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

HOLLYWOOD NEIGHBORHOOD)
ASSOCIATION,)
)
Petitioner,)
)
vs.)
)
CITY OF PORTLAND,)
)
Respondent,)
)
and)
)
GENERAL HEALTH, INC., an Oregon)
corporation dba DELTA CLINIC,)
)
Intervenor-Respondent.)

LUBA No. 91-100
FINAL OPINION
AND ORDER

Appeal from City of Portland.

Michael E. Haglund, Portland, filed the petition for review on behalf of petitioner.

Ruth Spetter, Portland, represented respondent.

Steven A. Moskowitz, Portland, filed a response brief on behalf of intervenor-respondent.

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

REMANDED 10/30/91

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

1 Opinion by Sherton.

2 Petitioner challenges a development permit issued by
3 respondent to intervenor-respondent's director, for a
4 "medical clinic" in the Office Commercial 1 (CO1) zoning
5 district. The assignments of error in the petition for
6 review contend respondent erred in (1) failing to provide a
7 public hearing before making the challenged decision;
8 (2) failing to provide notice of such a public hearing, as
9 required by ORS 197.763; (3) not making information
10 submitted by the applicant available to the public; and
11 (4) determining the proposed use is a "medical clinic."

12 On September 26, 1991, this Board issued an order
13 denying the motion to dismiss filed by respondent and
14 intervenor (respondents). In that order we concluded that
15 determining whether the proposed use is a "medical clinic"
16 requires interpretation and judgment and, therefore, the
17 exception to our jurisdiction provided by ORS
18 197.015(10)(b)(C) does not apply.¹

19 Respondent has not submitted a response brief, but
20 rather moves that the challenged decision be remanded for

¹ORS 197.015(10)(b)(C) provides that "land use decision" does not include a decision of a local government:

"Which approves or denies a building permit made under land use standards which do not require interpretation or the exercise of factual, policy or legal judgment[.]"

ORS 197.015(10)(b)(C) has been amended by Oregon Laws 1991, chapter 817, section 1, which became effective September 29, 1991. All references and citations in this opinion are to the statutes prior to the 1991 amendments.

1 further proceedings. Respondent represents that after
2 remand by this Board, and provided that intervenor does not
3 withdraw the subject application, respondent will conduct a
4 public hearing on the question of whether the proposed use
5 is a "medical clinic" and, therefore, permitted outright in
6 the CO1 zone. Respondent also states it will provide notice
7 of such hearing to neighboring property owners, as requested
8 by petitioner.²

9 Petitioner states it will not agree to respondent's
10 motion for remand unless respondent agrees to
11 (1) immediately suspend the challenged development permit;
12 and (2) follow Type III rather than Type II procedures in
13 acting on the subject application after remand.³

14 We have stated that where a petition for review has
15 been filed, granting a local government request for remand
16 of an appealed decision, over petitioner's objection, is
17 consistent with the policy of ORS 197.805 and 197.835(9)(a)
18 favoring complete and expeditious review only if the local
19 government demonstrates that the proceedings on remand will

²Respondent also states that if intervenor chooses to withdraw the subject application and file a new application, the procedures followed by respondent in acting on such new application will be governed by the relevant statutes, as amended by Oregon Laws 1991, chapter 817. Intervenor takes no position on whether it will withdraw the subject permit or file a new application.

³Under the Portland City Code (PCC), a Type II procedure involves providing notice of an initial administrative decision made without hearing and an opportunity for a local appeal, whereas a Type III procedure involves providing a public hearing and notice thereof prior to making an initial decision. PCC 33.730.020 and 33.730.030.

1 be capable of providing petitioner with the relief it would
2 otherwise be entitled to receive from this Board. Angel v.
3 City of Portland, ___ Or LUBA ___ (LUBA No. 90-108, Order on
4 Motion for Remand, January 16, 1991), slip op 4; Century 21
5 Properties v. City of Tigard, 17 Or LUBA 1298, 1307, rev'd
6 on other grounds 99 Or App 435 (1989); Mobile Crushing v.
7 Lane County, ___ Or LUBA ___ (LUBA No. 84-092, Order Denying
8 Motion for Remand, January 16, 1985).

9 In this case, petitioner does not raise in the petition
10 for review the issue of whether a Type III procedure is
11 required under the relevant statutory and PCC provisions.
12 Therefore, the most petitioner would be entitled to from
13 this Board, if this appeal proceeding were continued, would
14 be a final opinion and order remanding the challenged
15 decision,⁴ on the basis that respondent had not provided the
16 hearing and notice of hearing and other procedures required
17 by statute.⁵ Respondent agrees to provide such notice and
18 hearing and other procedures regarding the subject

⁴We note that regardless of whether the this Board's final opinion and order remanding the challenged decision is issued on the basis of respondent's motion for voluntary remand, such an order will render the challenged development permit ineffective. See Standard Insurance Co. v. City of Hillsboro, 17 Or LUBA 886, 900 (1989); Gearhard v. Klamath County, 7 Or LUBA 27, 31 (1982).

⁵The challenged decision includes no findings, and is supported by virtually no evidentiary record. Therefore, if we determined that respondent failed to provide a statutorily required hearing and notice of hearing, we would remand the decision to respondent to hold such hearing and interpret and apply its code provisions in the first instance. See Flowers v. Klamath County, 18 Or LUBA 647 (1990); see also Mental Health Division v. Lake County, 17 Or LUBA 1165, 1176 (1989).

1 application if its motion for remand is granted and the
2 subject application is not withdrawn and, therefore, agrees
3 to provide petitioner the relief it would be entitled to
4 from this Board.

5 Accordingly, the city's decision is remanded.