ORS 197. 835(10).

When issues relevant to approval standards are clearly raised in a permit proceeding, the decisionmaker is obligated to address those issues in the findings. City of Wood Village v. Portland LGBC, 48 Or App 79, 616 P2d 528 (1980); Hillcrest Vinyard v. Board of Comm. of Douglas County, 48 Or App 285, 608 P2d 201 (1980). Petitioners direct our attention to ten issues they say should have been addressed. We consider each in the paragraphs below.

1. The facility will be incompatible with the low density area because it will house 12-15 persons.

We find no error in the order on this point. First, we note that petitioners do not identify any portion of the record in which this issue is raised. We will not search for the evidence relied on by a petitioner in a findings challenge. Second, the findings indicate that the site is large enough to accommodate the projected number of occupants. Nothing in the county ordinance requires that a residential care facility be occupied by a given number of persons.

2. The proximity of the residence to nearby Rex Putnam High School, Concord and Riverside Grade Schools.

The record contains testimony expressing fear that the facility will present a threat to nearby school children. The final order addresses the testimony, concluding that the proposal wouldnot present a threat. The finding is adequate.

3. The dangerous intersection at Oatfield and Roethe Roads.

Opponents of the permit testified that this intersection is dangerous and would be made more dangerous by operation of the facility. However, the final order indicates that the county traffic engineer considered these issues and nonetheless felt that the location of the facility did not present traffic problems. The county could rely on the advice of its engineer. See Meyer v. Portland, 7 Or LUBA 184 (1983).

4. Roethe road is steep and is dangerous in winter; persons using the facility will encounter dangerous conditions.

We are unclear as to the precise nature of this issue, or the findings petitioners believe should have addressed it. In

any event, petitioners do not cite testimoney or other evidence raising the issue.

5. The potential risk of danger to school children.

This issue is discussed above.

6. The fact that this facility is the first of its kind to be located in a low density residential neighborhood.

We fail to see why this fact, assuming it is a fact, required a response by the county in the final order. Petitioners point to no approval standard under which such a fact would be relevant.

7. Other sites would be better suited for the facility.

We have previously rejected the argument that findings on this issue were necessary.

8. There are no commercial facilities within walking distance of the facility.

We find no standard in the county ordinace requiring commercial facilities within walking distance of a residential care facility. No finding on this point was therefore required.

9. The resultant decline in property values.

A letter from a permit opponent alleges that property values will decline if the facility is established. However, petitioners do not explain which approval standard applicable to the proposal requires consideration of property value impact. Since a legal theory is not developed, we proceed no further. Deschutes Development v. Deschutes County, 5 Or LUBA 218 (1982).

10. Expensive improvements will be necessary to make the dwelling suitable for the intended use.

Petitioners cite no approval standard that would make this issue relevant. No findings were required.

Petitioners raise one final contention in this appeal. They claim that "There is no substantial evidence in the record which addresses these issues [the issues summarized above] which would allow the county to conclude the applicable criteria have been satisfied." Petition at 21. However, the statute governing our review of land use decisions does not require that there be substantial evidence addressing "issues" raised during permit hearings. The statute authorizes relief where the decision is unsupported by substantial evidence. See ORS 197.835 (8)(a)(C). Petitioners point to no specific portion of the decision that lacks evidentiary support. We therefore reject this argument.

The sixth assignment of error is denied.

The decision is remanded for adoption by Respondent of a final order containing findings of fact and conclusions of law. ORS 215.416(7).

FOOTNOTES

[1] Respondent's ordinance defines "residential care facility" as

> "[A] residence, boarding house, or apartments operated for the purpose of providing room board, care...and when appropriate, a planned treatment or training program of counselling, therapy, or other rehabilitative social service, for persons of similar or compatible conditions of circumstances." Section 200 Clackamas County Zoning Ordinance p. 202-14.
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> "[A] residential home for (6) or more elderly, or physically or mentally handicapped persons, and foster and shelter care homes for (7) or more childeren are residential care facilities. Facilities which require regular on-premise care by a registered physician or registered nurse are not 'residential care facilities'." (9/19/84)

[2] The record shows that commissioner Lindquist moved for approval of the permit "as requested with some restrictions." Record at 4. The restrictions were those recommended by a previous witness, Dr. Foresman.

[3] City of Cleburne v. Cleburne Living Center, ___ US ___, 105 S Ct. 3249 (1985). In Cleburne the court construed an ordinance that required a special use permit for a group home for mentally retarded persons but did not require such a permit for other uses, such as apartment houses, boarding houses, fraternity houses, and nursing homes. The court held that the record showed no rational basis for believing that a group home would pose any special threat to the city's legitimate interests. The ordinance therefore violates the Equal Protection Clause.

We are not asked in this case to analyze the county's ordinance in light of Cleburne. Rather, the issue is whether Respondent approved the permit without considering the standards in the zoning ordinance. The record indicates that the standards were considered.

[4] One argument in this assignment of error is repeated in more detail in the second assignment of error. We address it in the second assignment of error.

[5] The order is dated March 17, 1986, but is "entered Nunc Pro Tunc as of February 5, 1986." Record at 2.

[6] ORS 192.680 gives the court open jurisdiction to enforce the open meeting law. Subsection (3) of the statute states:

> "The provisions of this section shall be the exclusive remedy for an alleged violation of ORS 192.610 to 192.690."

[7] The permit applicant introduced into the record letters from neighbors of two other residential facilities to show that neighborhood impact was not adverse. Petitioners were therefore on notice of the locations of those two facilities. We find no authority for the proposition that due process entitled them to notice of the locations of other facilities in the county.