



1 COX, Referee.

2 NATURE OF PROCEEDING

3 Petitioner appeals Gresham City Council's denial of its  
4 request for a plan and map amendment to the Gresham  
5 Comprehensive Plan. The proposed amendment would have changed  
6 the designation on Phase II of petitioner's Sandpiper East  
7 development from low density residential (LDR) to moderate  
8 density residential (MDR). Petitioner also appeals Gresham's  
9 refusal to change the "district designation" for the Sandpiper  
10 development from "estabilshed to "developing."

11 ALLEGATIONS OF ERROR

12 Petitioner sets forth four allegations of error which when  
13 read together bring into issue the adequacy of the Gresham City  
14 Council's findings. The findings are alleged to be inadequate  
15 because they fail to properly address petitioner's proposal to  
16 build single family residences at a density of 12 or fewer  
17 units per acre on Phase II. Petitioner also claims that the  
18 findings are not supported by substantial evidence in the  
19 record.

20 FACTS

21 Phase II of the Sandpiper East subdivision contains  
22 approximately 34 acres and is located adjacent to southeast  
23 Stark Street in Gresham, Oregon. The subject property is in an  
24 area of Gresham predominately zoned MDR. Under petitioner's  
25 original Phase II plan, which had been approved by Gresham, the  
26 property is to be developed with a standard 7,000 square foot

1 per lot subdivision. The entire Sandpiper East subdivision  
2 (Phase I as well as the subject Phase II) are designated in the  
3 Gresham Comprehensive Plan and Zoning Map (a combination  
4 document) as low density residential. The LDR designation  
5 permits two basic housing types: (1) a standard single family  
6 detached home located on a minimum 7,000 square foot lot or,  
7 (2) attached multi-family housing such as duplexes and  
8 triplexes. The LDR designation does not permit alternative  
9 single family housing arrangements such as cluster housing,  
10 zero lot line housing or single family town houses. Petitioner  
11 desires to construct those alternative single family housing  
12 types based on its belief that the market for the traditional  
13 7,000 square foot lot single family home is no longer lucrative  
14 given changes in the market place and the economy. In order to  
15 develop the property with the housing types which petitioner  
16 feels are more marketable, it was necessary to receive an MDR  
17 designation. Such a designation would permit greater  
18 flexibility in matters such as setbacks and lot sizes and  
19 configurations. The MDR zone allows a maximum density of 24  
20 units per acre. The existing LDR designation allows a maximum  
21 of 8.7 units per acre on the property.

22 Although no specific site plan had been developed at the  
23 time petitioner requested the designation change, the record  
24 indicates the corporation consistently represented to the city  
25 that it wished to develop the property at approximately  
26 one-half (12 units per acre) the maximum density allowed under

1 the MDR zone (24 units per acre). The record reveals that  
2 petitioner proposed to construct 315 housing units instead of  
3 the approximately 800 units which theoretically could be built  
4 on the property if the 24 unit per acre density were utilized.  
5 If the MDR zone were granted and petitioner developed the  
6 property at the proposed 12 units per acre density, the total  
7 Sandpiper East development (Phase I and Phase II) would have an  
8 overall density of approximately 6.95 units per acre. Such  
9 density would be below the maximum 8.7 units per acre allowed  
10 under the existing LDR designation. The main reason for  
11 requesting the MDR designation seems, therefore, to be to allow  
12 the petitioner flexibility in designing the single-family  
13 development.<sup>1</sup> The Gresham Comprehensive Plan has only the  
14 two residential zones (LDR and MDR).

15 The Gresham Planning Commission, on the basis of staff  
16 reports, recommended approval of the requested comprehensive  
17 plan and map change. However, it recommended denial of  
18 petitioner's request for change in the development district  
19 designation from "established" to "developing." Under  
20 provisions of the Gresham city code the planning commission's  
21 recommendation is automatically reviewed by the city council,  
22 therefore no appeal was necessary.

23 On July 7, 1981 the city council closed its first public  
24 hearing on the planning commission recommendation. On July 21,  
25 1981 petitioner requested the hearing be reopened in order to  
26 respond to new issues raised during the public comment portion

1 of the July 7, 1981 hearing. Respondent granted the request  
2 and held an additional hearing on August 18, 1981. At the  
3 conclusion of the August 18th hearing the Gresham City Council  
4 voted unanimously to disregard the planning commission's  
5 recommended approval. On September 1, 1981 written findings of  
6 fact were adopted by the council. It is at this September 1,  
7 1981 hearing that petitioner claims materials relating to a key  
8 issue in the case, i.e. the purpose for and capacity of the  
9 North Trunk Parallel Sewage line, were discussed for the first  
10 time by city council members. The City Council based part of  
11 its decision on facts about the North Trunk Parallel line. No  
12 public discussion was permitted at the September 1, 1981  
13 meeting.

#### 14 DECISION

##### 15 Comprehensive Plan and Map Change

16 Pursuant to Section 10.013 of the Gresham Community  
17 Development Plan

18 "Changes to the Community Development Map may be  
19 initiated by affected parties annually and approved if  
the City Council finds:

20 "(a) The change is consistent with applicable  
21 comprehensive plan policies, and either;

22 "(b) A change of physical circumstances has occurred  
23 since the application of the original  
designations, or;

24 "(c) A mistake was made in the original land use  
designations." (Emphasis added)

25 Petitioner claims it has met all of the standards required of  
26 it to show that an amendment is justified. The city found,

1 however, that (1) the requested change was not consistent with  
2 the "public facilities and services" policy of the community  
3 development plan; (2) a change in physical circumstances had  
4 not occurred since the original plan; and (3) the original land  
5 use designation was not based on a mistake.

#### 6 Consistency With Plan Policies

7 In ruling on whether the proposed plan map amendment was  
8 consistent with plan policies, the city concluded that  
9 petitioner had met its policies relating to energy sources and  
10 conservation, and housing but had failed to comply with the  
11 public facilities and services policies because the main street  
12 serving the property was "over capacity." Specifically, the  
13 city found

14 "1. The requested change was not found to be  
15 consistent with the Public Facilities and Services  
16 Policy of the Community Development Plan. The Public  
17 Facilities and Services Policy (Section 10.330) states  
18 that 'It is the City's Policy that development will  
19 coincide with the provision of adequate public  
20 facilities and services, including access, drainage,  
21 water and sewerage.' The Engineering Division's memo,  
22 Exhibit 'E', indicates that 'according to the 1980  
23 Multnomah County Transportation Safety Study, Stark  
24 Street between 242nd and 257th has a capacity of 600  
25 vehicles per hour and rush hour volume of 880 vehicles  
26 an hour.' 'The street is currently over capacity.'  
The preceding indicates that the primary access mode,  
Stark Street, is inadequate to accommodate the  
additional traffic volumes which would be associated  
with a Plan Map Amendment that increases the potential  
development density from a range of 4.8--8.7 dwelling  
units an acre, under the present Low Density  
Residential Designation, to a potential 24 dwelling  
units an acre, under the Moderate Density Residential  
Designation."

The "finding" indicates the only plan policy the proposal

1 is inconsistent with is the one referring to access. The city  
2 bases that conclusion on the potential traffic increase  
3 associated with a development at the density of 24 dwelling  
4 units an acre.

5 Petitioner attacks the above findings as being unresponsive  
6 to its request and not based on substantial evidence.

7 Petitioner argues that the city council's finding on the street  
8 capacity issue was premised on its evaluation of the potential  
9 impact created by development at a density of 24 units per acre.

10 We find that the contested finding is not adequate given  
11 the fact that the petitioner is proposing to develop the land  
12 at less than 24 units per acre. Petitioner has a right to a  
13 responsive and accurate evaluation of its proposal. The  
14 finding relied upon by the city is not responsive to the great  
15 quantity of material in the record indicating petitioner  
16 proposes not to build at a 24 unit per acre density but rather  
17 at a 12 or fewer units per acre density.

18 The record and respondent's brief indicate the city  
19 believes that it must evaluate petitioner's request as if 24  
20 units per acre were to be built on the property. We do not  
21 understand from the city's findings why it has taken such a  
22 position or whether the comprehensive plan requires it to do  
23 so. Since the MDR designation contemplates a range of density  
24 up to 24 units per acre and because the city appears to possess  
25 some power to control density at less than 24 units per acre  
26 (see discussion infra), we believe the city was obligated to

1 explain why it has taken such a position.

2 Also, there is an unexplained inconsistency in the city's  
3 finding that traffic on Stark Street exceeds the street's  
4 carrying capacity. The city concludes Stark Street would not  
5 be able to accommodate the additional traffic volumes  
6 associated with petitioner's proposal to increase the density  
7 of its development. The petitioner already has approval to  
8 develop its property at a density of up to 8.7 units per acre.  
9 Evidence in the record indicates that even with 12 units per  
10 acre on Phase II, the total Sandpiper East development density  
11 will be only 6.95 units per acre. Implicit in the city's  
12 earlier approval of 8.7 units per acre density is the  
13 conclusion that the streets serving the development can  
14 accommodate traffic generated by that dense of development.  
15 Yet in its decision on petitioner's present request, the city  
16 seems to be saying that Stark Street can not now handle even  
17 the traffic generated by the approved development density. The  
18 city does not explain this obvious inconsistency. In addition,  
19 the city position seems to ignore the evidence in the record  
20 indicating plans and efforts are underway to alleviate some of  
21 the congestion on Stark Street. These include using alternate  
22 access routes. The finding also ignores the comprehensive plan  
23 policy which is to establish a street and roadway system to  
24 meet anticipated future growth and development.

25 Change in Physical Circumstances

26 With regard to the second portion of the plan amendment

1 criteria, the city found that the construction of a parallel  
2 north trunk sewerage line did not represent a change in  
3 physical circumstances of the type necessary to justify the  
4 requested density. Specifically, the city found:

5 "The parcel is located within the North Trunk Sewerage  
6 Basin. This basin is served by a sewerage trunk line  
7 which developed surcharging problems (Exhibit "E")  
8 that resulted in property damages. The surcharging  
9 problem was evident in January of 1980. The City  
10 Council authorized a study to resolve the surcharging  
11 problem on June 24, 1980. This study recommended and  
12 the council approved the construction of another  
13 sewerage trunk line to relieve the surcharging  
14 problem. The construction of the new line does not  
15 represent a change in physical circumstances since the  
16 new facility was designed to accommodate an existing  
17 surcharging problem and not to provide for additional  
18 development densities. This finding is supported by  
19 the fact that engineering division memo (Exhibit "E")  
20 indicated that 'sewer master plan has projected the  
21 flows from the property at the current comprehensive  
22 plan designation of low density. Increasing the  
23 density on this property would increase the peak  
24 sanitary sewage flow into the North Trunk by 250,000  
25 gallons per day. This is a significant increase in  
26 the sewage volume over what was allowed for in the new  
sewer master plan.'"

17 Petitioner says the findings relating to this issue are  
18 unsupported by substantial evidence and, like the issue on plan  
19 policy compliance, unresponsive to its proposal. We understand  
20 petitioner's argument to be that the mere fact the city  
21 authorized a study of a surcharging problem before the adoption  
22 of the comprehensive plan does not eliminate the fact that a  
23 new line has been constructed since the plan was adopted. As a  
24 result of the new "parallel" line, excess sewer capacity now  
25 exists. It is this additional capacity that petitioner argues  
26

1 is the change of circumstances, and the fact the surging  
2 problem was recognized before the comprehensive plan adoption  
3 is of no moment. As petitioner argues:

4 "The contention that a study of a parallel north trunk  
5 line constituted a recognition that such a line should  
6 be funded and constructed appears no where in the  
7 record, but is simply a finding constructed out of  
8 whole cloth in order to provide some response to the  
9 comprehensive plan amendment criteria."

10 We agree with petitioner. There is nothing in the record to  
11 indicate the surcharging problem was anything more than  
12 recognized prior to the adoption of the comprehensive plan.  
13 The comprehensive plan itself addresses the North Trunk line  
14 but says nothing about construction of the new line and  
15 additional capacity. As the plan states:

16 "3.422 Current Capacities of the Collection System.

17 "The north trunk sewer, beginning at Kelly Creek  
18 Trunk has been at capacity for the past two years.  
19 The north trunk sewer serves north and northeast  
20 Gresham as well as southeast Gresham via a division of  
21 the Kelly Creek Trunk Sewer into the North Trunk  
22 Sewer. Gresham's master plan calls for an expansion  
23 of the facility from the existing 15" to 27".

24 "On the 25th of March, 1980, the Gresham City  
25 Council imposed a moratorium in the North Trunk  
26 Basin. After finding that property damage was being  
caused by surcharging during periods of heavy rain  
fall, and that engineering studies revealed that  
blockage or damage to the trunk line had occurred, the  
council passed resolution No. 904 which prohibited the  
City from making any further development committals in  
the North Trunk and Kelly Creek Drainage Basins. The  
moratorium would stay in effect until December 10,  
1980, at which time the engineering department, with  
the help of a consulting engineer would have a full  
report before the City Council concerning the  
resolution of the problem. The moratorium itself did  
not halt completely the building activity in the

1 entire basin. The City still recognized its  
2 responsibility to prior project approvals which were  
3 underway by not imposing a full building moratorium.  
4 A survey of the potential building activity in the  
5 basin disclosed that an additional 850+ building  
6 permits could be issued in the interior. [sic]  
7 (See Appendix 39B for the boundary of North Trunk  
8 Basin Moratorium)." Gresham Community Development  
9 Plan, Volume I, pg. 150, July 1, 1980.

10 Additionally, as we've held above, the finding is not  
11 responsive to the proposal to develop Phase II, at a density of  
12 12 or fewer units per acre. The reference in the finding to an  
13 engineering division memo (Exhibit "E") ignores the fact that  
14 "Exhibit E" was completely revised by "Exhibit G". It is  
15 Exhibit "E" which used the 250,000 gallon per day flow figure.  
16 Exhibit "G," which originated from the same source as Exhibit  
17 "E" states:

18 "We have been informed by Nawzad Othman of Marx and  
19 Chase that the developer of this property is  
20 requesting an increase in density from 8.7 to only  
21 approximately 12 units per acre.

22 "As you are aware the engineering division comments on  
23 PMA6-80 [Exhibit E] were based on the maximum MDR  
24 density of 24 units per acre. The requested increase  
25 of 3 to 4 units per acre over the present LDR density  
26 would not place a significant increase in the loading  
27 on planned sewer, water and storm drainage systems.  
28 Any increase in loading could be incorporated in the  
29 design of the public utilities or in the master plans  
30 yet to be developed. The present design for the north  
31 trunk relief sewer can handle this increase in  
32 loading. If limiting this property to 12 plus or  
33 minus units per acre is not possible, our original  
34 comments would still apply."

35 The city has not explained in its findings why the  
36 comprehensive plan requires denial of the request when  
37 development is proposed at 12 units per acre which the sewer

1 system can, apparently, handle. In addition, the evidence  
2 submitted by the planning division for the City of Gresham  
3 states in reference to the change of circumstances issue:

4 "[t]here has been a change in physical circumstances  
5 since July 1, 1980 (date of adoption of the  
6 comprehensive plan).\*\*\*This change in physical  
7 circumstances is the future construction of the  
8 parallel north trunk sewerage line. This does qualify  
9 as a physical change and fulfills the change criteria  
10 for a plan amendment.

11 "The engineering division has indicated that the  
12 proposed change would have a significant impact on the  
13 facilities; i.e., sewer, water, storm water and  
14 streets, compared to the present low density  
15 residential designation if built out to the maximum  
16 density of 24 units an acre as permitted within the  
17 moderate density residential district. However, based  
18 on the comments made by the engineering division  
19 (Exhibit "G") the proposed 12 units an acre, as  
20 proposed by the applicant's representative, was found  
21 not to place a significant increase 'in loading on  
22 planned sewer, water and storm drainage systems.'"

23 The staff report then concluded that:

24 "Public facilities are adequate to meet the lower  
25 development density range within the moderate density  
26 residential district. Furthermore, a change in  
27 physical circumstances has occurred since the plan was  
28 adopted."

29 Respondent's counsel, in his brief and at oral argument,  
30 placed great emphasis on the fact that if the MDR designation  
31 were allowed, then the city may be forced to allow petitioner  
32 to build 24 units per acre. Such a position is confusing. The  
33 MDR designation allows a range of density up to 24 units. If  
34 physical constraints, roads, sewers, topography, etc. prevent  
35 maximum density development, it would certainly seem to be  
36 within the city's power to reasonably control the density.

1 Provisions in the city's "Community Development Plan" appear to  
2 give the city that authority. Section 2.0120, et seq., Volume  
3 IV establishes minimum development standards which must be  
4 met. Included is a requirement in Article VI which states:

5 "Section: 6.0110 - General Provisions

6 "The applicant shall install sanitary sewerage  
7 facilities in a manner prescribed by the Department of  
8 Environmental Quality (DEQ), and the City of Gresham.  
9 Connection to sewerage lines shall be permitted if the  
City Manager determines that the following facilities  
have adequate additional capacity to serve the  
development;

10 "1. the interceptor, trunk and feeder lines to  
11 the wastewater treatment plant; and

12 "2. the wastewater treatment plant"

13 Here the sewer capacity limits development to 12 units per acre  
14 and the record reveals petitioner's willingness to so limit its  
15 development density. The city made no mention in the findings  
16 it believed it could not limit density in the MDR zone to less  
17 than 24 units per acre maximum. In fact, the respondent's  
18 brief concedes that public facility capacity can be used to  
19 limit development. As is stated on page 20 of the brief:

20 "Respondent concedes petitioner's argument that if  
21 public facilities do not allow more than 12 units an  
acre, a requested development of greater density could  
not be approved."

22 Therefore, we can not accept the respondent's argument as  
23 presented in its brief and at oral argument (see discussion  
24 supra re: findings).

25 Respondent city throughout the proceeding has taken the  
26 additional position that even if the applicant demonstrates

1 compliance with the applicable criteria, a plan map change can  
2 still nevertheless be denied. As the respondent says in its  
3 brief:

4 "Petitioner has cited no authority that a plan map  
5 change must be approved even if the applicant  
6 demonstrates compliance with the applicable criteria.  
7 The criteria exists to protect the public from changes  
8 to its plan. The plan map cannot be changed unless  
9 the applicant has demonstrated compliance with the  
10 criteria. But even with demonstrated compliance, the  
11 decision is ultimately political, and the city council  
12 may exercise its policy judgment in reviewing the  
13 requested change." (Emphasis added).

14 Petitioner submitted a reply brief addressing respondent's  
15 position. We find the issue has not been properly placed  
16 before us in this case. The City of Gresham did not exercise  
17 the discretion its attorney claims it possesses. The city  
18 based its decision on the criteria set forth in the  
19 comprehensive plan (Section 10.013 supra). There is nothing in  
20 the city's order and findings indicating the Gresham City  
21 Council believes it has authority to apply its comprehensive  
22 plan in the manner asserted.

23 Established v. Developing

24 According to the city in its brief, the designation of  
25 property as established depends on whether a preliminary  
26 development plan has been accepted by the city. Since the  
subject property had been previously zoned LDR and development  
plans in compliance with that zone approved, petitioner's  
requested change in district designation appears to be  
dependent on its receiving the requested MDR zone. If the MDR

1 zone is granted, any existing plans would become moot and the  
2 "established" designation would no longer be warranted. Since  
3 we are remanding the matter of the appropriate zone, this issue  
4 can also be reviewed by the city.

5 In light of our holding above, we find it unnecessary to  
6 address petitioner's arguments regarding "mistake." This case  
7 is remanded for further proceedings not inconsistent with this  
8 opinion.

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FOOTNOTES

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4 Gresham's Development Code classifies land into districts:  
5 Established, Redevelopment, or Developing. Petitioner  
6 requested its property be redesignated from established to  
7 developing. Reading the characteristics of each district in  
8 the context of this case, petitioners request is in line with  
9 its desire to change the character of Sandpiper East Phase II.  
10 Specifically, Section 10.3100 provides:

11 "Development Within an Established District. In an  
12 established district, a parcel of land may be  
13 developed in a manner similar to and compatible with  
14 existing development on other parcels in the vicinity  
15 and, if appropriate, an area accessory development may  
16 be permitted subject to approval pursuant to sections  
17 10.5110 to 10.5114. Development within an established  
18 district shall be processed as a Type I procedure  
19 unless the development is not similar to or compatible  
20 with existing development. A proposed development is  
21 similar to and compatible with existing development if  
22 it meets the requirements of sections 10.3102 to  
23 10.3106."

24 That provision contrasts with the developing district  
25 classification set forth in Section 10.3400 which states:

26 "Development Within a Development District.

27 "(1) Except as indicated by the community  
28 development plan, the overall character of new  
29 development within a development district has not been  
30 predetermined; thus, each new development proposal  
31 shall be decided on its merits pursuant to section  
32 10.3412 and processed as a Type III procedure. New  
33 development in a developing district shall be approved  
34 only where necessary and adequate services and  
35 facilities are available or provisions have been made  
36 to provide these services and facilities as provided  
37 in the standards document.

38 "(2) Except as otherwise provided in section  
39 10.3412, in an urban developing district a development  
40 is permitted if authorized pursuant to the Type III  
41 procedure and determination that the development is  
42 consistent with any emerging patterns of area  
43 development in addition to compliance with the  
44 comprehensive plan, other requirements of this code

1 and applicable standards. Notice of the hearing shall  
2 be provided by mail, posting and publishing with  
3 mailed notice including mailing to the owners of  
property situated within 300 feet of a boundary of the  
property to be developed."

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