

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 OWEN DEVELOPMENT GROUP, INC.,)
5 and PETER O. ESLICK,)
6)
7 Petitioners,) LUBA Nos. 91-107 and 91-123
8)
9 vs.) FINAL OPINION
10) AND ORDER
11 CITY OF GEARHART,)
12)
13 Respondent.)

14
15
16 Appeal from City of Gearhart.
17

18 Jeff H. Bachrach, Portland, filed the petition for
19 review and argued on behalf of petitioners. With him on the
20 brief was O'Donnell, Ramis, Crew & Corrigan.
21

22 William R. Canessa, Seaside, filed the response brief
23 and argued on behalf of respondent.
24

25 KELLINGTON, Referee; HOLSTUN, Chief Referee; SHERTON,
26 Referee, participated in the decision.
27

28 DISMISSED 12/06/91
29

30 You are entitled to judicial review of this Order.
31 Judicial review is governed by the provisions of ORS
32 197.850.

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a letter of the city administrator
4 expressing an opinion concerning the nature of a 1985
5 shopping center approval decision, and the city's council's
6 refusal to hear an appeal of that letter opinion.

7 **FACTS**

8 The subject property is zoned Residential Commercial
9 Planned Development (RCPD).¹ The RCPD zone does not list
10 any permitted uses. Rather, all uses allowable in the RCPD
11 zone are listed as conditional uses. Among the uses which
12 are listed as conditionally permitted in the RCPD zone, are
13 those uses allowed in the city's Resort Commercial (C-2)
14 zone.²

15 In 1985, the city approved petitioners' application for
16 preliminary development plan approval and a conditional use
17 permit (hereinafter referred to as 1985 conditional use
18 permit decision) for a 104,000 square foot retail shopping
19 center on the subject parcel.³ The application stated
20 "[t]he final configuration of the center is approximate and
21 schematic until final lease arrangements can be made."

¹The subject parcel is the only parcel in the city zoned RCPD.

²In turn, the C-2 zone states that it allows all commercial uses permitted in the city's Neighborhood Commercial (C-1) zone.

³The shopping center was to be the first phase of a planned development on the subject property.

1 Record 312. The 1985 decision approving the shopping center
2 stated the following regarding the tenants which might
3 occupy the leased shopping center space:

4 "The applicant has stated in his testimony that
5 the retail shopping center proposed will likely
6 include a food market, a drug store, a variety
7 store, a junior department store, a restaurant, a
8 financial institution and other retail shops.
9 These are all uses permitted in either the C-1 or
10 C-2 Zoning Districts and are therefore included as
11 permitted conditional uses within the RCPD Zone."
12 Record 113.

13 In 1986, the planning commission granted final development
14 plan approval for the shopping center (phase I of the
15 planned development).

16 In 1991, the city administrator approved a development
17 permit authorizing certain work to begin on the shopping
18 center.⁴ During 1991, a dispute arose between petitioners
19 and the city regarding whether occupancy permits could be
20 denied for particular kinds of retail uses which might seek
21 to occupy the shopping center. To resolve this dispute,
22 petitioners submitted an application for an interpretation
23 of the 1985 conditional use permit decision requesting the
24 following:

25 "* * * Are there any restrictions on the kind of
26 retail stores and shops that can locate in the
27 shopping center?

⁴The development permit authorizes the installation of utilities, preparation of building pads, grading and paving, and installation of on-site lighting. Record 52.

1 "It is our position that all uses allowed in the
2 C-1 and C-2 Zoning Districts can locate in the
3 shopping center.* * *"⁵ Record 50.

4 A staff report was issued regarding petitioners'
5 application for an interpretation of the 1985 conditional
6 use permit decision. That staff report stated the following
7 regarding the 1985 conditional use permit decision:

8 "[The 1985 decision approved t]hree anchor stores,
9 a grocery store, a drug store and a variety store,
10 pads to be developed for use as a restaurant and
11 financial institution; and unspecified businesses
12 to be located in the remaining retail spaces shown
13 on the final site plan. It is unclear what types
14 of businesses could be located in these undefined
15 retail spaces. However, it could be inferred that
16 because these spaces represent a relatively small
17 percentage of the total project square footage,
18 specifying their particular use, at the time of
19 plan approval, was not vital. * * * Therefore, any
20 retail use permitted in the C-1 or C-2 Zone would
21 be permitted in the unspecified retail spaces
22 shown on the approved site plan." Record 46.

23 The planning commission considered petitioners'
24 application for an interpretation of the 1985 conditional
25 use permit decision during a public meeting. The minutes of
26 that meeting state:

27 "Each commissioner was asked to comment on how the
28 Lewis & Clark Shopping Center should proceed. All
29 commissioners felt the project should proceed as
30 per the 1985 agreement with the five listed

⁵There is some confusion in the record concerning whether petitioners requested an interpretation of the 1985 conditional use permit decision or the 1986 decision. For purposes of this opinion it does not matter which decision petitioners sought to have interpreted. For convenience, we refer to the 1985 conditional use permit decision as the decision for which an interpretation was requested.

1 stores. Discussion followed on the 'community
2 shopping center' concept and the wish of the
3 commission to maintain a close handle on what goes
4 on at the center along with the fact that the RCPD
5 zone allowed no outright uses. All but
6 Commissioners Clarke and Mersereau felt the
7 smaller undefined stores should go through the
8 Conditional Use process." (Emphasis supplied.)
9 Record 36.

10 No planning commission member made a motion and no vote
11 was taken concerning petitioners' application for an
12 interpretation. Thereafter, the city administrator sent a
13 letter to petitioners stating:

14 "As you know, in response to your letter
15 requesting clarification in respect to what
16 specific businesses can be located in your
17 client's RCPD project, the Gearhart Planning
18 Commission met Tuesday evening, July 9, 1991.

19 "Since you were present, you know that no formal
20 motion, resolution or order was approved by the
21 Commission. The Commissioners did, however,
22 express their feelings as to the intended projects
23 when polled by the Chairman. By his count and
24 mine, as well, the consensus was that any of the
25 five major specifically named businesses could be
26 located in the larger complex without further
27 approval required. Those businesses are a
28 financial institution, a restaurant, a grocery
29 store, a variety store and a drug store. Any
30 other retail stores in the complex would require
31 conditional use approval as they were not
32 specifically approved during the original approval
33 process.

34 "It is reasonable for you to assume that as the
35 building official, I will act in accord with this
36 interpretation in issuing permits and/or business
37 licenses." Record 33.

38 Petitioners appealed the determinations expressed in
39 the planning commission's minutes and in the administrator's

1 letter to the city council. The city council refused to
2 consider petitioners' appeal. Petitioners then appealed the
3 letter from the city administrator, as well as the city's
4 council's refusal to hear the local appeal, to this Board.

5 **MOTION TO DISMISS**

6 The city moves to dismiss this appeal on the basis that
7 the challenged determinations are advisory opinions, and not
8 a final land use decision over which this Board has
9 jurisdiction under ORS 197.825(1) and ORS 197.015(10).⁶

10 Petitioners argue the planning commission did make a
11 final decision concerning their application, which is
12 expressed in the minutes and in the administrator's letter.
13 According to petitioners, this appeal involves a
14 determination substantially similar to the determination we
15 held was a final decision subject to our review in Townsend
16 v. City of Newport, ___ Or LUBA ____ (LUBA No. 90-157, June
17 13, 1991) (Townsend). In Townsend, the city council voted
18 to approve a motion determining that a previously approved
19 conditional use permit was valid, and that if the holder of
20 that conditional use permit applied for a building permit,

⁶ORS 197.825(1) provides, in relevant part,:

"[The Land Use Board of Appeals] shall have exclusive
jurisdiction to review any land use decision * * *."

ORS 197.015(10) defines land use decision, in relevant part, as follows:

"A final decision or determination made by a local government
* * *."

1 one would be issued to him.⁷

2 In Hollywood Neighborhood Assoc. v. City of Portland,
3 ___ Or LUBA ____ (LUBA No. 91-063, July 12, 1991), slip op
4 5, a majority of the Board stated the following regarding
5 when a local government interpretation of plan or land use
6 regulation provisions is a final decision subject to our
7 review:

8 "When a local government interprets existing
9 comprehensive plan or land use regulation
10 provisions without amending or adopting plan or
11 land use regulation provisions or granting or
12 denying development permit or other land use
13 approval, such a decision is a final decision if
14 it is issued pursuant to an established local
15 process for issuing binding declaratory rulings."

16 In Hollywood, the city had a formal procedure in its
17 code for issuing final, binding interpretations of its
18 zoning ordinance. However, the decision at issue in
19 Hollywood (a letter by a city planner) had not been rendered
20 pursuant to that city procedure and, on that basis, LUBA
21 concluded the challenged decision was not a final decision
22 subject to its review.

23 In Townsend, this Board recognized that even though a
24 local determination in the nature of a declaratory ruling is
25 not adopted pursuant to a particular process codified in a
26 local code, such a determination may still result in a land

⁷In Townsend, the appealed decision was reflected in both the minutes of the city council, and in a subsequent letter from the city planning director expressing the city council's decision.

1 use decision where the determination is made pursuant to a
2 motion and vote of the governing body and results in the
3 last local determination concerning land use standards
4 applicable to a pending application.

5 Here, neither the planning commission minutes nor the
6 city administrator's letter purports to adopt or amend city
7 plan or land use regulations. Further, neither was issued
8 as a part of a decision approving or denying a permit. In
9 addition, the minutes of the planning commission do not
10 indicate any motion was made concerning petitioners' request
11 for an interpretation of the 1985 conditional use permit
12 decision approving the shopping center. The minutes of the
13 planning commission reflect that individual commissioners
14 simply expressed how they "felt" concerning the requested
15 interpretation. The administrator's letter states only what
16 he believed to be the consensus of the planning commission
17 and states that he, as the building official, would follow
18 his own interpretation of what the planning commission
19 "felt" if he were requested to issue building or other
20 permits. These are not final determinations of the city.
21 Rather, the planning commission minutes and the city
22 administrator's letter are simply advisory opinions that do
23 not bind the city to take any particular course of action
24 concerning the 1985 conditional use permit approval.
25 Further, because no determination was made by the planning
26 commission or city administrator, there was no decision to

1 be appealed to the city council.

2 This appeal is dismissed.