



1 BAGG, Board Member.

2 NATURE OF THE DECISION

3 Petitioner appeals the denial of his "Butler Ridge"  
4 subdivision proposal by the City of Gresham. The proposal was  
5 to divide 35.6 acres to provide 18 acres of open space, 54  
6 condominiums and 13 detached dwellings.

7 FACTS

8 The subject site is located on the west flank of Gabbert  
9 Hill, between Southwest 33rd and Southwest 27th Avenues.  
10 Elevations on the property range from 600 feet at its southwest  
11 corner at Southwest 33rd Avenue to 940 feet at its northeast  
12 corner. Southwest 33rd Avenue, which would be the main access  
13 route to the proposed subdivision, extends through the existing  
14 Seven Oaks Subdivision to Towle Road, and 33rd Avenue is to  
15 connect to the east boundary of the plat with future street  
16 connections to the east and the south. An emergency vehicle  
17 access is proposed to connect to Gabbert Road.

18 The planning commission considered the subdivision on  
19 January 26, 1982.<sup>1</sup> The planning commission denied the  
20 proposal, and the applicant appealed to the city council. On  
21 March 2, 1982 the city council determined the scope of the  
22 appeal to be "restricted to the record made on the decision  
23 being appealed." Presumably, the city council wished to limit  
24 its review to only those matters heard by the planning  
25 commission. A hearing was held before the city council on  
26 March 16, 1982, at which the city council upheld the planning

1 commission decision. The council issued an order to that  
2 effect, signed by the mayor, on March 22, 1982. The same order  
3 was adopted by the Gresham City Council at its meeting of April  
4 6, 1982.

5 The order identifies the issues as "Street grades, Traffic,  
6 Future Streets, and Storm Drainage." The city found that the  
7 proposal did not comply with the city's "Trafficways Policy"  
8 found at Section 10.321, Vol. II of Gresham's Comprehensive  
9 Plan. The policy states:

10 "It is the policy of the city to provide a safe and  
11 efficient street and roadway system that meets current  
12 needs and anticipated future growth and development."  
Gresham Community Development Plan, Vol. II, "Policies  
and Summary," sec 10.321.

13  
14 The city council found that no safe and efficient street system  
15 had been planned or established for the future development of  
16 Gabbert Hill; and, without such a comprehensive street plan,  
17 the new subdivision would set a pattern for future  
18 development. The council believed that by using Southwest 33rd  
19 Avenue as primary access to the Gabbert Hill area (presently  
20 undeveloped), the new subdivision could create traffic on 33rd  
21 Street at "potentially unacceptable levels," in the future.  
22 The council concluded, therefore, that the applicant's proposal  
23 was not consistent with the city's "Trafficways Policy."

24 The council suggested an alternate access route but did not  
25 make the alternate route a condition of approval.

26 "This proposal has been extensively revised by the  
applicant since October to resolve most major staff

1 concerns with the original submitted, especially  
2 private streets and drainage concerns. The only major  
3 issue still unresolved is the sustained 16% grade and  
4 future traffic conditions on Gabbert Hill. The  
5 pattern of ownership on Gabbert Hill and unavoidable  
6 topographic constraints make establishment of a 'safe  
and efficient street system' difficult at best for all  
properties on the upper hill. Alternate access at  
lesser grades is feasible to the Butler Ridge site  
[subject development site] only through adjoining  
properties." Record, p. 7.

7 ASSIGNMENTS OF ERROR I - III

8 Petitioner's first three assignments of error are as  
9 follows:

- 10 1. "The city erred in applying standards for other  
11 future developments to this subdivision."
- 12 2. "The city erred in interpreting the Trafficways  
13 Policy."
- 14 3. "The city erred in applying vague standards."

15 As we understand petitioner's first three assignments of  
16 error, petitioner attacks the city's conclusion (1) on how the  
17 possible future development of Gabbert Hill may affect a "safe  
18 and efficient" future street system for the hill; (2) that the  
19 "Trafficways Policy" in the comprehensive plan, Section 10.320,  
20 may be applied to individual land use actions; and (3) that the  
21 terms "safe and efficient" as they appear in city ordinances  
22 may be used as standards to deny developments. The petitioner  
23 argues that the city is not free to rely on a comprehensive  
24 plan policy where the specific standards in the city's  
25 development ordinance have all been met. The purpose of the  
26 plan, according to petitioner, is to outline broad policy

1 decisions with development ordinances setting specific  
2 standards. Petitioner believes that he has met all specific  
3 applicable standards, and the city may not now use the  
4 "Trafficways Policy" with its vague safety standard to deny  
5 petitioner the development.

6 Respondent counters that the city was correct in testing  
7 this development against future development in the area.  
8 Respondent argues that Gresham Development Code, Section  
9 10.1050 requires all developments be consistent with the  
10 comprehensive plan and therefore the city was correct in  
11 testing this development against the city's "Trafficways  
12 Policy." According to respondent, this subdivision would  
13 establish the pattern of development for the area, and the  
14 traffic pattern proposed for the subdivision could adversely  
15 impact the existing Seven Oaks Subdivision and remainder of  
16 undeveloped property on Gabbert Hill. The applicant, according  
17 to the city, knew he had to address all the policies in the  
18 plan including the city's "Trafficways Policy." Respondent  
19 argues that the city's development code anticipates there will  
20 have to be modifications to standards for individual  
21 developments, and respondent claims the city's "Type III"  
22 procedure, Section 10.2130, specifically allows for the city to  
23 exercise such flexibility.

24 Firstly, we note that the "Type III" quasi-judicial  
25 procedure appearing at Section 10.2130 of the Gresham Community  
26 Development Code does not, as respondent characterizes, allow

1 the city to modify development standards. The "Type III"  
2 procedure rather allows conditions to be attached

3 "beyond those warranted for compliance with a  
4 Development Standards Document in granting an approval  
5 if the planning commission determines the conditions  
6 are necessary to avoid imposing burdensome public  
7 service obligations on the city, to mitigate  
8 detrimental affects to others where such mitigation  
9 are consistent with an established policy of the city  
10 and to otherwise fulfill the criteria for approval."  
11

12 We conclude, therefore, that we must find justification for the  
13 city's denial in specific controlling comprehensive plan  
14 provisions or in the city's standards as included in its  
15 implementing ordinances.

16 As we understand the city's comprehensive plan, the  
17 individual policies in the plan are not guides for specific  
18 developments but are policies under which the city takes  
19 specific implementation measures. The implementation measures  
20 appear to be city ordinances that provide specific guidance to  
21 the city and developers. For example, the "Trafficways Policy"  
22 contained at Section 10.321 of the Gresham Development Plan,  
23 Vol. II, states

24 "It is the policy of the city to provide a safe and  
25 efficient street and roadway system that meets current  
26 needs and anticipated future growth and development."

27 Under this policy, there are six implementation strategies  
28 which direct the city to take action on a broad basis to ensure  
29 a safe and efficient street system.<sup>2</sup> We therefore agree with  
30 the petitioner that the city was not free to impose the

1 comprehensive plan "Trafficways Policy" on this individual  
2 development where the development proposal met all specific  
3 standards and criteria found in the implementing ordinances.  
4 Philippi v City of Sublimity, 59 Or App 295, \_\_\_ P2d \_\_\_  
5 (1982); Alluis v Marion County (LUBA No. 82-074, Slip Op  
6 12/22/82).

7 However, our conclusion does not mean the city could not  
8 consider safety. The requirement of safe streets is carried  
9 over into Vol. IV of the Gresham Community Development Plan.  
10 Vol. IV is a "standards" document that we believe serves as an  
11 implementing ordinance under the comprehensive plan.<sup>3</sup> Vol.  
12 IV includes standards for individual development, and at  
13 Section 6.0410, "General Provisions," the city states that

14 "[n]o development will be permitted where it will  
15 cause traffic generation beyond the street's [sic]  
16 current carrying capacity including pavement width and  
17 signalization. No development permits will be granted  
18 where such development will create dangerous or  
19 hazardous traffic conditions."

20 We believe the city was correct in addressing the safety of the  
21 proposed street system. In relevant part, the city's findings  
22 about the street system are as follows:

23 "IT IS THE POLICY OF THE CITY TO PROVIDE A SAFE AND  
24 EFFICIENT STREET AND ROADWAY SYSTEM THAT MEETS CURRENT  
25 NEEDS AND ANTICIPATED FUTURE GROWTH AND DEVELOPMENT.

26 "Gabbert's [sic] Hill is one of the City's major  
undeveloped Low Density Residential areas. No public  
street system or urban development exists on the upper  
level of Gabbert's [sic] Hill, 650-990 ft. elevation.  
Outside of scattered dwellings along Regner Road, only  
three residences exist on the upper level of the hill  
served by a 1200 ft. private driveway off the East end  
of S.W. 27th, an unimproved City street. The terrain  
of the hill limits future public street access to 3 to

1 4 points, probably off Towle Rd. and Regner. (Exhibit  
2 "F" - Potential Access Points). Extreme slopes  
(35-50%) make street connection to the North (S.W.  
3 19th) or South (Butler Rd.) unlikely.

4 "As the first major development on upper Gabbert Hill,  
5 Butler's Ridge raises major concern for development of  
6 a "'safe and efficient'" street system to meet current  
7 needs and future growth. Butler's Ridge proposes to  
8 extend S.W. 33rd for 1925 ft. from the West plat  
9 boundary, providing two future street connections to  
10 the South (to Towle Rd.) and East (to Gabbert Rd.) and  
11 a potential access to the North (Tract A). Butler  
12 Ridge could trigger other development on Gabbert Hill  
13 utilizing the Hill's single improved public street,  
14 S.W. 33rd., which is classified as a local street.

15 "Butler's Ridge is estimated to add 450-500 trips per  
16 day to the West end of S.W. 33rd, bringing traffic  
17 levels to 650 trips per day. In addition to the  
18 Butler's Ridge site, the upper level of Gabbert Hill  
19 has a development potential of 150-200 dwellings,  
20 which could generate an additional 1100-1600 trips per  
21 day. According to the Gresham Year 2000 Travel Demand  
22 Analysis (1979, Straam Engineers) about 60% of future  
23 traffic from the Gabbert Hill area will be attracted  
24 to destinations accessible by Towle Rd/221st and 40%  
25 to destinations accessible by Regner Rd.

26 "Assuming that S.W. 33rd becomes the East-West  
collector street across Gabbert Hill, the West end of  
S.W. 3rd near Towle will have a year 2000 traffic of  
up to 1400 trips per day. If other upper Gabbert Hill  
properties develop without access to Regner Rd, this  
traffic level could be exceeded. This traffic would  
exceed the capacity and design of S.W. 33rd, a local  
street, especially considering the sustained 16% grade  
proposed through most of the Butler's Ridge site.  
(Exhibit "E" - Engineering Comments).

"Since no "'safe and efficient'" street sytem has been  
planned or established for the future development of  
Gabbert Hill, Butler's Ridge would set the pattern for  
future development and traffic circulation. By  
utilizing S.W. 33rd as its primary access, Butler's  
Ridge could funnel future Gabbert Hill traffic via  
33rd St. at potentially unacceptable levels.

"This proposal is not consistent with the Trafficways  
Policy."



1        These findings illustrate the city's concern about traffic  
2 patterns in the area. However, the city's conclusion that the  
3 proposal is "not consistent with the Trafficways Policy"  
4 appears to rest on assumptions about future development of the  
5 area and the impact of that future development on the capacity  
6 of Southwest 33rd Avenue. The city concludes that because no  
7 "'safe and efficient' street system has been planned or  
8 established for the future development of Gabbert Hill,  
9 Butler's Ridge would set the pattern for future development and  
10 traffic circulation." (Emphasis added). This supposition  
11 about the potential "unacceptable levels" of traffic mentioned  
12 in the finding is the apparent basis for the city's conclusion  
13 that the proposal is not consistent with its "Trafficways  
14 Policy" or, fairly read, the city's ordinance requirement  
15 calling for safe streets. The city is, in effect, telling the  
16 developer that his development will not be approved because of  
17 the city's best guess as to what the future will bring to the  
18 area. We do not believe suppositions heretofore unannounced  
19 and not made into applicable standards of evaluation are  
20 sufficient to deny this development.

21        There was another ground for denial, however. We  
22 understand from respondent city's brief that respondent had  
23 reason to deny the development on the ground that street grades  
24 of 16% will exist in the development, and such sustained grades  
25 are "not recommended for local streets by the Institute of  
26 Traffic Engineers, Traffic Engineering Handbook." Brief of

1 Respondent City at 12. The city's findings on the matter of  
2 street grades state that the extension of 33rd Street will  
3 result in a sustained street grade of 16% for a distance of  
4 some 1,325 feet. The city recognizes, however, that 16% is the  
5 maximum allowable grade on a local street such as the one here  
6 on southwest slopes, Section 6.0435.2.<sup>4</sup> The city's findings  
7 say that sustained grades of that length are not recommended by  
8 the Traffic Engineering Handbook. The city's engineering  
9 division is represented in the findings as having not  
10 recommended approval of the street as primary access to the  
11 subdivision. The engineering division is quoted in the  
12 findings as follows:

13 "This continuously steep grade over such a long  
14 stretch of this street increases the potential hazards  
15 associated with streets at steep grades. These  
16 include hazards to traffic using this street in  
17 adverse weather conditions, hazards to maintenance  
18 crews and equipment trying to keep the street open in  
19 icy [sic] or snow conditions and hazards to residents  
20 along S.W. 33rd Street. If this proposed street is  
21 approved, it may not be possible for maintenance crews  
22 to keep it open during severe winter conditions.  
23 Considering the potential traffic this street may  
24 carry, it creates a less than desirable situation for  
25 the residents along S.W. 33rd Street, which is  
26 classified as a Local Street...If Butler's Ridge is  
allowed to develop without Gabbert Hill, the other  
properties on the Upper Gabbert Hill may not be able  
to economically support that construction. If this  
happens some properties will not have access and will  
not be able to develop in the future." Record, p. 11.

23 Here, the city has not specifically found that 16% grades  
24 are inappropriate or unsafe, the city has simply hinted at this  
25 conclusion. The city does not say whether it agrees with the  
26

1 engineering division. The city simply recites evidence of the  
2 engineering division, and such recitation of evidence is not  
3 sufficient to constitute a "finding" or conclusion by the  
4 city. Gresham v OLCC, 20 Or App 97, 530 P2d 985 (1975);  
5 Norvell v Portland Area L.G.B.C., 43 Or App 849, 609 P2d 896  
6 (1979); Dickson v Washington County, 3 Or LUBA 123, 127 (1981).

7 The city may understand that sustained grades of 16% are  
8 not recommended for local streets by the Institute of Traffic  
9 Engineers, but for some reason the city allows grades of 16% in  
10 its ordinance. Where the city has a fixed standard apparently  
11 met by the applicant, we do not believe it appropriate for the  
12 city to deny a development on the ground that its own ordinance  
13 standard is somehow inappropriate. If the city does not  
14 believe 16% is an appropriate grade, it should amend its  
15 ordinance or base its decision on specific findings or both.<sup>5</sup>

16 In summary, the city's findings address matters of future  
17 development where city ordinances do not appear to make such  
18 considerations grounds for denial of proposed developments.  
19 While the city has the power to deny unsafe development, the  
20 city has not stated that the applicant's proposal is indeed  
21 unsafe or contrary to established relevant standards and  
22 criteria in city ordinances. We agree with the petitioner and  
23 sustain his first three assignments of error.

24 FOURTH ASSIGNMENT OF ERROR

25 "The city erred in implying that the standards for a  
26 collector street applied to this development."

1       Petitioner's argument is that 33rd Street is referred to  
2 throughout the staff report and throughout the proceedings as a  
3 local street. As we understand the argument, petitioner  
4 believes the city's order bootstraps 33rd Avenue from a local  
5 street to a neighborhood collector street (with higher  
6 standards) and use the fact that 33rd Avenue does not meet  
7 neighborhood collector standards to deny the development. In  
8 other words, arbitrarily the city has treated 33rd Street as a  
9 future neighborhood collector, thereby providing further  
10 authority to deny petitioner's development.

11       The respondent states the city had an obligation to review  
12 the proposal in terms of future development and therefore was  
13 correct in concluding that 33rd Street would have to be  
14 redesignated as a neighborhood collector street.

15       As before, we believe that if the city is to review this  
16 development in terms of its impact on future development, a  
17 provision allowing the city to do so must be found in the  
18 ordinance. While the future development on Gabbert Hill may  
19 certainly be made a criteria, we can find no provision in the  
20 Gresham Community Development Plan and ordinances establishing  
21 such a criteria as a standard for approval. The fourth  
22 assignment of error is sustained.

23 FIFTH ASSIGNMENT OF ERROR

24       "The city erred in requiring this applicant to plan  
25 for connection to a street plan that does not exist."  
26

1           Petitioner argues that the city is avoiding the  
2 responsibility of providing an adequate street plan. The  
3 effect of this failure to develop a street plan is an improper  
4 moratorium on development until the city has completed a plan  
5 upon which it has not made any progress, petitioner argues.

6           The respondent argues that the city had every reason to  
7 find that the best access to this proposed subdivision was from  
8 a route that does not exist rather than the route chosen by the  
9 developer. The city's conclusion is that until such time as  
10 this preferred access is available, "petitioner's property is  
11 not ready for development." Brief of Respondent City at 15.

12           In this case, we do not agree that respondents may prohibit  
13 development on the ground the property is not ready. If the  
14 area does not have an adequate street plan or if an adequate  
15 street plan may not be made a condition of approval, then the  
16 property, indeed is not ready for development and should not be  
17 so designated in the city's planning documents. We find no  
18 provision in the city ordinances allowing the city to deny a  
19 development while the city prepares a plan for streets. If the  
20 petitioner is able to meet the standards available in the  
21 planning documents and if the property is zoned for  
22 development, the city may not claim the development must,  
23 nevertheless, be denied because the area has not been  
24 adequately planned. We do not agree with the respondent city  
25 that the city is being asked to "build streets upon demand by  
26 an isolated property owner." Brief of Respondent City at 16.

1 We believe that if the city requires a specific traffic plan  
2 before a development may be approved, the city must provide  
3 that plan or, based on authority in the ordinance, condition  
4 the development on the submission of such a plan. Absent those  
5 acts, the city should not zone the property as though it were  
6 ready for development unless it so believes. Philippi v City  
7 of Sublimity, supra.

8 SIXTH ASSIGNMENT OF ERROR

9 "The city erred in not placing the entire file, or at  
10 least the city required exhibits, before the planning  
11 commission."

11 Petitioner's argument appears to be a complaint that the  
12 city failed to provide an adequate record of its own  
13 proceedings to this Board. Petitioner also seems to be arguing  
14 that certain testimony was not made available to the planning  
15 commission and that therefore the planning commission was  
16 "improperly influenced by neighborhood testimony...."  
17 Presumably, the evidence would rebut the neighbors' views.

18 Respondent states that the material in front of the  
19 planning commission was submitted to the city and denies that  
20 any undue influence existed.

21 The time to settle matters of the record submitted by the  
22 city is long since past. Further, we do not believe this  
23 assignment of error is sufficiently detailed for us to find  
24 that the city had committed any procedural error in failing to  
25 properly supply the record of the planning commission  
26

1 proceedings to the city council. Procedural irregularities  
2 need to be alleged in detail. Here, the allegation is sketchy,  
3 and we can not determine exactly what evidence was omitted or  
4 how the omission was improper. Before we may reverse or remand  
5 for a procedural error, we must find the substantial rights of  
6 the petitioner to have been prejudiced. 1979 Or Laws, ch 772,  
7 sec 5(4)(B), as amended. The allegation lacks the required  
8 assertion that petitioner's substantial rights were prejudiced  
9 by the city. Ibid. For these reasons, we deny this assignment  
10 of error.

11 SEVENTH ASSIGNMENT OF ERROR

12 "The city erred in not processing applicant's hardship  
13 relief application."

14 Petitioner claims that Section 10.5120 of the Gresham Code  
15 allows relief from provisions of the ordinance on the ground of  
16 hardship. Petitioner claims that he submitted an application  
17 for hardship relief, and the city did not provide proper notice  
18 of the application or set it for hearing as required. The  
19 city's response is that no hardship relief was necessary. The  
20 applicant's request was to vary a street standard to allow a  
21 pavement of 28 feet, and 28 feet is adequate under county  
22 ordinances.

23 We do not find the city to have committed error, as we do  
24 not understand the relief requested by the petitioner to be  
25 necessary under the county ordinance. This assignment of error  
26 is therefore denied.

1 EIGHTH ASSIGNMENT OF ERROR

2 "The city erred in not providing applicant, prior to  
3 the city council hearing, with a copy of Monasch's  
4 memo to mayor and city council dated March 16, 1982  
(R.P. 83-86), and not providing applicant any notice  
of city council action of April 6, 1982 (R.P. 1)."

5 The petitioner states:

6 "As stated in other assignments of error the City has  
7 consistently and frequently not lived up to their  
8 obligation to correctly inform applicant of what was  
9 going on. Applicant's experienced, professional  
10 agents were frequently frustrated by lack of  
11 cooperation and full response to questions, as would  
have been documented had the entire record of  
correspondence discussed in the Sixth Assignment of  
Error been included."

12 The city appears to understand the assignment of error as a  
13 claim that a memo was not provided to the applicant while it  
14 was provided to the city council. The respondent states that  
15 the memo was a summary prepared by the city and does not  
16 include any new evidence.

17 It is our view that material presented to the city council  
18 should be available for rebuttal. To the extent that the city  
19 did not provide the applicant with all the materials available  
20 to the decisionmaker, the city council, the city erred.  
21 However, we find no allegation or showing that the petitioner  
22 was prejudiced by the omission of the mayor's memo. We  
23 therefore deny the assignment of error. See 1979 Or Laws, ch  
24 772, sec 5(4)(a)(B), as amended.

25 This matter is remanded to the City of Gresham for further  
26 proceedings not inconsistent with this opinion.<sup>6</sup>



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

The original proposal was made in the fall of 1981. Discussions between the applicant and staff resulted in a revision of the proposal. The January 26, 1982 hearing was the first time the matter was formally presented to the planning commission.

---

2

Implementation Strategies:

"(1) The City shall develop, adopt and implement an Official Streets Master Plan.

"(2) The City shall work with other East Multnomah County jurisdictions to adopt and maintain a functional street classification system designating the arterial and collector street network and to designate major routes for through traffic.

"(3) The Community Development Standards shall specify street design standards:

"(4) The City shall adopt and implement a uniform street naming and addressing system.

"(5) The City shall maintain the traffic flow and carrying capacity of major arterials and other major streets by restricting or reducing curb cuts and other direct means of access and requiring adequate right-of-way and setback lines as part of the development process.

"(6) The City shall make every effort to design municipal streets and roadways and to establish traffic flow patterns which minimize or reduce vehicular emissions."

---

3

"The purpose of the zoning ordinances, both under our statute and the general law of land use regulation, is to 'carry out' or implement the comprehensive plan. The plan embodies policy determinations and guiding principles; the zoning ordinances provide the detailed means of giving effect to these principles." Fasano v Washington County Comm., 264 Or 574, 582, 507 P2d 23 (1973).

1  
4

Street grades of 12% are permitted on northeast slopes.  
The provision states

3       "Slope:   12% Maximum, on slopes or exposure to the  
4                    northeast and 15% with exposure to the  
5                    southwest, unless otherwise approved by the  
6                    City Engineer. However, in no case shall  
7                    the slope exceed 16%." Gresham Community  
8                    Development Plan, Vol. IV, "Standards," Sec  
9                    6.0435.2.

10  
11  
12  
5

We add that should the city believe that development  
in this particular area must wait for detailed street  
plan, as suggested by the city's finding below, then the  
city should not have zoned the property in such a manner  
as to suggest that it was available for immediate  
development. See: Philippi v City of Sublimity, supra.

13  
14  
15  
16  
17  
6

Participant Daniel S. Forsberg submitted a brief in  
this proceeding. Participant Forsberg does not challenge  
petitioner's conclusions as to the city's action but  
rather provides evidence about the safety of the  
development. We are unable to reach conclusions as to the  
factual matters presented by participant. Our review is  
on the record generated below, and we are not permitted to  
decide issues of fact of the kind submitted by the  
participant.