

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

FEB 2 2 39 PM '83

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

HALLBERG HOMES, INC.,	)	
	)	
Petitioner,	)	LUBA NO. 82-069
	)	
v.	)	FINAL OPINION
	)	AND ORDER
CITY OF GRESHAM,	)	
	)	
Respondent.	)	

Appeal from City of Gresham.

John M. Wight, Portland, filed a brief and argued the cause for petitioners.

Matthew R. Baines, Gresham, filed a brief and argued the cause for Respondent City of Gresham.

Katherine & Roger Fisher, Gresham, filed a brief as participants on behalf of Respondent.

Cox, Board Member; Bagg, Board Member; participated in the decision.

Remanded. 2/2/83

You are entitled to judicial review of this Order. 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 COX, Board Member.

2 NATURE OF PROCEEDING

3 Petitioner seeks review of a denied development proposal it  
4 had submitted for the seventh and final phase of a planned unit  
5 development in the City of Gresham. Petitioner's planned unit  
6 development, known as the Binford Farms PUD, had previously  
7 received conceptual approval by the City of Gresham in 1971.

8 ALLEGATIONS OF ERROR

9 In general, petitioner alleges the City of Gresham erred  
10 because it relied upon the wrong comprehensive plan provisions  
11 to the decision; neglected to specify on what basis a final  
12 subdivision plat would be approved; and even if the Gresham  
13 plan provisions were correctly relied upon, they were  
14 improperly applied.

15 FACTS

16 The tract of land which is the subject of this appeal is  
17 known as the Binford Lake subdivision and is the final phase of  
18 a seven phase "Binford Farms" planned unit development. The  
19 Binford Farms PUD was first approved by the city in 1969. In  
20 1971 on review of the planned unit development permit, the  
21 planning commission for the City of Gresham required that each  
22 of the PUD phases be reviewed by the planning commission before  
23 construction could begin. Hallberg Homes, Inc. has completed  
24 the approval process for six of the seven phases. The  
25 completed phases of the PUD include both single-family attached  
26 and single-family unattached dwellings. The 1969 conceptual

1 approval, as modified in 1971, provided for 82 attached  
2 dwellings on the subject parcel of property. The current  
3 proposal is for a 40 lot subdivision which is designed to  
4 permit construction of 20 duplexes (or 40 attached dwellings)  
5 on 13.15 acres of land. Of the 13.15 acre site, 2.25 acres are  
6 occupied by a lake. The site, therefore, excluding the lake,  
7 contains 10.9 acres of potentially buildable land which, when  
8 related to the number of units proposed to be built, results in  
9 an overall development density of 3.67 dwelling units per  
10 acre. This overall proposed density is less than the density  
11 of the adjacent developments. The Gresham comprehensive plan  
12 identifies this property as low-density residential which  
13 provides for a maximum density in the zone of 8.7 dwellings per  
14 acre. The lots in phase 7 will be smaller than the median  
15 parcel size of existing unattached residential development  
16 immediately to the east and the west. However, the proposed  
17 lot sizes will be approximately the same size as the existing  
18 attached residential development to the north of this tract.  
19 All development existing east, west and north of the site was  
20 constructed by petitioner as part of the Binford Farms PUD.  
21 South of the parcel is greenway and no development exists  
22 thereon.

23 The City of Gresham adopted its present Gresham Community  
24 Development Plan on July 1, 1980. That plan designates the  
25 Binford Farms area as low density residential and as  
26 "established."<sup>1</sup> The Gresham plan consists of four volumes as

1 follows:

- 2 Volume I - Findings,
- 3 Volume II - Policies and Summary
- 4 Volume III - Gresham Development Code (Code)
- 5 Volume IV - Standards

6 The comprehensive plan provides in Volume III (Code) that:

7 "A PUD which conforms to the land use designations of  
8 the Community Development Plan Map and has received  
9 concept plan approval shall be valid for the purpose  
10 of obtaining final development plan approval  
11 consistent with the appropriate standards contained in  
12 the community development standards document."  
13 (Emphasis added) Gresham Code Section 10.1071(4).

14 The community development standards document referred to in  
15 Section 10.1071(4) is Volume IV of the Gresham Comprehensive  
16 Plan.

17 Hallberg Homes submitted its subdivision plat for phase  
18 seven and a public hearing on the proposal was held by the  
19 planning commission on March 9, 1982. In addition to the  
20 subdivision application, petitioner requested hardship relief  
21 for four standards set forth in Volume IV of the Gresham plan.  
22 Those requests were (1) to waive minimum right-of-way  
23 standards, (2) to waive pavement width standards, (3) to waive  
24 minimum intersection spacing requirements for streets  
25 intersecting a collector, and (4) to waive the number of  
26 allowable lots on a cul-de-sac. Petitioner requested, under  
items (1) and (2), it be allowed 40 instead of 50 foot wide  
rights-of-way on the cul-de-sac streets. This width would  
match the existing 40 foot rights-of-way on cul-de-sacs and  
non-through streets in the area. The 1980 comprehensive plan

1 increased the required widths from 40 to 50 feet. Item 4 was  
2 necessitated by Gresham planning staff's request that 20,  
3 instead of the standard 18, lots be platted in a manner to  
4 allow more driveways to empty onto a cul-de-sac rather than SW  
5 19th Drive. SW 19th is a collector street bordering phase 7  
6 on the north.

7 On April 13 after an interim hearing, the planning  
8 commission approved a final order denying the application.  
9 That decision was appealed by Hallberg Homes to the city  
10 council. On May 18, 1982, the city council issued an order  
11 that the review would be de-novo and set a public hearing for  
12 July 6, 1982.<sup>2</sup> At the hearing on the appeal applicant  
13 withdrew three of its four requests for hardship relief. The  
14 only hardship relief that was not withdrawn was that relating  
15 to the intersection spacing (item 3 above). The intersection  
16 spacing hardship relief request had been approved by the  
17 planning commission. On July 20, 1982, the Gresham City  
18 Council issued an order upholding the planning commission's  
19 decision and adopted with modification the standards, findings  
20 and conclusions stated in an attached March 2, 1982 planning  
21 commission staff report. That order and referenced staff  
22 report did not mention or deal with the fact that petitioner  
23 had withdrawn three of its four requests for hardship relief.  
24 Rather, the order dealt with the request as if all the hardship  
25 relief requests still applied.

26 DECISION

1 We find that the City of Gresham erroneously dealt with  
2 applicant's appeal. The city's order does not recognize the  
3 applicant's request had been modified, and as a result, the  
4 denial was based on inapplicable ordinance standards.

5 Improper Standards

6 The fact that this development had already received concept  
7 approval made Volume IV of the comprehensive plan the only  
8 criteria upon which denial of the subdivision proposal could be  
9 made once the applicant had withdrawn the three hardship relief  
10 requests which the planning commission had denied. (See  
11 Gresham Code Section 10.1071(4) supra.) Volume IV of the  
12 comprehensive plan establishes standards for all land use  
13 activities. The Volume IV standards document establishes lot  
14 sizes, lot dimensions, setbacks, building heights, siting  
15 criteria, street frontage, public services and facilities, site  
16 development standards and supplementary regulations. In  
17 addition, it dictates lot arrangement, side yards, off-street  
18 parking, drainage, design, land division plans and data  
19 requirements, etc.

20 Rather than considering the modified request under the  
21 applicable Volume 4 criteria, the city based its denial on  
22 Volume III, sections 10.3102 and 10.5120. As the city stated  
23 in the "conclusions" section of its July 20, 1982 order:

24 "This proposal has been found to be in compliance with  
25 all of the policies, procedures and standards of the  
26 Gresham Comprehensive Plan except Gresham's Code  
section 10.3102 and Gresham Code Section 10.5120."

1 Denial on such basis was error. First, 10.5120 is only  
2 applicable when an applicant's plan requires modification of  
3 Volume IV standards. Volume III, Section 10.5120 entitled,  
4 "Hardship Relief Procedure," states:

5 "The planning commission may grant hardship relief  
6 waiving a specified provision set forth in the  
7 Development Standards Document [Volume IV] for an  
8 individual land parcel under the Type III procedure if  
9 it finds that strict application of the requirement  
10 would render the parcel incapable of reasonable  
11 economic use. The authority to grant hardship relief  
12 does not include authority to approve a development  
13 that is designed, arranged or intended for use not  
14 otherwise approvable in the location."<sup>3</sup> (Emphasis  
15 added)

16 Since petitioner removed the three undesirable hardship relief  
17 requests, the city should not have relied on section 10.5120 in  
18 deciding to deny the subdivision request as though the requests  
19 were still pending. Section 10.5120 was no longer applicable  
20 to the three withdrawn requests.

21 Next, Volume III, Section 10.3102 entitled "Residential  
22 Parcel Size Consistency" provides that a proposed residential  
23 development shall be compatible with neighboring established  
24 developments. The test for compatibility consists of  
25 determining that the proposed residential development will not  
26 create a parcel of land (lot) smaller than the adjusted median  
parcel size of existing residential parcels (lots) in the  
area. The adjusted median parcel size in the area is to be  
determined as set forth in the Development Standards Document  
(Volume IV).

Pursuant to Volume IV, Section 3.0150, the city's

1 determination of whether the parcel sizes proposed by Hallberg  
2 Homes were consistent with the existing residential  
3 developments in the vicinity was to have been based on  
4 specified measurement techniques. Section 3.0150 states that  
5 in determining the consistency of lot sizes with established  
6 lots, only parcels which are within the established district  
7 (all neighboring Binford Farms PUD developments are within an  
8 established district) shall be listed and "only structures of  
9 the same housing type shall be compared (e.g. single-dwelling  
10 to single-dwelling or two-dwelling to two-dwelling)." The city  
11 erred in applying the standard. Specifically the error is  
12 found in a finding which states in part:

13 "The proposed lots would be different and incompatible  
14 with the rest of the subdivision to the east and to  
the west." (emphasis added)

15 This finding indicates the city incorrectly compared  
16 petitioner's proposed development to the existing  
17 "single-dwelling" development to the east and west of phase 7  
18 instead of the existing "two-dwelling" development to the  
19 north. Petitioner's proposed development appears to be similar  
20 to the existing "two-dwelling" development immediately to the  
21 north of the subject site. To properly have applied the  
22 consistency rule, the city should have looked to the north, not  
23 to the east or west.

#### 24 Adequacy of Proposal

25 Respondent takes the position that the applicant's proposal  
26 could not be satisfactorily considered by the city council

1 without the inclusion of hardship relief requests. The city  
2 points out that under its procedure for land divisions, at the  
3 time of a tentative plat review, an applicant must demonstrate  
4 compliance with development standards. If the tentative plat  
5 is accepted, then the final plat approval can be issued by the  
6 city manager. Respondent argues that since the petitioner  
7 never submitted a redesigned plat but only withdrew its  
8 hardship requests, the city had an insufficient development  
9 plan before it. The city concludes in its brief that it could  
10 not approve the tentative plat because the petitioner failed to  
11 demonstrate compliance with all requirements.

12 The problem with the city's argument is that it was not the  
13 stated basis for its denial order. The city did not address it  
14 in its findings. Rather, the city denied Hallberg's tentative  
15 development plan based on misapplication of "Code" requirements  
16 (see discussion supra). It may very well be that petitioner's  
17 tentative plat plan, without the requested hardship relief,  
18 will not meet the standards set forth in Volume IV of the  
19 comprehensive plan. However, that issue was not discussed by  
20 the city in its findings. Furthermore, by adopting the March  
21 2, 1982 staff report as part of its order, some glaring  
22 inconsistencies exist between the order and its argument before  
23 this Board. The staff report recommended approval with  
24 conditions. The city adopted the entire staff report with  
25 modifications. The staff "recommendations and conditions" were  
26 not, however, modified. The denial was based, as above stated,

1 solely on inapplicable and improperly applied code provisions.  
2 It is unclear whether the removal of the hardship requests  
3 would have resulted in the applicant then being able to obtain  
4 plat approval based on those staff conditions. The city did  
5 not address this issue in its order. As we have held before,  
6 the applicant is entitled to findings that are responsive to  
7 its request. See Daon Corporation v. City of Gresham, 6 Or  
8 LUBA 126 (1982). The city's findings do not respond to  
9 petitioner's modified request.

10 The city's position regarding the lack of a proper  
11 tentative plan submission also seems to be inconsistent with  
12 the procedural posture of this proceeding. Petitioner and  
13 respondent both agree that the request was properly being  
14 processed pursuant to the procedure known as "Type III  
15 Procedure." A Type III Procedure provides:

16 "(1) Under the Type III procedure an application  
17 is scheduled for public hearing pursuant to sections  
18 10.7100 to 10.7530 [public deliberations and hearings]  
19 before the planning commission. The city shall notify  
20 all property owners within 300 feet of the proposal.  
21 At the public hearing, the staff, any applicant, and  
22 interested persons may present information relevant to  
23 the criteria and standards pertinent to the proposal,  
24 giving reasons why the application should or should  
25 not be approved or proposing modifications and the  
26 reasons the person believes the modifications are  
27 necessary for approval. The planning commission may  
28 attached certain development or use conditions beyond  
29 those warranted for compliance with the Development  
30 Standards Document [Volume IV] in granting an approval  
31 if the planning commission determines the conditions  
32 are necessary to avoid imposing burdensome public  
33 service obligations on the city, to mitigate  
34 detrimental effects to others where such mitigation is  
35 consistent with an established policy of the city and  
36 to otherwise fulfill the criteria for approval.

1 Additional development costs incurred shall be  
2 minimized to the extent possible. Needed housing  
3 types will not be excluded as a result of special  
4 conditions. Densities will not be reduced without  
5 findings that are based upon an adopted policy or  
6 implementation strategy of the comprehensive plan. If  
7 the application is approved, the manager will issue a  
8 development permit when the applicant has complied  
9 with the other requirements of this ordinance.

10 "(2) A decision of the commission may be  
11 appealed by a party to the hearing in accordance with  
12 sections 10.7500 to 10.7530." (Emphasis added)

13 It would appear that given the applicant's withdrawal of  
14 the three hardship requests found to be unacceptable by the  
15 planning commission, the city council was left with possibly  
16 two options: (1) it could have either approved the modified  
17 request by referring to the conditions recommended in the staff  
18 report; or (2) it could have sent the request back to the  
19 planning commission with instructions to follow the Type III  
20 procedures, i.e. placement of conditions on the proposal that  
21 would allow the development to go forth. Such an  
22 interpretation of the Type III procedural provision is in line  
23 with the requirements enunciated by the Court of Appeals in  
24 Commonwealth Properties v. Washington County, 35 Or App 387,  
25 582 P2d 1384 (1978). The applicant at that point would be made  
26 aware of what was required of it to move ahead with its  
project. If it could not meet the conditions, then its plan  
would have to be revised or dropped. As it stands now, the  
applicant does not know what is required of it because its  
application was denied based on a plat plan that was no longer  
relevant.

1 CONCLUSION

2 This Board can only review the findings that were made and  
3 the city's stated basis for its decision to deny petitioner's  
4 application. As we have held above, those findings and reasons  
5 are not responsive to petitioner's modified request. Based on  
6 the foregoing, this matter is remanded to the City of Gresham  
7 for further proceedings not inconsistent with this opinion.

8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

FOOTNOTES

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

---

1

Section 10.3100 states:

"Development Within an Established District. In an established district, a parcel of land may be developed in a manner similar to and compatible with existing development on other parcels in the vicinity and, if appropriate, an area accessory development may be permitted subject to approval pursuant to sections 10.5110 to 10.5114. Development within an established district shall be processed as a Type I procedure unless the development is not similar to or compatible with the existing development. A proposed development is similar to and compatible with existing development if it meets the requirements of sections 30.3102 to 10.3106.

---

2

It should be noted that the city, prior to hearing the appeal of the planning commission's decision, did offer the applicant the opportunity to file a new application for development without the requested hardship relief. The city also agreed at that point to waive all costs associated with the reapplication. The applicant chose not to do so but instead proceeded with its appeal apparently in an attempt to clarify its rights and obligations.

---

3

Further on in Section 10.5120 is set forth the criteria to be used for granting hardship relief. That criteria consists of seven items which must be dealt with by the applicant.