

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

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KATHY FISHER, GERI WILLIAMS, )  
and THE BINFORD LAKE )  
NEIGHBORHOOD COALITION, )  
Petitioners, )  
vs. )  
CITY OF GRESHAM, )  
Respondent. )

LUBA No. 83-105  
FINAL OPINION  
AND ORDER

On Remand from the Court of Appeals.

Steven L. Pfeiffer, Portland filed the Petition for Review and argued the cause on behalf of petitioner. Edward J. Sullivan, Portland, filed the supplemental memorandum. With them on the brief were O'Donnell, Sullivan and Ramis.

Matthew R. Baines, Gresham, filed a response brief and supplemental memorandum and argued the cause on behalf of Respondent City. With him on the brief was Thomas Sponsler.

John M. Wight, Portland, filed a response brief and supplemental memorandum and argued the cause on behalf of Respondent-Participant Hallberg Homes, Inc.

KRESSEL, Referee; BAGG, Chief Referee; DUBAY, Referee, participated in the decision.

REMANDED 10/17/84

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

1 Opinion by Kressel.

2 NATURE OF THE DECISION

3 Petitioners appeal the city's allowance of hardship relief  
4 (variance) in connection with approval of a planned unit  
5 development. The decision allows relief from a zoning standard  
6 requiring a minimum distance of 400 feet between intersections  
7 along a collector street.

8 FACTS

9 This appeal is before the Board on remand from the Court of  
10 Appeals. In Fisher v. City of Gresham, 69 Or App 411, \_\_\_  
11 P2d \_\_\_ (1984), the appellate court reversed our determination  
12 that the city had improperly construed certain code provisions  
13 governing hardship relief. Specifically, we held the city  
14 could not construe the code to allow relief from the  
15 intersection requirement to foster "reasonable economic use" of  
16 the property. In our view, the criteria in the code set a more  
17 restrictive standard. Fisher v. City of Gresham, LUBA No.  
18 83-105, Slip Op. at 16-18, (March 28, 1984). On appeal,  
19 however, the Court of Appeals concluded the code provisions in  
20 question were ambiguous and that the city's "reasonable  
21 economic use" interpretation should have been sustained.  
22 Accordingly, the Court stated:

23 "We reverse the portion of LUBA's order that  
24 concludes, as a matter of law, that the City is not  
25 authorized under its ordinance to grant hardship  
26 relief under Criteria 5 and 6 of the ordinance.  
However, LUBA's order does not show whether the city's  
findings in support of granting hardship relief under  
Criteria 5 and 6 are adequate, assuming the propriety

1 of the city's interpretation of its ordinance,  
2 including those criteria. Therefore, we remand to  
3 LUBA to determine whether the city's findings are  
adequate, given our view of the city's authority to  
interpret its ordinance." 69 Or App at 416.

4 DISCUSSION

5 At issue is the adequacy of the city's findings in  
6 connection with criteria 5 and 6 in the hardship relief portion  
7 of the code. Our analysis of the findings is guided by the  
8 following:

9 "If there is to be any meaningful judicial scrutiny of  
10 the activities of an administrative agency - not for  
11 the purpose of substituting judicial judgment for  
12 administrative judgment but for the purpose of  
13 requiring the administrative agency to demonstrate  
14 that it has applied the criteria prescribed by statute  
15 and by its own regulations and has not acted  
16 arbitrarily or on an ad hoc basis - we must require  
that its order clearly and precisely state what it  
found to be the facts and fully explain why those  
facts lead it to the decision it makes." Green v.  
Hayward, 275 Or 693, 707, 552 P2d 815 (1976) (quoting  
Homeplate, Inc. v. OLCC, 20 Or App 188, 190, 530 P2d  
862 (1975).

17 For the reasons stated below, we hold the findings in question  
18 fall short of this standard.

19 Criterion 5 of the code's hardship relief section reads:

20 "5. The development will occur on a parcel of land  
21 that in conjunction with adjacent land in the  
22 same ownership is not otherwise reasonably  
23 capable of economic use under the provisions of  
24 this code so that hardship relief is necessary  
for the preservation of a substantial property  
right of the applicant." Section 10.5120(5)  
Gresham Development Code.

25 With reference to this criterion, the city found:  
26

1 "The coalition claims that denial of the hardship will  
2 not preclude economic use of the land. The coalition  
3 claims that it is not the city's obligation to  
4 guarantee the number of lots that can be developed or  
5 the profit. The city has an obligation to allow  
6 development consistent with the land use designation  
7 of the property. The coalition states that  
8 alternative economic uses for the property can be  
9 achieved, and that alternative access points are  
10 available. But the coalition does not identify any  
11 alternative economic uses or alternative access points.

12 "Variation to the standard intersection spacing  
13 requirement is necessary for access to the site by a  
14 public street. Without public access to the internal  
15 sections of the property, a substantial number of lots  
16 could not be created as proposed." Record at 24.

17 We agree with petitioners that the finding is inadequate.  
18 Most of it summarizes the objections raised by opponents ("the  
19 coalition") of the request, rather than address the  
20 relationship of the facts to the approval criterion. The  
21 remainder of the finding makes two points: (1) The City has an  
22 obligation to allow development at the density authorized by  
23 the zoning designation and (2) if the requested relief is  
24 denied "...a substantial number of lots could not be created as  
25 proposed." Id.

26 Neither point adequately addresses criterion 5. As we read  
the criterion, the critical inquiry is whether conformance to  
the zoning requirement permits reasonable economic use of the  
property. Only if that inquiry yields a negative answer (i.e.,  
conformance does not allow reasonable economic use) can the  
city authorize relief. The finding, however, does not address  
this question. It does not describe what use would be

1 available if the intersection standard was met or explain why  
2 that use would not be reasonable economic use.<sup>1</sup> Nor does the  
3 finding explain, as we believe it must,<sup>2</sup> why the use  
4 authorized by the variance constitutes "reasonable economic  
5 use." The general statement that, without relief, a  
6 substantial number of lots "could not be created as proposed"  
7 does not constitute such an explanation. A remand of this  
8 finding is therefore in order.

9 The second criterion in issue reads as follows:

10 "6 The development will be the same as development  
11 permitted under this code and city standards to  
12 the greatest extent that is reasonably possible  
13 while permitting some economic use of the land."  
14 Section 10.5120(6) Gresham Development Code.

13 The city's finding with reference to this criterion reads:

14 "The relief to the intersection spacing requirement is  
15 the minimum necessary to allow public access to the  
16 internal portions of the site which is necessary for  
17 the development of the site as proposed.

17 "The coalition claims that the applicant is requesting  
18 two variances, not one. The applicant is requesting  
19 just one variance to the intersection spacing  
20 requirement. The coalition claims other alternatives  
21 are available but does not identify what they are.  
22 The coalition does not identify a less severe  
23 diversion from this standard." Record at 24.

21 We accept the city's statement the criterion requires it  
22 "to determine if the requested variation from the standard is  
23 the minimum necessary to allow the economic use found in  
24 Criterion 5." Respondent's Supplemental Memorandum on Remand  
25 at 4. The difficulty is that the city's explanation of the  
26 economic use protected by Criterion 5 in this case is unduly

1 vague. It follows that the finding under Criterion 6 is  
2 insufficient to explain why the relief granted is the minimum  
3 necessary.

4 Based on the foregoing, this case is remanded to the city  
5 for findings explaining the manner in which relief to the  
6 intersection spacing requirement satisfies Criteria 5 and 6 of  
7 the code's hardship relief provision. OAR 661-10-070(1)(C)(1).

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FOOTNOTES

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The city's memorandum on remand discusses this point. However, a legal memorandum by counsel does not constitute a finding by the decisionmakers.

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2  
At first glance, Criterion 5 seems only to require a determination phrased in negative terms, i.e., that conformance to the zoning requirement would not yield reasonable economic use. However, the city's interpretation of Criterion 6 makes clear that a positive determination must also be made. As the city interprets Criterion 6, relief is available only if found to be the "minimum necessary to allow the economic use found in Criterion 5." Respondent's Supplemental Memorandum on Remand at 4. It follows that the findings in connection with Criterion 5 must affirmatively explain the city's application of the reasonable economic use criterion.