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

ROBERT WEEKS, ELVA WEEKS,)
BILL BECK, and ELZA BECK,)
Petitioners,)
vs.)
CITY OF TILLAMOOK,)
Respondent,)
and)
COMMUNITY ACTION TEAM, Inc.,)
an Oregon nonprofit corporation,)
Intervenor-Respondent.)

LUBA No. 91-110
FINAL OPINION
AND ORDER

Appeal from City of Tillamook.
Phillip E. Grillo, Portland, represented petitioners.
Douglas E. Kaufman, Tillamook, represented respondent.
Neal C. Lemery, Rockaway Beach, represented intervenor-respondent.

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

TRANSFERRED 02/19/92

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

1 Opinion by Kellington.

2 **NATURE OF THE DECISION**

3 Petitioners appeal the following statement in the
4 minutes of a city council meeting: "[i]t was the consensus
5 of Council that the conditional use permit is still valid."
6 Record 28.

7 **FACTS**

8 This is the third time an appeal involving these
9 parties and the subject property is before this Board. In
10 Beck v. City of Tillamook, 18 Or LUBA 587 (1990) (Beck I),
11 we remanded a city decision approving a conditional use
12 permit for a homeless shelter on the subject "Central
13 Commercial" zoned property on the basis that the city
14 improperly reversed the burden of proof in the proceedings
15 below. We also determined that certain standards relating
16 to parking and landscaping were apparently met.

17 Beck v. City of Tillamook, ___ Or LUBA ___ (LUBA
18 No. 90-056, October 25, 1990) (Beck II), was an appeal of
19 the city's second decision approving the conditional use
20 permit for the homeless shelter. We affirmed the city's
21 second decision approving the conditional use permit.

22 Petitioners appealed our decision to the Court of
23 Appeals, and the court affirmed our decision. Beck v. City
24 of Tillamook, 105 Or App 276, 805 P2d 144 (1991).
25 Petitioners petitioned for review by the Supreme Court, and
26 the Supreme Court accepted review of the Court of Appeals'

1 decision. Beck v. City of Tillamook, 311 Or 432, 812 P2d
2 827 (1991).

3 Tillamook City Zoning Ordinance (TCZO) section 34
4 provides that if conditional use permits are not "used"
5 within one year of the "date of approval," they expire. It
6 further provides:

7 "[A conditional use permit] shall not be deemed
8 used until the applicant has actually obtained a
9 building permit, and commenced construction
10 thereunder. * * *"

11 One year after the date the city approved the
12 conditional use permit appealed in Beck II, petitioners
13 submitted a request to the city that it declare the
14 conditional use permit void, on the basis of TCZO section
15 34. That request was in the form of a proposed city
16 resolution. The requested resolution was placed on the city
17 council's agenda. The minutes of the city council's June 3,
18 1991 meeting indicate the following occurred:

19 "LEGISLATIVE:

20 "1. C.A.T. Shelter Home:

21 "Prior to possible adjournment to Executive
22 Session to discuss the C.A.T. shelter home, [one
23 of the city council members] said he wished to
24 state a potential conflict of interest. He said
25 he had been approached by one of the parties
26 involved who wished to buy property. [That
27 council member] added that he did not feel that it
28 would influence his vote in any way.

29 "The City attorney advised that he could not give
30 any opinion without further information.

31 "[2.] Executive Session:

1 "[The mayor] adjourned to executive session, under
2 ORS 192.660(H), Litigation, at 8:11 p.m.

3 "[3.] Reconvene:

4 "The regular meeting was reconvened at 9:01 p.m.

5 "[4.] Discussion:

6 "It was the consensus of Council that the
7 conditional use permit is still valid." Record
8 28.

9 This appeal followed.

10 **MOTIONS TO DISMISS**

11 Respondent and intervenor-respondent (respondents) move
12 to dismiss this appeal on the basis that the challenged
13 statement is no more than an advisory opinion, and is not a
14 final land use decision over which this Board has
15 jurisdiction under ORS 197.825(1) and ORS 197.015(10).¹
16 Respondents point out the city has no procedure for the
17 issuance of declaratory rulings and that no motion, vote or
18 decision was made concerning whether the conditional use
19 permit is valid under TCZO 34.

20 Petitioners argue they submitted an application for a
21 determination of whether the conditional use permit is

¹ORS 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 valid. Petitioners also argue the tapes of the council
2 meeting establish that after the council adjourned from
3 executive session, the mayor requested each of the council
4 members to take a position concerning whether the
5 conditional use permit is valid. Petitioners maintain that
6 the mayor then summarized the city council members'
7 responses by stating the "consensus" of the council was that
8 the conditional use permit is valid.² According to
9 petitioners, this summary constitutes a land use decision
10 subject to our jurisdiction. Petitioners argue that under
11 Sauvie Island Agricultural v. GGS (Hawaii), Inc., 107 Or App
12 1, 810 P2d 856 (1991) (Sauvie Island Agricultural), once an
13 application is submitted to a local government requesting
14 revocation of a conditional use permit, by a person with
15 standing,³ the city is required to make a land use decision
16 regarding such an application, which land use decision is
17 appealable to LUBA.

18 First, we do not read Sauvie Island Agricultural to
19 establish as broad a legal principle as petitioners contend.
20 Under Sauvie Island Agricultural, a circuit court lacks the
21 authority to grant a declaratory judgment concerning whether

²There is no dispute concerning petitioners' description of the June 3, 1991 city council meeting. For purposes of this opinion we assume petitioners' relation of what the tapes reflect is accurate.

³There is no issue presented in this case concerning whether petitioners had "standing" below to request a determination regarding the conditional use permit.

1 a conditional use permit has expired. In Sauvie Island
2 Agricultural, the Court of Appeals stated a determination of
3 whether a conditional use permit has expired requires the
4 making of a land use decision, something the circuit court
5 cannot do.⁴ However, we do not believe that Sauvie Island
6 Agricultural converts what is otherwise not a land use
7 decision, into a land use decision.⁵

8 Under ORS 197.015(10), "land use decisions" over which
9 this Board has jurisdiction, must be "final" decisions.⁶
10 This Board has recently stated relevant legal principles
11 applicable to determining whether a particular action of a
12 local government is a final decision. We discuss them
13 briefly below.

14 In Hollywood Neighborhood Assoc. v. City of Portland,
15 ___ Or LUBA ____ (LUBA No. 91-063, July 12, 1991), slip op
16 5, LUBA stated the following regarding when a local
17 government interpretation of plan or land use regulation
18 provisions is a final decision subject to its review:

⁴The Court of Appeals went on to state that the proper entity to make that land use decision in the first instance is the local government.

⁵In Sauvie Island Agricultural, the petitioners did not request that the circuit court order the local government to make a decision on the validity of the conditional use permit.

⁶The requirement that a land use decision be a final decision is also an inherent part of the "significant impact test," an alternative basis for identifying land use decisions subject to this Board's jurisdiction. Flowers v. Klamath County, 17 Or LUBA 1078, 1085 (1989); CBH Company v. City of Tualatin, 16 Or LUBA 399, 405 n 7 (1988).

1 "When a local government interprets existing
2 comprehensive plan or land use regulation
3 provisions without amending or adopting plan or
4 land use regulation provisions or granting or
5 denying development permit or other land use
6 approval, such a decision is a final decision if
7 it is issued pursuant to an established local
8 process for issuing binding declaratory rulings."

9 In Hollywood, the city had a formal procedure in its
10 code for issuing final, binding interpretations of its
11 zoning ordinance. However, the decision at issue in
12 Hollywood (a letter by a city planner) had not been rendered
13 pursuant to that city procedure and, on that basis, LUBA
14 concluded the challenged letter was not a final decision
15 subject to its review.

16 In Townsend v. City of Newport, ___ Or LUBA ___ (LUBA
17 No. 90-157, June 13, 1991) (Townsend), the city council
18 voted to approve a motion determining that (1) a previously
19 approved conditional use permit to be valid, and (2) if the
20 holder of the conditional use permit applied for a building
21 permit, one would be issued.⁷ In Townsend, this Board
22 recognized that even though a local determination in the
23 nature of a declaratory ruling is not adopted pursuant to a
24 particular process codified in a local code, such a
25 determination may still result in a land use decision where
26 the determination is made pursuant to a motion and vote of

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 the governing body and results in the last local
2 determination concerning land use standards applicable to a
3 pending application.

4 Here, nothing indicates any motion was made concerning
5 petitioners' request that the conditional use permit be
6 revoked, or that any vote was taken on that request.
7 Petitioners' summary of the tapes of the city council
8 meeting reflect that individual councillors gave their
9 impression of the validity of the conditional use permit,
10 and that the mayor articulated the "consensus" of the
11 council concerning the conditional use permit. The minutes
12 reflect the "consensus" of the council. However, neither
13 the minutes nor the summary of the tape establishes the city
14 made a final determination concerning whether the
15 conditional use permit should be revoked.⁸ Rather, the
16 minutes and the summary of the tape of the June 3, 1991
17 council meeting indicate that only an advisory opinion was
18 given that did not bind the city to take any particular
19 course of action concerning whether the conditional use
20 permit was valid. See Owen Development Corp. v. City of
21 Gearhart ___ Or LUBA ___ (LUBA Nos. 91-107 and 91-123,
22 December 6, 1991). This "consensus" of the city council is
23 not a final land use decision and, therefore, is not a land

⁸Similarly, we do not believe a decision not to make a decision on petitioners' request is itself a land use decision subject to our review, as petitioners suggest.

1 use decision subject to LUBA review.⁹

2 ORS 19.230(4) provides that if a decision appealed to
3 LUBA "is not reviewable as a land use decision," the notice
4 of intent to appeal "shall be transferred to the circuit
5 court and treated as a petition for writ of review."
6 However, our rules provide that this Board will dismiss
7 appeals of decisions found not to be reviewable as land
8 use decisions, rather than transfer such appeals to circuit
9 court, unless a party moves to transfer the appeal. See
10 Southwood Homeowners v. City of Philomath, ___ Or LUBA ___
11 (LUBA No. 90-103, November 15, 1990), slip op 3 n 1, rev'd
12 106 Or App 21 (1991).

13 OAR 661-10-075(10)(a) provides that any party may move
14 to transfer an appeal to the circuit court of the county in
15 which the appealed decision was made pursuant to ORS 19.230,
16 if the Board determines the challenged decision is not a
17 land use decision. However, OAR 661-10-075(10)(b) provides
18 that a motion to transfer an appealed decision to the
19 circuit court must be made "no later than ten days after the
20 date respondent's brief is due * * *." Here, no
21 respondent's brief has been filed. Consequently, the time
22 for filing a motion to transfer has not yet expired. Under
23 these circumstances, we must transfer this appeal to the

⁹In view of our disposition of this appeal, no purpose is served in reviewing petitioners' motions for evidentiary hearing, depositions or consolidation with Weeks v. City of Tillamook, LUBA No. 92-025.

1 Tillamook County Circuit Court, as required by ORS 19.230.

2 This appeal is transferred.

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