BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

REALTY INVESTMENT CO., and TERRA CORPORATION, Petitioners, vs. CITY OF GRESHAM Respondent.	LUBA No. 80-085 FINAL OPINION AND ORDER

Appeal from City of Gresham.

James A. Cox, Lake Oswego, filed the Petition for Review and argued the cause for Petitioners Realty Investment Company and Terra Corporation. With him on the brief was Dan R. Olsen.

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

REYNOLDS, Chief Referee; COX, Referee; BAGG, Referee; participated in this decision.

REMANDED 1/12/81

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).

REYNOLDS, Chief Referee.

NATURE OF THE PROCEEDINGS

Petitioners challenge Ordinance Nos. 885 and 886 adopted by the City of Gresham on June 24, 1980, adopting the city's comprehensive plan and plan map and repealing the city's preexisting comprehensive plan, zoning ordinance and map. Petitioners challenge the validity of Ordinances 885 and 886 with respect to petitioners' 36 acres located within the City of Gresham.

ASSIGNMENTS OF ERROR

Petitioners set forth six assignments of error. The first assignment of error is that the decision of the city with respect to petitioners' property was so vague, confusing and uncertain that a reasonable person could not determine the actual result. The second assignment of error asserts that the city's plan was improperly enacted because certain materials allegedly incorporated into the plan were not in existence on the date of the enactment. The third and fifth assignments of error assert that procedural safeguards were not provided and the requirements for quasi-judicial decision making were not followed. Petitioners' fourth assignment of error is that the city violated statewide planning Goal 2 (Land Use Planning) by failing to provide for citizen review and comment during preparation of the portion of its comprehensive plan affecting petitioners' property. Petitioners' final assignment of error is that the city's decision was arbitrary and capricious.

DECISION

For reasons which follow, we concurr with petitioners' first and sixth assignments of error that the city's decision concerning a portion of petitioners' property was vague and uncertain as well as arbitrary.

STATEMENT OF FACTS

Petitioners own approximately 36 acres of undeveloped land lying generally north of Powell Boulevard and east of 182nd Avenue in the City of Gresham. In August of 1975 the City of Gresham began its process of developing a new comprehensive plan to comply with the statewide planning goals. In April of 1980, and as part of this process, the city planning staff prepared a proposed Gresham Community Development Plan Map. The northern 28 acres of petitioners' property was designated under this proposed plan map as low density residential (LDR). This portion of petitioners' property had previously received preliminary subdivision plat approval from the city at densities consistent with the LDR designation of the property proposed in the April 1980 plan map. The remainder of petitioners' property lying between this subdivision and Powell Boulevard was designated medium density residential (MDR), with a small corner designated industrial.

The designation of petitioners' property under the proposed plan map was the same as the designation which existed for petitioners' property under the city's prior comprehensive plan, with the exception of the industrial designation in the

extreme southeast corner of petitioners' property.

In May of 1980, petitioners requested that the northern 28 acres of their property be redesignated to moderate density residential. This MDR designation would allow zero lot line duplexes[1] at a density which could not be accommodated in a low density residential district (unless within 275 feet of a major arterial such as Powell Boulevard). An MDR designation for the northern 28 acres would permit a maximum of 672 units, as compared to the 110 units which would have been allowed under the LDR designation and which would have been permitted under petitioners' tentative subdivision plat approval. Staff recommended, however, that approximately half of the northern 28 acres be designated MDR and half designated LDR. This recommendation would have permitted approximately 304 units on the northern 28 acres which was very close to the 244 duplex units which petitioners actually desired to construct. The planning commission approved the staff recommendation.

On June 10, 1980, Ordinance No. 885 and Ordinance No. 886 were read for the first time before the city council. These ordinances were for the purpose of adopting a comprehensive plan and map for the City of Gresham. The plan map was to serve in place of a zoning map for the city and included the planning commission's recommendation that the northern 28 acres of petitioners' property be designated approximately half LDR and half MDR. The remainder of petitioners' property was proposed to be designated MDR and industrial.

On June 17, 1980, the city council held a public hearing on the comprehensive plan. Petitioners appeared and objected to the recommendation as to the northern 28 acres because of the split land use designation on this property. They requested that the entire 28 acres be designated MDR.[2] The city was concerned about designating the property all MDR because this would allow the potential for more units to be constructed (672 units maxiumum) than the streets in the area could bear. To alleviate this concern petitioners offered the city a restrictive covenant which would restrict the number of units petitioners could build on the property. The city, however, followed its staff recommendation against accepting a restrictive covenant because the city had not adopted such an approach in the past and because there was concern as to the legality of such "contract zoning."

The city took no action at this June 17th hearing concerning petitioners' property. This was the one and only hearing at which petitioners and the general public were allowed to testify concerning the proposed designation for petitioners' property. No evidence was taken at this hearing with respect to the remaining portions of petitioners' property.

On June 23, 1980, the city council conducted a work session on the proposed comprehensive plan and map. The vast majority of the council's discussions and deliberations on petitioners' property concerned the 28 acres previously granted subdivision approval. Councilman Hansen expressed the opinion that he

would prefer to "leave it the way it is all single-family homes." Powell Boulevard, as proposed for realignment,[3] would border or come close to bordering the subdivision on the south. Councilman Hansen spoke to this problem as follows:

> "But once Powell is realigned, I realize that it is not an ideal place for single-family homes. You could still run the street pattern so that none of them front on Powell. They'd front in behind where there'd only be one exit whether you have duplexes or single-family homes and I just personally, I think they'd be completely satisfied with what they got if we weren't going through a zone -- comprehensive plan change. That's my feeling."

Councilman Hansen then made the following motion:

> "...well, I'd...the recommendation is moderate density designation on southern half of the property and low density on the northern half as approved by the planning commission, but I'd like to open up discussion. I'd like to move that we retain the original designation and make this entire piece of property low density."

The council then discussed the fact that with Powell Boulevard as proposed for realignment, the lots along the southern edge of the subdivision (known as "Glocca Morra") would be within 275 feet of Powell Boulevard and thus available for duplexes. Planning Director Daniels then made the following clarification:

> "***there's a point of clarification. There are two -- a couple of lots below the Glocca Morra -- the Glocca Morra piece is a square one -- yeah, there -- and there are lots south of that -- yeah, right in there -- that are not part of the Glocca Morra piece of property but they were treated the same. They were designated moderate density residential."

Councilman Bentley asked what the prior comprehensive plan and zoning map designations had been on the lots mentioned by Planning Director Daniels. He was told "R-10 or R-20,"

meaning moderate density residential. The significant part about this discussion, however, is that it is the first time the transcript shows any attention being given to petitioners' property besides the 28 acres contained within the previously approved Glocca Morra subdivision. The following statements were then made by members of the council:

"K. Hansen - My motion -- to include that whole area.

"R. Daniels - Okay.

"M. Opray - Down to Powell.

"K. Hansen - Down to Powell.

"R. Walker - Down to Powell."

The council then voted in favor of Councilman Hansen's motion. The result of the council's deliberations and its work session on June 23, 1980 was its determination that all of petitioners' property down to Powell Boulevard as it presently exists should be designated low density residential. This resulted in a change in the recommendation made by the planning commission in that there would be no moderate density residential nor industrial designation for any of petitioners' property.

Following the council's deliberations on June 23, 1980, the planning staff amended what were to become the official zoning maps on file at city hall to reflect what it perceived to be the result of the city council's deliberations. With the exception of a small portion of petitioners' property located in the extreme southeast corner of the property, which portion

was designated industrial, all of petitioners' property was designated LDR. None of petitioners' property was designated moderate density residential. On June 24, 1980, the city council adopted the plan map as it had been amended by the planning staff.[4]

Although adopted on July 24, 1980, Ordinances No. 885 and 886 were given an effective date of July 1, 1980, in order to meet LCDC's deadline for submission of comprehensive plans to the Department of Land Conservation and Development for acknowledgement. The plan was submitted to the Department and was acknowledged by LCDC as in compliance with all statewide planning goals in October of 1980. Petitioners did not participate in the acknowledgement process but instead filed an appeal of the city's adoption of its plan and map with this Board.

OPINION

Respondent City of Gresham contends in a motion to dismiss as well as in its brief with respect to each of petitioners' six assignments of error that LCDC's acknowledgement of the city's comprehensive plan has decided all of the issues raised by petitioners and that the Land Use Board of Appeals is bound by this determination. As a basic proposition, we agree with the city that any statewide goal issues involved in this appeal are now moot given LCDC's acknowledgement of the city's comprehensive plan in October of 1980. Even though petitioners did not participate in the acknowledgement process, as owners

of property affected by the comprehensive plan, they clearly were entitled to participate and could have participated had they chosen to do so. If petitioners believe that the city violated any of the statewide planning goals in its land use designations for petitioners' property in the comprehensive plan, petitioners could have raised those goal violations during the acknowledgement process. An acknowledgement order issued by LCDC formally recognizes that the city's comprehensive plan complies with the statewide planning goals. Once that acknowledgement is given, no collateral inquiry as to that plan's compliance with the statewide goals may be asserted by one affected by that plan. Cf Oregon Business Planning Council v. LCDC, 490 Or App 153, ___ P2d ___ (1980).

While we agree with the city's position in principle, this does not mean that petitioners are precluded from raising non-goal issues concerning the validity of Gresham's comprehensive plan. LCDC's acknowledgement order is limited in that it recognizes only that the comprehensive plan complies with the statewide planning goals. See ORS 197.251. To the extent that a city must comply with other requirements not rooted in the statewide planning goals, the commission's order acknowledging a comprehensive plan does not reach such issues. This Board may properly rule upon such matters if they are raised in the Petition for Review.

In the present case, at least two of petitioners' six assignments of error are not rooted in the statewide planning

goals. Petitioners' first assignment of error is that the city's action was so vague and uncertain that a reasonable person could not determine the actual result. Petitioners' sixth assignment of error is that the city's action as reflected on the official zoning maps was arbitrary and capricious. We discuss the sixth assignment of error first.

The requirement that a governing body's exercise of its planning and zoning responsibilities not be arbitrary or capricious existed long before adoption of the statewide planning goals. As stated by the Supreme Court in Fasano v. Washington County Commissioners, 264 Or 574, 507 P2d 23 (1973):

> "Ordinances laying down general policies without regard to a specific piece of property are usually an exercise of legislative authority, are subject to limited review, and may only be attacked upon constitutional grounds for an arbitrary abuse of authority." 264 Or 574 at 580 - 581.[5]

In Jehovah's Witnesses v. Mullen, et al, 214 Or 281, 330 P2d 5 (1958), the Supreme Court described the terms arbitrary and capricious:

> "The terms 'arbitrary and capricious action,' when used in a matter like the instant one, just mean willful and unreasoning action, without consideration and in disregard of the facts and circumstances of the case. On the other hand, where there is room for two opinions, action is not arbitrary or capricious when excercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion had been reached. [Citing cases]" 214 Or 281 at ___.

Applying the arbitrary and capriciouses test set forth in Jehovah's Witnesses, we conclude the City of Gresham acted arbitrarially in adopting Ordinances Nos. 885 and 886 and

specifically the plan map embodied in Ordinance No. 885 designating approximately 7 acres of petitioners' property below the previously approved subdivision as LDR. There is no dispute, and in fact, petitioners conceded during oral argument that the city's action in designating the previously approved subdivision LDR was unchallengable. The council discussed this area specifically and testimony was received concerning this area. However, a review of the transcript concerning the city council's discussions and deliberations as to the southern most 7 acres of petitioners' property leads us to conclude that there was no basis in fact for the city's decision to alter the designation on this property from MDR as it previously had been designated and as it had been proposed to be continued by staff to LDR. All there is concerning this property is Mr. Daniel's statement that there were a couple of lots below the Glocca Morra subdivision designated MDR and councilman Hansen's statement that his motion included that area as well. No support for this action, however, exists anywhere in the record. When one cannot look at the record and find some basis to support a decision made, that decision must be characterized as "unreasoning action, without consideration and in disregard of the facts and circumstances of the case," within the meaning of Jehovah's Witnesses v. Mullen, supra.[6]

There is a second basis for declaring the city's action legally deficient. The city has chosen to use its comprehensive plan and plan map as a combined planning and

zoning map. The city does not intend to adopt a zoning map in addition to the plan map but will rely upon the plan map for purposes of determining permissible uses within zones and the boundaries of those zones.

The plan map, as it relates to petitioners' property, separates that portion of petitioners' property designated LDR from industrial by means of a heavy, wide, dark line drawn apparently in free-hand fashion. The line follows Powell Boulevard for a ways and then cuts across petitioners' property at no specifically discernible point. The line proceeds from petitioners' property to cut through adjoining lots, severing these lots also at no specific or discernible point.

In Lane County v. R.A. Heintz Construction Company, 228 Or 152, 364 P2d 627 (1961), the Supreme Court held that in order to be valid a zoning ordinance must "be definite enough to serve as a guide to those who have a duty imposed on them." 228 Or 628 at 629. The rule announced in the Heintz case is generally recognized as it applies specifically to the fixing of the boundaries or limits of zones:

> "As other ordinances, zoning ordinances are required to be reasonably definite and certain in terms so that they may be capable of being understood. The boundaries or limits of zones or district must be clearly and definitely fixed, and the restrictions on property rights in the several zones must be declared as a rule of law in the ordinances and not left to the uncertainty of proof by extrinsic evidence.***" 3 McQuillan, Municipal Corporations, sec 25.59.

See also 2 Anderson, Amercian Law of Zoning, sec 9.05.

Respondent has pointed to no extrinsic evidence by which one might be able to determine where specifically the boundary separating the LDR zone from the industrial zone is actually located on the ground. Even if this were possible, however, the problem still exists that the boundary separating the two zones splits petitioners' property as well as neighboring lots with no apparent justification. This is simply indicative of the apparently arbitrary manner in which respondent chose to draw the boundary line separating the LDR zone from the industrial zone. See Anderson, supra, sec 9.12.

In conclusion, we hold the city's decision to designate petitioners' property south of the Glocca Morra subdivision low density residential was unsupported by any factual or other information in the record and, hence, invalid. We also hold that the boundary separating the LDR zone from the industrial zone is so vague and uncertain that it must be declared to be invalid. This matter is remanded to the city for further proceedings consistent with this opinion.

FOOTNOTE

1

A "zero lot line duplex," as we understand the term, is a duplex essentially straddling two lots. That is, it is two units joined together with the point of joinder resting on the lot line separatng the two lots.

2

Although petitioners only intended to develop 244 units on the entire property, a number allowed by the proposed split designation, petitioners were objecting to the proposed split designation because in that portion of the property designated LDR petitioners would not be able to construct duplexes at densities of one unit per 4,000 square feet. The LDR district had a minimum lot size of 7,000 square feet per unit.

3

At present, Powell Boulevard is the southern boundary of petitioners' property. It is not clear from the record exactly where Powell Boulevard would be located if realigned. However, it is clear that the proposed realignment would shift Powell to the north, bisecting petitioners' property at a point somewhere near the southern boundary of the 28 acre subdivision.

4

The Board was not furnished with a transcript or minutes of the June 24, 1980, meeting. However, because the Board was furnished a written transcript of the city council's discussions concerning petitioners' property as part of the comprehensive plan amendment process, the Board assumes that the council on June 24, 1980, did not discuss petitioners' property.

5

Petitioners have argued that the decision in this case is a quasi-judicial as opposed to a legislative decision because the ordinances affect their specific property. The same is true, however, whenever a city adopts a comprehensive plan because that plan will affect individual pieces of property. The adoption of a comprehensive plan has been described as a legislative act. See Fifth Avenue Corporation v. Washington County, 282 Or 591, 581 P2d 50 (1978). We do not believe the Supreme Court of Oregon has altered the holding in Fifth Avenue Corporation and we are unwilling to do so in this case.

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6 We also take note of Oregon Laws 1979, ch 772, sec 5(5) which provides, in pertinent part:

> "(4) The board shall reverse or remand the land use decision under review only if:
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> "(a) The board finds that the city, county or special district governing body:
>
> "* * *
>
> "(C) Made a decision that was not supported by substantial evidence in the record; * * * *"

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

REALTY INVESTMENT CO., and TERRA CORPORATION, Petitioners,	)	LUBA No. 80-085
v.	)	FINAL ORDER (ON REMAND)
CITY OF GRESHAM, Respondent.	)	

This matter is before the Board on remand from the Court of Appeals' decision in City of Gresham v. Realty Investment Company and Terra Corporation, 55 Or App 527, 638 P2d 1177 (1982). The Court of Appeals reversed, in part, and remanded the case to this Board to modify our order consistent with the Court of Appeals' opinion.

In Realty Investment Co. v. Gresham, 2 Or LUBA 153 (1981), we remanded the city's land use decision involving the adoption of a comprehensive plan and plan map and repeal of the city's existing comprehensive plan, zoning ordinance and map. Only that portion of the city's new comprehensive plan and plan map pertaining to petitioner's 36 acres was involved in our decision.

We remanded the decision to the city for two reasons: (1) we concluded the city's decision was arbitrary and capricious in that there was no factual basis in the record to support the city's decision to designate 7.5 acres of petitioner's 36 acres low density residential; and (2) the boundary line on the

city's comprehensive plan for separating petitioner's land designated low density residential from a small portion of petitioner's land designated industrial was so vague and uncertain as to the location of the boundary that the decision had be declared invalid.

On appeal to the Court of Appeals petitioner challenged only that portion of our order declaring the city's decision to be aribtrary and capricious. It was that portion of the Board's opinion which the Court of Appeals reversed. No action was taken by the Court of Appeals with respect to that portion of our opinion in which we said the boundary line separating low density residential from industrial was vague and uncertain.

It is hereby ordered that that portion of the final opinion and order of the Board dated January 12, 1981, is modified by deleting the portion which discusses petitioner's sixth assignment of error. For the reasons expressed by the Court of Appeals in City of Gresham v. Realty Investment Co., supra, petitioner's sixth assignment of error is denied.

Dated this 6th day of July, 1982.

Michael D. Reynolds
Chief Hearings Referee