BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

PAMELA STRAWN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	LUBA No. 90-098
CITY OF ALBANY,	)	
	)	FINAL OPINION
Respondent,	)	AND ORDER
	)	
and	)	
	)	
MILESTONES FAMILY RECOVERY, INC.,	)	
	)	
Intervenor-Respondent.	)	

Appeal from City of Albany.

Pamela Strawn, Albany, filed the petition for review and argued on her own behalf.

James V.B. Delapoer, Albany, and George B. Heilig, Corvallis, filed a response brief on behalf of respondent and intervenor-respondent. With them on the brief was Long, Delapoer, Healy and McCann, P.C. James V.B. Delapoer argued on behalf of respondent; George B. Heilig argued on behalf of intervenor-respondent.

HOLSTUN, Referee; KELLINGTON, Chief Referee; SHERTON, Referee, participated in the decision.

REMANDED 12/06/90

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

Opinion by Holstun.

NATURE OF THE DECISION

Petitioner appeals an Albany City Council decision denying her appeal of a City of Albany Hearings Board (hearings board) decision approving an application to modify a non-conforming use.

MOTION TO INTERVENE

Milestones Family Recovery, Inc. moves to intervene on the side of respondent. There is no objection to the motion, and it is allowed.

FACTS

The subject property is designated Low Density Residential in the Albany Comprehensive Plan and is zoned Single Family Residential (R-1). The property includes 8,163 square feet and is the site of the Hochstedler House, an historic structure constructed in 1889. The structure, described as "a locally-significant and well-preserved example of Stick/Eastlake Style architecture," was constructed as a single family home and has been included on the National Register of Historic Places since 1980. Record (HB) 34.[1] In addition, the subject property is located within the Hackleman Historic District, which is also listed

[1]The record submitted by the city includes two documents -- the record compiled before the city hearings board and the record compiled before the city council. The documents are numbered separately rather than sequentially and we refer to the record before the hearings board as "Record (HB)" and the record before the city council as "Record (CC)."

on the National Register of Historic Places.

Sometime prior to 1971, the Hochstedler House was converted from a single family dwelling to a three unit dwelling. Under the zoning regulations in effect at that time, three unit dwellings were allowed on lots in excess of 8,000 square feet. Under the current R-1 zoning, the three unit dwelling is a "non-conforming situation."[2]

The applicant proposes to convert the existing three unit dwelling to a residential alcohol and drug treatment center for adolescents.[3] A development permit is required before modifying a non-conforming situation. ADC § 1.100(1). The relevant standards governing modification of a non-conforming situation are set forth at ADC § 1.100(5)(a) as follows:

> "1. The requested modifications will not create additional adverse effects for abutting properties or the neighborhood (e.g. objectionable conditions; visual, noise, and/or air pollution; increased vehicular traffic, dust, or street parking).
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> "2. To the maximum extent possible, as determined by the approval authority, the requested modification meets all other applicable Code

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[2]Multi-family dwellings are allowed in the R-1 zone if approved as part of a planned development. However, the three unit dwelling on the subject property was not approved as part of a planned development. Under Albany Development Code (ADC) § 1.090(1), the term "non-conforming situation" includes non-conforming "lots, developments, and uses * * *."

[3]Up to 14 adolescents would be housed at the center for up to 90 days. At least one supervising staff person would be on the premises at all times. Record (HB) 143.

standards, or necessary variances are granted.

"3. The existing non-conforming situation was not created illegally or without required approvals."

The hearings board conducted a public hearing on the request on May 16, 1990 and approved the request unanimously. Petitioner and others appealed the hearings board's decision to the city council. The city council conducted a de novo review and held a public hearing on June 27, 1990.[4] At the close of the public hearing the city council voted 3 to 2 to deny the appeal and affirm the hearings board's decision.

The Albany City Council is composed of seven members. It appears from the record that only six members were present at the June 27, 1990 public hearing, and one member "excused herself because she thought she was biased in favor of the applicant * * *." Respondents' Brief 5. The Albany

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[4]The ADC defines "de novo hearing" as follows:

"'De novo hearing' shall mean a hearing by the review body as if the action had not been previously heard and as if no decision had been rendered, except that all testimony, evidence, and other material from the record of the previous consideration may be included in the record of the review." (Emphasis added.)

Respondent and intervenor-respondent (respondents) concede the city council's review in this case was de novo. Respondents' Brief 1. Actually, the appeal hearing apparently was limited to issues raised by the appellants below in their appeal of the hearings board's decision. However, the city council considered those issues de novo and conducted its own evidentiary hearing.

City Charter (ACC) provides in relevant part "the concurrence of four of the members of the council shall be necessary to decide any question before the council." ACC Chapter III Section 20. Therefore, the motion to deny the appeal and affirm the hearings board's decision failed because it did not receive the required four votes. However, the city council determined that "since four affirming votes are required to pass a motion, the decision of the Hearings Board is affirmed." Record (CC) 8.

DECISION

Petitioner asserts eight assignments of error. We consider only the seventh assignment of error, in which petitioner contends the city erroneously concluded the legal effect of its failure to obtain four votes in favor of a motion to deny the appeal is to uphold the hearings board's decision. Petitioner contends the city's interpretation of the legal effect of its 3-2 vote is to render the de novo public hearing before the city council a nullity and deny her right under the ADC to appeal the hearings board's decision to the city council.

Under ADC § 4.140, affected parties are given the right to appeal a decision of the hearings board to the city council. All parties agree that the question presented in the appeal to the city council was whether the hearings board's decision should be affirmed or overturned, in whole or in part. Further, under ADC §§ 4.140 and 4.190, the

parties are entitled to an answer to that question.[5]

ADC § 4.160 governs the city council's scope of review and provides as follows:

> "Scope of Review. The reviewing body shall determine the scope of review on appeal to be one of the following:
>
> "(1) Restricted to the record made on the decision being appealed.
>
> "(2) Limited to such issues as the reviewing body determines necessary for a proper resolution of the matter.
>
> "(3) A de novo hearing on the merits."

As noted earlier in this opinion, the city conducted a de novo review in this matter.

ACC Chapter III Section 20 requires "the concurrence of four members of the of the council * * * to decide any question * * *." Such requirements for concurrence of a majority of the governing body (as opposed to a majority vote of a quorum) are to be given effect. Such requirements may leave a quorum of the governing body unable to achieve the required majority vote of the governing body where

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[5]ADC § 4.190 provides in part:

> "* * * When the [city council] modifies or renders a decision that reverses a decision of the hearing body, the [city council] shall set forth its findings and state its reasons for taking the action. When the [city council] elects to remand the matter back to the previous hearing body for such further consideration as the [city council] deems necessary, it may include a statement explaining the error found to have materially affected the outcome of the original decision and the action necessary to rectify such."

members are absent or abstain.[6] State ex rel Roberts v. Gruber, 231 Or 494, 498-500, 378 P2d 657 (1962). In such circumstances, even though a majority of the quorum favors a particular action on a question, the city council cannot act on the question.

Respondents cite no authority in the ADC, ACC or elsewhere for their contention that the failure of the motion to receive four votes on June 27, 1990 has the legal effect of upholding the hearings board's May 16, 1990 decision. Contrary to the ultimate conclusion reached by the city concerning the legal effect of its vote, the unambiguous language in ACC Chapter III Section 20 supports a conclusion that because there were not four votes for or against the appeal, the city council took no action on the appeal.

Neither does the city explain the legal basis for its view of the legal effect of the 3-2 vote in the challenged decision itself. Respondents' position in this appeal concerning the legal effect of the city council's 3-2 vote appears to rest entirely, by way of analogy, on appellate court practice.

> "Appellants failed to convince four councillors that the Hearings Board decision should be reversed. The failure of the Council to must[er]

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[6]The Albany City Charter provides that four members of the council constitute a quorum and may conduct business. However, under Section 20 four like votes are required to take action.

> four (4) votes is not unlike an appellate court which is deemed to have affirmed the lower court decision if it deadlocks in its review. Certainly [the applicant] is entitled to have the [Hearings] Board's order affirmed under the charter. [Fasano v. Washington Co. Comm.], 264 Or 574, 507 P2d 213 (1973). See also [Eastgate Theatre v. Bd. of County Comm'rs], 36 Or App 745, 588 P2d 640 (1978)." Respondents' Brief 14-15.

Respondents are correct that the general rule is where an appellate court is unable to reach a majority decision, the decision under review is considered affirmed or the appeal is considered denied. 5 Am Jur 2d, Appeal and Error § 902 (1962); 5B CJS, Appeal and Error § 1844 (1958). In Oregon, where the Justices of the Supreme Court or Judges of the Court of Appeals are equally divided in their view as to "the judgment to be given, the judgment appealed from shall be affirmed." ORS 1.111(5); 2.510(6); see Wheeler v. Huston, 288 Or 467, 476, 605 P2d 1339 (1980); Brannan v. Slemp, 260 Or 336, 490 P2d 979 (1971).

However, respondents' appellate court practice analogy fails to recognize critical differences between the function performed by local governments in their quasi-judicial land use decision making and the function performed by appellate courts.[7] As respondents recognize, the applicant bears the

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[7]As the Oregon Supreme Court explained in 1000 Friends of Oregon v. Wasco Co. Court, 304 Or 76, 82, 742 P2d 39 (1987), the rules governing judicial conduct and procedure do not necessarily apply to local government quasi-judicial decision makers.

> "* * * The prefix 'quasi,' we recently said in another context, 'means that a thing is treated as if it were something it

burden of proof in demonstrating that all relevant approval standards governing modification of a non-conforming use are met. Fasano v. Washington Co. Comm, 264 Or at 586; Billington v. Polk County, 13 Or LUBA 125 (1985); Bobitt v. Wallowa County, 10 Or LUBA 112 (1984). The hearings board determined that burden was met. However, once the hearings board's decision is appealed to the city council, the applicant is obligated to carry its burden of proof before the city council. See 1000 Friends of Oregon v. Benton County, ___ Or LUBA ___ (LUBA No. 90-066, September 14, 1990), slip op 10.

That the applicant had the burden of proof before the city council is even clearer in this case because the city council's review was de novo, and under the city's definition of that term, the hearings board's decision is entitled to no weight at all and the city council considers the matter "as if the action had not been previously heard and as if no decision had been rendered * * *[.]" However, even where the city council's review is limited to the evidentiary record below, the city council must adopt its own decision and findings. While the city council may adopt the hearings board's decision and findings as its own, the

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> resembles but is not.' The quasijudicial decisions of local general-purpose governing bodies resemble, or should resemble, adjudications in important respects that bear on the procedural fairness and substantive correctness of the decision, but in other respects these bodies remain more 'quasi' than judicial. * * *." (Citation omitted.)

city council is also free under ADC § 4.190 to disagree with the hearings board and determine that the applicant failed to carry its burden of proof.

Absent some ADC or city charter provision establishing that the hearings boards' decision is revived in the event the city council is unable to determine whether the applicant has carried its burden of proof, we conclude the legal effect of the city council's failure to achieve the required majority vote is that intervenor's application to modify the existing non-conforming use is denied.

We find no Oregon appellate court cases directly on point. However, in Committee for a Rickel Alternative v. City of Linden, 111 NJ 192, 543 A2d 943 (1988)(Rickel), the New Jersey Supreme Court held that where a de novo review of a board of adjustment decision granting a zoning variance resulted in a deadlock, the legal consequence was that the variance was denied. See also Grant Center v. Mayor & Council, 235 NJ Super 491, 563 A2d 449 (1989); Lohrmann v. Arundel Corp., 65 Md App 309, 500 A2d 344 (1985).

The principle underlying the above cited cases is relatively straightforward. The applicant bears the burden of proof in local proceedings. Where the local government provides a right to de novo review of an inferior tribunal's decision, the applicant must also carry its burden of proof before the appellate tribunal. Where the appellate tribunal is under a legal obligation to act only where a majority of

its members concur in the action, and a majority cannot agree on a decision, the applicant is deemed to have failed to carry its burden of proof and the application must be denied. The result is the same whether the applicant prevailed before the inferior tribunal or not.[8]

For the reasons explained above, the city's decision must be reversed or remanded. Our conclusion concerning the legal effect of the city council's 3-2 vote (i.e., that the application is denied) suggests the city's decision should be reversed. For two reasons we remand rather than reverse.

First, we cannot tell from the record why Councillor

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[8]The city in Rickel, like the City of Albany, was required by law to act only where a majority of the city council concurred. The New Jersey Supreme Court explained:

> "* * * N.J.S.A. 40:55D-17(e) now provides that '[t]he affirmative vote of a majority of the full authorized membership of the governing body shall be necessary to reverse, remand, or affirm with or without conditions any final action of the board of adjustment.' * * *" Rickel, 111 NJ at 196.

As noted earlier in this opinion, the Albany City Council conducted a de novo review proceeding. It accepted new evidence and, had it been able to reach a decision, it would have been required to adopt findings to support that decision. Although the local de novo proceedings before the appellate tribunals in Rickel and Grant Center were limited to the evidentiary record compiled before the inferior tribunal, the New Jersey Supreme Court noted the appellate review tribunal in conducting this type of de novo proceeding is to "consider the record * * * and the legal arguments of counsel and to make its own findings and conclusions based on that record and argument. * * *." Rickel 111 NJ at 199. The de novo proceedings in Lohrmann were more like the de novo proceedings envisioned by ADC §§ 4.160 and 4.180, see n 4. In Lohrmann, the Maryland Court of Appeals, quoting from its earlier decision in Boehm v. Anne Arundel County, 54 Md App 497, 459 A2d 590, cert denied 297 Md 108 (1983), explained that under the applicable county code de novo review "'is an entirely new hearing at which time all aspects of the case should be heard anew as if no decision has been previously rendered' * * *." Lohrmann, 65 Md App at 319. (Emphasis in original.)

Silbernagel elected not to participate in the appeal. Respondents contend in their brief that she "excused herself because she thought she was biased in favor of the applicant * * *." Respondent's Brief 5. As the Court of Appeals has made clear, although the parties have a right under Fasano to an impartial tribunal in quasi-judicial land use decision making, they are also entitled to a "determination * * * by a reasoned order based upon supported findings." Eastgate, 37 Or App at 750 (citing Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 3, 20, 569 P2d 1063 (1977)).[9] The Court of Appeals explained as follows:

> "The goal of the Fasano procedures is that land-use decisions should be made fairly. The abstention in this case did not prevent partiality; instead, it prevented the decision itself. Fasano cannot be applied so literally that the decision-making system is aborted because an official charged with the public duty of adjudication fears that his motivation might possibly be suspect. The court stated in Fasano, that '[p]arties at the hearing before the county governing body are entitled * * * to a tribunal

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[9]In Eastgate, the applicant sought a plan change to develop an industrial park warehouse complex. The county commissioners, like the Albany City Council, could only act with the concurrence of a majority of the governing body. The county commissioners voted 2 to 1 in favor of the application, with two county commissioners abstaining. Of the two county commissioners who declined to participate, one abstained

> "because he had been chairman of a community planning organization which had studied and unanimously recommended approval of the proposed plan change. The other disqualified himself because he was a director of the Metropolitan Service District which had expressed an interest in acquiring the parcel as a site for a solid waste milling-transfer station." Eastgate, 37 Or App at 748.

> which is impartial,' * * * but the commissioners' refusal to vote here effectively denied the petitioners their entitlement to any tribunal at all; if there is no tribunal, partiality and impartiality become irrelevant." Eastgate, 37 Or App at 754.

On remand, city councillors may consider whether abstention is warranted in this case, in view of the circumstances and the above direction from the Court of Appeals. As additional guidance in making that determination, we note that the Oregon Supreme Court has made it clear that a quasi-judicial decision maker is not required to abstain merely to avoid an appearance of impropriety. Rather, actual bias or self interest is required. 1000 Friends of Oregon v. Wasco Co. Court, 304 Or at 84.

A second reason for remanding rather than reversing is that one of the seven city council members apparently was not present at the public hearing and did not participate in the decision. This councillor's vote offers a second possibility of reaching the merits in this case so that a deadlock may be avoided and the parties may receive the reasoned decision to which they are entitled.[10] We note that even where appellate courts have deadlocked, cases have on occasion been delayed where there is an expectation that

[10]Of course, the absent city councillor would be required to review the record of the prior de novo proceeding unless additional proceedings are held on remand.

changes in court personnel may eliminate a deadlock and allow a decision on the merits. Serra v. National Bank of Commerce of Seattle, 27 Wash 2d 277, 178 P2d 303 (1947); Luco v. Toro, 88 Cal 26, 25 P 983 (1891). While there may not be an expectation of new city councillors in this case, there could easily be an expectation that all city councillors would be present at the next meeting of the city council.[11]

Finally, we do not consider the merits of petitioner's remaining assignments of error.[12] However, the following is provided as guidance to the parties on what appears to be the central dispute in this matter. Petitioner argued before the hearings board and in considerably more detail before the city council that in order for the proposed treatment center to comply with a variety of structural regulations, the Hochstedler House would require significant alterations. Petitioner contends the required alterations will diminish the historic significance of the Hochstedler

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[11]We are mindful that under ORS 227.178(1) the city is obligated to take action on an application for approval of a permit "within 120 days after the application is deemed complete." However, as we have already explained, the city's failure to reach a majority vote supporting a decision one way or the other means the city's action is to deny the application. Faced with that prospect, it seems likely an applicant would agree to a reasonable extension of time under ORS 227.178(4) to pursue the possibility of reaching a decision on the merits.

[12]Those assignments of error, in significant part, rely on evidence submitted and issues raised after the hearings board's decision. Because a majority of the city council was unable to reach a consensus, the city council adopted no findings addressing those issues.

House, resulting in adverse impacts on the surrounding historic district in violation of the criteria set forth in ADC § 1.100(5).[13]

To the extent a city decision simply approves a change in the non-conforming use of the existing structure with no approval of interior or exterior modifications to accommodate that new use, we agree with respondents that no findings are required to explain why hypothetical modifications to the structure do not violate the standards governing modification of non-conforming situations set forth in ADC § 1.100(5). On the other hand, it is possible the city may wish to approve the requested modification of the current non-conforming use along with any interior or exterior modifications that may be necessary to accommodate the proposed use -- in the sense such interior or exterior modifications could be made in the future without applying for a development permit under ADC § 1.100(1) or demonstrating that such modifications comply with the criteria in ADC § 1.100(5). If this latter type of approval is intended, the city must explain in its findings whether such structural modifications will be required and, if so, demonstrate that such modifications are consistent with the criteria in ADC § 1.100(5).

The city's decision is remanded.

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[13]Those criteria are set forth in our discussion of the facts, supra.