

RESOLUTION NO. 322

A RESOLUTION AUTHORIZING THE CITY ATTORNEY TO FILE AN APPEAL OF LAND USE BOARD OF APPEALS DECISION WITH THE OREGON COURT OF APPEALS.

WHEREAS, the City Staff has prepared a report on the above captioned subject which is attached hereto as Exhibit "A", and

WHEREAS, the City Council has duly considered the subject and the recommendation(s) contained in the staff report, and


WHEREAS, interested parties, if any, have had an opportunity to be heard on the subject,

NOW, THEREFORE, BE IT RESOLVED that the City Council of the City of Wilsonville does hereby adopt the staff report attached hereto as Exhibit "A", with the recommendation(s) contained therein and further instructs that action appropriate to the recommendation(s) be taken.

ADOPTED by the City Council of the City of Wilsonville at a regular meeting thereof this 6th day of June, 1983, and filed with the Wilsonville City Recorder this same day.


WILLIAM G. LOWRIE, Mayor

ATTEST:


DEANNA J. THOM, City Recorder

CITY OF WILSONVILLE

MEMO

June 6, 1983

DATE

TO: Mayor and City Council

FROM: Daniel O. Potter, City Administrator

SUBJECT: Land Use Board of Appeals Decision
The Robert Randall Company vs. the City of Wilsonville

I attach a memorandum from Mr. Kohlhoff, City Attorney, on the subject of our LUBA case involving the Robert Randall Company.

The LUBA action leaves some interesting problems in terms of an applicant's ability to withdraw an application for a zoning or comprehensive plan change.

Mr. Kohlhoff suggests that the effect of the LUBA opinion is so serious that there is a need to pursue this issue by appeal to the Oregon Court of Appeals. I concur in Mr. Kohlhoff's opinion.

I also concur in the suggestion that we prepare an Ordinance that procedurally would prohibit applicants from withdrawing zoning or comprehensive plan changes without the permission of the City.

Recommendation: I recommend that the City Council authorize Mr. Kohlhoff to file an appeal of this LUBA decision with the Oregon Court of Appeals.

I also recommend you instruct the staff to prepare an Ordinance for consideration prohibiting applicants from withdrawing zoning or comprehensive plan changes without the permission of the City Council.

Respectfully submitted,



Daniel O. Potter

DOP/fr

LAW OFFICES OF
KOHLMHOFF & MOEN

MICHAEL E. KOHLHOFF
STEPHEN A. MOEN
BETH ELLEN MARKS

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May 26, 1983

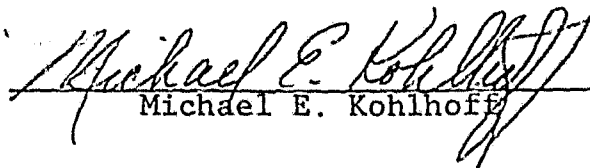
TO: Mayor William G. Lowrie
FM: Michael E. Kohlhoff, City Attorney
RE: Land Use Board of Appeals Decision in
The Robert Randall Company vs. the City of Wilsonville

On May 23, 1983, LUBA filed an opinion stating that the Robert Randall Company properly withdrew its application for a comprehensive plan change on January 11, 1983. Because the request was withdrawn, the City's subsequent denial of the application was only an "advisory memorandum which does not have the force or effect of a final land use decision," and thus, LUBA has no jurisdiction over the matter.

The effect of LUBA's ruling is to allow applicants for zone or comprehensive plan changes to withdraw at any point in the proceeding before a final written order with findings of fact is issued. Applicants who see that a ruling is going to go against them could withdraw before the City has an opportunity to make a formal written order. The City would have little or no control over its own system.

We believe that LUBA's decision has a significant impact on the City of Wilsonville's governing process. It is likely that this sort of situation will occur again in the future, and the City will be bound by LUBA's decision in this case. It is our opinion that the City should consider appealing LUBA's decision to the Oregon Court of Appeals. A petition for review would need to be filed within thirty (30) days following the date that LUBA's order was served on the City of Wilsonville (May 23, 1983). In most cases, the filing of the petition will not stay enforcement of LUBA's order.

In addition, we suggest that the City consider an ordinance prohibiting applicants from withdrawing without the City's permission.


Michael E. Kohlhoff

MEK:jam

cc: ✓ Mr. Dan Potter

MAY 23 3:43 PM '83

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

3 THE ROBERT RANDALL COMPANY,)
 4 an Oregon corporation,)
 5 Petitioner,)
 6 vs.)
 7 THE CITY OF WILSONVILLE,)
 8 J. MICHAEL GLEESON, CHARLES)
 9 PAULSON, AMY PAULSON, JANE)
 10 PAULSON, DAVID and DORIS)
 11 MATTHIES and JAMES R. FARRELL,)
 12 Respondents.)

LUBA No. 83-022

FINAL OPINION
AND ORDER OF DISMISSAL

11 Appeal from the City of Wilsonville.

12 Jack L. Orchard, Portland, filed the Petition for Review
13 and argued the cause on behalf of Petitioner. With him on the
brief were Ball, Janik & Novack.

14 Michael E. Kohlhoff, Wilsonville, filed the brief and
15 argued the cause on behalf of Respondent City of Wilsonville.

16 J. Michael Gleeson, Beaverton, filed the brief and argued
17 the cause on his own behalf and on behalf of Respondents
Charles Paulson, Amy Paulson and Jane Paulson.

18 BAGG, Board Member; COX, Board Member; participated in this
19 decision.

20 DISMISSED 5/23/83

21 You are entitled to judicial review of this Order.
22 Judicial review is governed by the provisions of Oregon Laws
1979, ch 772, sec 6(a), as amended by Oregon Laws 1981, ch 748.

1 BAGG, Board Member.

2 NATURE OF THE DECISION

3 Petitioner appeals a decision of the City of Wilsonville
4 entitled:

5 "Wilsonville City Council Resolution; Plan Amendment -
6 The Robert Randall Company (Tax Lots 1800, 1801 and
7 1900, T3S, R1W, Section 13A and a portion of Tax Lot
8 300 T3S, R1W, Section 13)."

9 The decision included an order and findings denying
10 petitioner's application for a comprehensive plan amendment and
11 zone change.

12 FACTS

13 Petitioner submitted a proposed plan and zone change to the
14 city planning staff in August of 1982. The matter was heard by
15 the City of Wilsonville Planning Commission, and the planning
16 commission recommended approval of the request. The planning
17 commission's recommendation was sent to the city for a final
18 action, and the city heard the application on January 3, 1983.
19 After discussion, it became apparent that the members of the
20 city council were likely to reject the planning commission
21 recommendation. A motion occurred as follows:

22 LUDLOW "Ok, my motion is to reject the findings of the
23 Planning Commission and reject the proposal by
24 the Robert Randall Co., and I can give a list of
25 things that I would desire to direct staff,
26 specifically Mr. Altman, as the Planning
Commission did, to use his findings and then we
can discuss those if you like and eliminate those
portions that the full Council doesn't agree
upon. You might catch these Ben, but they could
probably get them off the tape even better."
Councilmember Ludlow, record p. 89.

1 Mr. Ludlow explained his reasons for making the motion. His
2 comments indicated he was concerned with roads, the impact of
3 the development on the city's plan and other matters. He added
4 the following:

5 "So, I'll just kind of open it up for discussion,
6 'cause I'm sure the body of the motion, simply is to
7 direct staff, Ben Altman, to prepare actual findings,
8 because we can't just reject something without having
9 decent findings and I think there's going to be a lot
of them. And possibly some of these will be changed.
So, I'll wait for a second." (Emphasis added).
Record, p. 91

10 A second was made. Other members of the council discussed the
11 motion, and it was apparent that many of them felt they were
12 voting against the proposal by the Randall Company. Mr. Ludlow
13 went on to give specific instruction to the staff to emphasize
14 findings on roads and Mr. Kohlhoff, the city attorney, then
15 said:

16 KOHLHOFF "Mr. Mayor, I would suggest that, what happens at
17 this point, is that you simply continue this
18 hearing for decision only, in order to give staff
19 an opportunity to present you written findings
20 and then make your final vote based on the
21 written findings and recommendations as prepared
by staff. I think that will give you a much
firmer record to stand on by doing it. Another
[sic] words, don't open it up for anything else,
except for decision making and continue for that
purpose only.

22 LOWRIE "That was your motion, wasn't it John?"

23 LUDLOW "I believe, yeah, it might not have been
24 conotated to be that, Michael, but my motion
25 would be only to direct staff to prepare the
26 proper material in a negative note as far as the
approval of this goes. And certainly, it will be
open for public hearing when it comes around.

1 KOHLHOFF "No, no, no.

2 LUDLOW "This is strictly for our....

3 KOHLHOFF "All the public testimony, that's closed. You're
4 directing staff to make findings and conclusions
5 based on your comments and the consensus that
6 you've developed. Ben has done all that and
7 he'll prepare that, he's done that in the past,
8 he'll prepare it for you. Then you simply take a
9 vote on it.

7 LUDLOW "Ok. So intrepreted [sic].

8 LOWRIE "This portion of the meeting will be continued
9 until next meeting." Record, p. 99.

10 On January 11, 1983, the Randall Company requested the
11 application be withdrawn.

12 "On behalf of The Robert Randall Company we are hereby
13 requesting that their [sic] application for a
14 Comprehensive Plan change for the 97 acre
15 Tolovana-Gesellschaft property be withdrawn and given
16 no further consideration." Record, p. 35.

15 The council did not act on the "request" to withdraw the
16 application, but issued a resolution on Janaury 17, 1983,
17 denying the application. Included in the denial were a number
18 of findings that echo and go beyond the discussions occurring
19 at the city council meeting of January 3, 1983.

20 At the February 7, 1983, city council meeting, an attorney
21 for the petitioner argued that the city had not taken any final
22 action because there was no application in front of it. After
23 some discussion by members of the city council as to what they
24 understood they were voting on, a motion was made and passed
25 that the council "chooses not to reconsider the decisions of
26

1 January 3rd and January 17th, 1983, in regards to the Robert
2 Randall Zone Change the Robert Randall Plan Amendment."
3 Record, p. 19.

4 This appeal followed.

5 ASSIGNMENT OF ERROR

6 Petitioner makes a single assignment of error. Petitioner
7 argues the city acted improperly when it proceeded to consider,
8 make a decision and adopt findings denying a previously
9 withdrawn application. In the argument, petitioner presents
10 two questions: (1) may an applicant withdraw a request
11 voluntarily submitted before the city has made a final
12 decision; and, (2) had the City of Wilsonville made a final
13 decision prior to the date of the withdrawal of the application
14 (January 11, 1983)? Petitioner argues that the landowner has
15 control over the application and is allowed to withdraw the
16 application up to the time of a final order. Petitioner
17 analogizes the matter to the right of a litigant to dismiss a
18 claim anytime prior to final decision. See Curey v Southern
19 Pacific Company, 23 Or 400, 31 P2d 963 (1893), Hutchings v
20 Royal Bakery, 60 Or 48, 118 P2d 185 (1911).

21 Petitioner then argues that when Petitioner Randall Company
22 withdrew the application, no final decision had yet been made.
23 The action of the January 3 meeting was a tentative expression
24 of councilmember views followed by direction to the staff to
25 prepare findings which would be brought to the council.
26 Petitioner argues the written findings only will form the basis.

1 for the council's decision. Petitioner argues the motion made
2 on January 3 contemplated a continuation of the hearing for
3 preparation of findings; and, thusly, the Wilsonville City
4 Council action may be contrasted from one in which a local
5 government, correctly or incorrectly, makes an oral motion and
6 vote with no intention of any further action on the matter.

7 Petitioner argues the legal affect of the city council's .
8 action is at best only a "memo" to the planning commission.

9 Petitioner supports its view with the following:

10 "'With withdrawal of the subdivision application, the
11 City's proceedings on the application became moot.
12 There no longer was an applicant to whom a permit
13 might be granted. There was no act that had any
14 effect upon the land. [citations omitted]

15 "'We view the extensive findings discussing the merits .
16 of the subdivision appliction to be surplusage. We do
17 not view the findings as having any more force and
18 effect than a memo from the city council the the [sic]
19 planning staff. To the extent that this 'memo' may
20 include erroneous information or erroneous conclusions
21 as to statewide land use requirements, the memo may
22 come to haunt the city in a later proceeding, but the
23 memo itself is not appealable as a 'decision.'
24 Friends of Lincoln City v Newport, 5 Or. LUBA 3465,
25 351 (1982).

19 Respondent City of Wilsonville argues that a party
20 submitting an application for a land use change does not retain
21 control over the proceedings in the manner urged by
22 petitioner. The city argues that there is a point at which
23 rights and interests of other persons will be affected, and
24 after that point, the right of the party to withdraw ends.
25 Respondent claims there are interested parties who have a right
26

1 of notice of city decisions, and the requested plan and zone
2 change could affect the rights of all the citizens of the city.

3 Respondent argues there were no issues of fact to be
4 decided after the city council motion and vote on January 3;
5 the hearing was continued only for the purpose of preparing
6 written findings. If an applicant were permitted to withdraw
7 anytime the city continued a meeting to draft findings,
8 applications could be indefinitely extended, argues
9 respondent. Respondent City says the Friends of Lincoln City v
10 Newport case, supra, is not supportive because the city council
11 in Newport allowed the withdrawal and declared the appeal
12 moot. Here, the city did not formally accept the withdrawal,
13 and respondent argues it is a matter of city discretion as to
14 whether or not such a request would be honored.¹

15 We do not believe a final land use decision occurred on
16 January 3. See 1979 Or Laws, ch 772, sec 4 and ORS
17 197.015(10). As we understand Councilman Ludlow's motion, he
18 requested the preparation of findings for denial and included
19 in his motion particular matters that he believed pertinent.
20 In so doing, we believe he expressed his view as to the proper
21 disposition of the matter and the reasons for that
22 disposition. The following statement serves to indicate the
23 tentative nature of the January 3, 1983 action:

24 LUDLOW "So, I'll just kind of open it up for discussion,
25 'cause I'm sure the body of the motion, simply is
26 to direct staff, Ben Altman, to prepare actual
findings, because we can't just reject something
without having decent findings and I think

1 there's going to be a lot of them. And possibly
2 some of these will be changed." Record, p. 90-91.

3 The comment of the city attorney cited at page 3 above that the
4 matter be continued "for decision only," further indicates the
5 tentative quality of Mr. Ludlow's motion.

6 It is also important to point out that the written order
7 issued by the city differed from the comments made by the city
8 councilmembers. The written order included statements of
9 applicability of the comprehensive plan and of factual matters
10 not discussed after Councilman Ludlow's motion. The fact that
11 the city took action to approve a document which stated that it
12 served as a denial of the application is additional evidence
13 that the signing of the document constituted the decision, not
14 the earlier oral motion and vote to direct that such a document
15 be prepared.²

16 Because a final decision had not been made by the time
17 Petitioner Randall Company requested withdrawal of the
18 application, we believe the request was sufficient to deprive
19 the city of jurisdiction over the application. We are not
20 concerned that the withdrawal took the form of a "request." We
21 take the language to be a polite but nonetheless effective
22 withdrawal of the application. With no application before it,
23 any decision the city rendered in the absence of an application
24 is a nullity. See Hallberg Homes v Gresham, ___ Or LUBA ___,
25 1983 (LUBA No. 82-069, 2/02/83).

26 We hold the January 3, 1983, oral statements and request of

1 its attorney to draft an order was not a final decision by the
2 City of Wilsonville. Also, since the land use request had been
3 withdrawn, the written order of January 17, 1983 is at best an
4 advisory memorandum which does not have the force or effect of
5 a final land use decision over which this Board has
6 jurisdiction.

7 Dismissed.

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FOOTNOTES

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4 Intervenor-Respondent J. Michael Gleeson adds there is a
5 distinction between a final action and a final decision. A
6 "final action," according to intervenor, occurred on January
7 3. That action was sufficient to deny the application. The
8 "final decision" for appeal purposes, according to intervenor,
9 is the time of the written order. As we understand
10 intervenor's argument, the "final action" bound the parties to
11 the denial and the "final decision" is the written
12 memorialization of the action and is the document that starts
13 the time for appeal to run. Intervenor is concerned about the
14 "final action" date because under Section 4.188 of the city's
15 code, there is a one year prohibition against the filing of a
16 second application for the same request following a denial.
17

18 2
19 It is our view that a quasi-judicial land use decision of
20 necessity must be preceded by findings and an order. In that
21 regard, it is rather like the decision of a court made orally
22 from the bench and later made final by a written order. See
23 Duddles v City Council of West Linn, 21 Or App 310, 315, 535
24 P2d 583 (1975); State v Swain/Goldsmith, 267 Or 527, 530, 517
25 P2d 684 (1978). Had the city contemplated no further action
26 but intended the motion and vote and the minutes of the meeting
27 to be some sort of final decision or determination, our view
28 might be controlled by Hitchcock v McMinnville City Council, 47
29 Or App 897, 615 P2d 409 (1980). However, we believe that
30 little purpose is served by holding an oral motion and vote to
31 be effective to control an application while a written order
32 issued of course is then affective for the purposes of
33 calculating the time for appeal. We believe the public is
34 better served by holding the written order to be affective for
35 both purposes.
36

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing Final Opinion and Order of Dismissal for LUBA No. 83-022, on May 23, 1983, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

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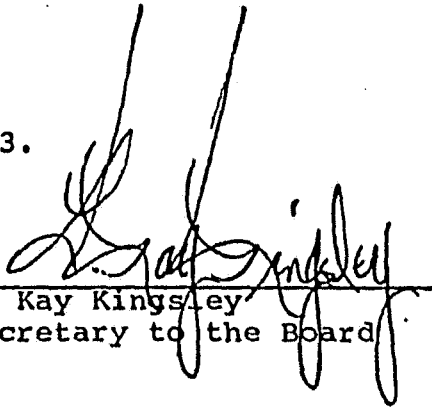
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Dated this 23 day of May, 1983.


L. Kay Kingsley
Secretary to the Board