

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

3 KATHY FISHER, GERI WILLIAMS,)
 and the BINFORD LAKE)
4 NEIGHBORHOOD COALITION,)
)
5 Petitioners,)
)
6 vs.)
)
7 CITY OF GRESHAM,)
)
8 Respondent.)

LUBA No. 83-105

ORDER DENYING
PETITIONERS' OBJECTION
TO RECORD

9 This subdivision case was previously before the Board.
10 Hallberg Homes v City of Gresham, 7 Or LUBA 145 (1983). A
11 final opinion and order was entered February 2, 1983, remanding
12 the case to the city for further proceedings. On remand, the
13 city council referred the case to its planning commission,
14 which conducted a hearing and approved the proposal. Record at
15 250. On appeal to the city council, the planning commission's
16 decision was affirmed. Record at 2. The present appeal
17 followed.

18 In this appeal, the parties disagree over whether the
19 record available for our consideration includes the record
20 previously submitted to the Board in Hallberg Homes, supra.
21 The city and Participant Hallberg Homes, Inc., argue that the
22 prior record should be considered as a part of the record filed
23 in this case. Petitioners object. We agree with the city and
24 Hallberg Homes, Inc., and therefore deny the objection.

25 Petitioners claim we cannot consider the previously
26 submitted record and claim it was not physically before the

1 city and available for its review during the proceedings on
2 remand. They rely principally on Neighborhood Opposing More
3 Operations For Rock Extraction v Polk County, 2 Or LUBA 430
4 (1981) (hereinafter "NOMORE v Polk County") in support of their
5 objection.

6 In NOMORE v Polk County, supra, we held that the record in
7 an appeal of a conditional use permit did not include the
8 county's record of a prior permit application concerning the
9 same property. In our holding we took particular note that the
10 record of the prior application was not physically before the
11 county when it undertook review of the present application. We
12 stated:

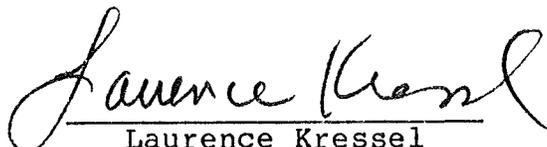
13 "Here, the record of the prior case would only be part
14 of the record in this case were it placed, physically,
15 in front of the Polk County Board of Commissioners.
16 Petitioner could have placed the old record before the
17 county by requesting the Board of Commissioners to
18 include it as part of the record of the new
19 application. Our review would, only then, include a
20 review of the earlier action as part of Polk County's
21 'record.'" 2 Or LUBA at 431 (emphasis added).

22 The case now before us is distinguishable from NOMORE v
23 Polk County, supra. Here, the material sought to be included
24 in the record on appeal is part of the very same application
25 previously considered by the city and reviewed by this Board.
26 That application was returned to the city as a consequence of
our remand in Hallberg Homes, Inc. v City of Gresham, supra.
After our remand to the city it is clear that, rather than file
a completely new application, Hallberg Homes, Inc. elected to
rely on the initial application and to supplement the record

1 of that application with additional material. The city
2 understood that the prior application was before it when, after
3 our remand, it took up the planning commission's recommendation
4 of approval.¹ No more was necessary in order for the entire
5 record concerning the application to be part of the record
6 available for this Board's review.

7 Based on the foregoing, the objection to the record is
8 denied.

9 Dated this 5th day of January, 1984.

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13 Laurence Kressel
14 Board Member
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FOOTNOTES

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1 We note that the final order adopted by the city in this case indicates clearly that Hallberg Homes, Inc. relied on the initial application when the case was taken up on remand. The order states as follows:

"Since the original subdivision proposal was heard by the City, the City Council has amended development code section 10.3102. The analysis of residential parcel size consistency is now strictly quantitative. The subjective requirement of compatibility has been eliminated.

"Therefore, there was a question as to which version of Section 10.3102 should apply to the subdivision on remand: the old or the new version. Staff informed Hallberg Homes, Inc. that it had two alternative methods of proceeding with the application:

"1) Proceed with the initial application without the hardship relief requests. Since this would be a review on remand from LUBA, the comprehensive plan provision in effect at the time of the original application would apply.

"2) Submit a new application and abandon the original application. Since this would be a new application, the current comprehensive plan provisions would apply.

"Hallberg Homes, Inc. choose to resubmit the initial application without three of the initial four hardship relief requests, and therefore have the application reviewed by the requirements in effect at the time of the initial application." Record at 5-6.

CERTIFICATE OF MAILING

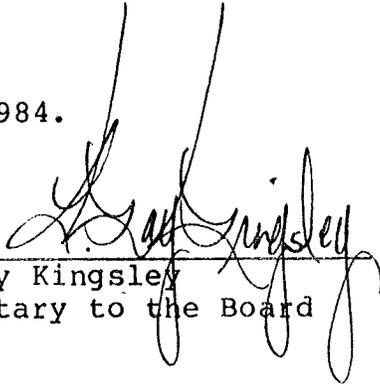
I hereby certify that I served the foregoing Order Denying Petitioners Objections to Supplemental Record for LUBA No. 83-105, on January 5, 1984, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

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Dated this 5th day of January, 1984.



L. Kay Kingsley
Secretary to the Board