BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

KATHY FISHER, GERI WILLIAMS, and THE BINFORD LAKE NEIGHBORHOOD COALITION, Petitioners, vs. CITY OF GRESHAM, Respondent.	LUBA No. 83-105
	FINAL OPINION AND ORDER

Appeal from City of Gresham.

Steven L. Pfeiffer, Portland, filed the Petition for Review and argued the cause for petitioner. With him on the brief were O'Donnell, Sullivan & Ramis.

Matthew R. Baines, Gresham, filed a brief and argued the cause for Respondent City. With him on the brief was Thomas Sponsler.

John M. Wight, Portland, filed a brief and argued the cause for Respondent/Participant Hallberg Homes, Inc.

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

REVERSED IN PART, REMANDED IN PART 03/28/84

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1983, ch 827.

Opinion by Kressel.

NATURE OF THE DECISION

Petitioners appeal an order of the Gresham City Council approving the final phase (Phase 7) of a Planned Unit Development (PUD) known as Binford Farms. The order approved the application of Respondent Hallberg Homes, Inc., to subdivide a 13 acre parcel into 40 building lots for 20 duplexes (attached dwellings). Also approved was (1) a request for hardship relief from a standard establishing 400 feet as the minimum distance between intersections along a collector street and (2) a request to modify the boundaries of a special district known as the Hillside Physical Constraint District, so as to exempt the subdivision from the requirements of that district.

FACTS

The Gresham Community Development Plan designates the area as Low Density Residential. The zoning map places the site in "an established district."[1] A portion of the land is also within the Hillside Physical Constraint District - 15 to 35 percent slopes.

Southwest 19th Drive, which is designated a collector street, forms the northern boundary of the site. Adjacent to the site's eastern and western boundaries are other lots in the Binford Farms PUD. They are developed with detached single family dwellings. To the north of S.W. 19th Drive, the land is developed with attached (duplex) single story dwellings. South

of the parcel is an undeveloped greenway.

The site is within the Johnson Creek Drainage Basin. Butler Creek bisects the property, running from north to south. A man-made lake, (Binford Lake) covers approximately 2.15 acres and occupies most of the central part of the site. The lake and surrounding lands are in a flood plain district, but no development is proposed in the flood plain.

At the time of the city's action in this case, the section of Butler Creek traversing the site was the only significant, privately owned section of the creek in the City of Gresham. The other portions of the creek had been acquired through dedication and made part of the city's Greenway system. In order to extend the Greenway system, the city required Hallberg Homes to dedicate the lake and surrounding open space areas to the public. Hallberg has not challenged this requirement.

In its application, Hallberg Homes proposed to develop lots to the east and west of Binford Lake. Access to the lots in each section of the plat was to be provided by cul-de-sac streets intersecting S.W. 19th Drive on the north. This configuration was in conflict with a development code provision, adopted in 1980, requiring a distance of at least 400 feet between streets intersecting a collector street. However, the city's approval included the granting of "hardship relief" from the spacing requirement.

The PUD of which this subdivision is a part was approved in concept by the city in 1969. Hallberg Homes first submitted

its subdivision plans for Phase 7 in 1982. The Gresham Planning Commission denied that application and denial was affirmed by the city council. The decision was then appealed by Hallberg Homes to this Board. In Hallberg Homes, Inc. v. City of Gresham, 7 Or LUBA 145 (1983), we held (1) the city had improperly relied on denial of three variances to deny the subdivision application as a whole, because Hallberg Homes had withdrawn the variance requests during its appeal to the council and (2) the city had misconstrued a section of its development code regarding parcel size.[2] Accordingly, we remanded the decision to the city for further proceedings. Hallberg Homes v. City of Gresham, 7 Or LUBA at 148-151.

On remand, Hallberg Homes resubmitted its application with some modifications. Record at 2. The city planning commission and the city council approved the application. This appeal followed. Our analysis of this appeal includes citations to various components of the Gresham Community Development Plan, a four volume document. These are (1) Community Development Standards of 1980 (Vol. IV of the Plan), (2) the Gresham Development Code (Vol. III of the Plan), and (3) Plan Policies and Summary Document (Vol. II of the Plan).

FIRST ASSIGNMENT OF ERROR

The first assignment of error reiterates an objection to the record previously asserted by petitioners. Having already denied that objection,[3] we proceed no further. This assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

A provision in §6.0433 of the community development standards requires intersections along a collector street to be at least 400 feet apart. As noted earlier, two cul-de-sac streets proposed by respondent would intersect S.W. 19th Drive so as to violate the 400 foot requirement.[4] In approving the subdivision, the city approved a hardship relief variance to permit the cul-de-sac streets in the proposed configuration. Petitioners claim the city erred in granting hardship relief. They argue the city's findings are inadequate, are unsupported by substantial evidence in the record, and represent an erroneous application of the approved criteria.

As a threshold matter, respondents urge us to disregard this challenge on grounds our prior decision in Hallberg Homes v. City of Gresham, supra, bars consideration of the lawfulness of this aspect of the city's action. We disagree.

In the prior proceeding, the city denied the subdivision. However in considering the case, the city found circumstances justified allowing hardship relief from the intersection spacing requirement. Record of LUBA No. 82-069 at 2-5. Certain of the petitioners herein participated in the proceedings leading to that decision. Having obtained what they considered a favorable ruling overall (subdivision denial) they did not appeal the city's findings concerning hardship relief to this Board. Respondents now contend petitioners

should have appealed the portion of the city's action indicating hardship relief was warranted. According to respondents, it is too late for petitioners to challenge the validity of the city's findings concerning hardship relief.

We reject respondents' argument. As noted, the city's decision in the prior proceeding was to deny the subdivision application as a whole. The record does not reflect denial of a subdivision application and approval of a separate hardship relief application. Rather, a single application was presented. Indeed, a bifurcated approach by the city would have been illogical since the request for relief from the intersection spacing standard had no raison d'etre apart from the proposed subdivision. Petitioners were not required to appeal what amounted only to findings concerning hardship relief. Their appeal is appropriate now.

The city makes the additional argument, reflected in its findings and brief, that it was "bound" by our decision in Hallberg Homes v. City of Gresham, supra, to retain its findings concerning hardship relief when Hallberg's application was resubmitted. Record at 22, Brief of Respondent City at 8-9. We neither stated nor implied such a requirement. Indeed, the discussion of hardship relief in our opinion was limited strictly to the effects of the applicant's withdrawal of certain other variance requests. 7 Or LUBA at 148. We were not called upon to reach the merits of any aspect of hardship relief, and we did not circumscribe the issues available for

consideration on remand.[5]

The record indicates that after our decision in Hallberg Homes v. City of Gresham, supra, the developer resubmitted its entire subdivision application, with various changes, to the city's planning commission. Record at 6. The resubmitted application included a request for relief from the intersection spacing requirement. Although the planning commission elected to rely on its previous findings with respect to hardship relief, it is clear the granting of relief was part of a new decision to approve the entire application. Any portion of that decison was subject to review by the city council and, on appeal, by this Board. Accordingly, we consider petitioners' challenges to the allowance of hardship relief.

Hardship Relief Standards

Section 10.5120 of the Gresham Development Code authorizes the planning commission to grant "...hardship relief waiving a specified provision set forth in the development standards document for an individual parcel...if it finds that strict application of the requirement would render the parcel incapable of reasonable economic use." Seven criteria must be satisfied.[6]

Petitioners challenge the adequacy of the city's findings under several of the criteria for hardship relief. Further, they generally contend the findings are in conflict with "the law of hardship relief or variances." Petition at 21. By this phrase, petitioners are referring to the general doctrine,

reflected in case law from this state and elsewhere, that variance relief is strictily construed against the applicant and is unavailable where the landowner can derive some economic benefit from the land without the aid of relief. See, e.g., Lovell v. Independence Planning Commission, 37 Or APP 3, 7, 586 P2d 99 (1978); Standard Supply Co. v. City of Portland, 1 Or LUBA 259, 263 (1980); 3 Anderson, American Law of Zoning, §17 (Second Edition 1977). Petitioners express this argument as follows:

> "In this case, economic use of the subject parcel is available without the variances, which are only necessary to construct public streets into the interior of the parcel so as to allow development of a greater number of lots. In other words, the city has simply waived its code to allow the developer to maximize his density and, thus, his profit - without regard to whether such relief is necessary to render the site 'otherwise reasonably capable of economic use.'" Petition at 22.

As a preliminary matter, we note land use law, including the law pertaining to variance relief, is not a branch of common law, but is rather based on particular statutes, ordinances, and rules, enacted by legislative and administrative bodies. Anderson v. Peden, 284 Or 313, 315, 587 P2d 59 (1978). Thus, in cases of this sort, the focus of our inquiry must be on the actual language appearing in the controlling enactment. Although Oregon courts have read some variance provisions to embody the stringent rules invoked by petitioners, see e.g., Lovell v. Independence Planning Commission, supra, more liberal provisions in other ordinances

have also been applied without judicial criticism. Atwood v. City of Portland, 55 Or App at 215, 637 P2d 1302 (1981); 1000 Friends of Oregon v. Clackamas County, 40 Or App 519, 595 P2d 1268 (1979); cf Morrison v. City of Portland, __Or LUBA ___, (LUBA No. 83-080, December 20, 1983) at 7-8. The significant fact is that to date, no Oregon appellate decision has circumscribed, on constitutional or other grounds, the scope of discretion which may be exercised by local officials in establishing variance relief standards. Accordingly, whether this aspect of petitioners' appeal should be sustained depends largely on whether the city council has embraced a stringent approach to hardship relief under Section 10.5120.

We now consider each of petitioners' challenges

1. SECTION 10.5120(1) (SELF-CREATED HARDSHIP)

Section 10.5120(1) of the development code authorizes hardship relief when "the circumstances of any hardship are not of the applicant's making." The city's findings with respect to this criterion, in pertinent part, are as follows:

> "The Coalition claims that the hardship is a self-created hardship. They claim that the city cannot now approve the hardship for the reason that the enforcement of its own ordinance will result in a hardship to the applicant.
>
> "Meeting the minimum 400 ft. spacing requirement between intersections along S.W. 19th Dr., a collector street, is precluded by the configuration of the developable areas of the site. Since the only potential access points to the developable areas along S.W. 19th Dr., the application of the provision would preclude development of the site. In addition, the 400 ft. spacing requirement did not exist until 1980 when the Comprehensive Plan was adopted and the

existing lotting pattern was already established." Final Order at 23.

Petitioners claim the city erred in relying on the configuration of the site and the date the 400 foot requirement was imposed in finding compliance with this criterion. The configuration, say petitioners, is the result of land divisions undertaken by Hallberg Homes itself, in connection with prior phases of the PUD on adjacent land. The fact the intersection spacing requirement was enacted in 1980, after the adjacent lots were created, is irrelevant to variance relief, argue petitioners, because the land in question remains capable of some economic use without deviation from the spacing requirement. Petitioners urge us to reject the city's finding under the authority of Moore v. Board of County Commissioners of Clackamas County, 35 Or App 39, 580 P2d 583 (1978); Faye Wright Neighborhood Planning Council v. Salem, 3 Or LUBA 17 (1981); and Patzkowsy v. Klamath Falls, 8 Or LUBA 64 (1983).

We do not find error in the city's finding under this criterion. Although the configuration of the site and the available means of providing access to it were largely determined by prior actions of Hallberg Homes itself, those actions were undertaken before the 400 foot intersection spacing requirement was established. We find this fact significant. It cannot be said Hallberg Homes knew, when it developed other portions of the PUD, that its actions would render the property inaccessible without variance relief.

Indeed, as the city comments, prior to adoption of the spacing requirement in 1980 the applicant could have built the Binford Lakes Subdivision as proposed, without hardship relief.[7] Brief of Respondent City at 11.

None of the authorities cited by petitioners persuade us the city erred in finding this criterion was satisfied. The closest case is Moore v. Board of Commissioners of Clackamas County, supra, but that case is distinguishable from this one. In Moore, a landowner erected structures on land previously allocated for parking to meet requirements of the county's zoning code. This left insufficient land for the construction of another building on the site unless variance relief was granted from the code's parking requirements. After noting these circumstances, the court of appeals observed: "The result of this is that WES [the land owner] does not have...sufficient land remaining to build its gymnasium and comply with the previously determined parking requirements for its chapel." 35 Or App at 45. (emphasis added). Accordingly, variance relief could not be granted under a criterion barring relief in cases of self created hardship. Id.

In Moore, a land owner's actions brought about a need for variance relief from code requirements which were in existence when those actions were taken. In the present case, by contrast, Hallberg Homes could not have known development of prior phases of the PUD would create the need for variances in Phase 7. Accordingly, we do not find the discussion of self

created hardship in Moore applicable here.

Petitioners also direct our attention to the decisions of this Board in two other variance cases, Faye Wright Neighborhood Planning Council v. Salem, supra, and Patzkowsky v. Klamath Falls, supra. Although we find these cases pertinent with respect to other criteria in the city's hardship relief provision, See discussion at pages 16-17, infra, we do not find them helpful in terms of the question presented under §10.5120(1), i.e., whether "the circumstances of any hardship are not of applicant's making." Accordingly, we will not consider those cases here.[8]

2. SECTION 10.5120(3) (IMPLEMENTATION OF COMPREHENSIVE PLAN)

Section 10.5120 of the Gresham Development Code authorizes hardship relief where it "...will not adversely affect implementation of the comprehensive plan." The city's finding under this criterion is as follows:

> "The coalition claims that denial of the variance will not preclude development of the land, although it will preclude development of this proposal.
>
> "The intersection spacing standard for streets intersecting a Collector street is designed to insure the carrying capacity of these traffic ways. Each intersection increases the accident rate as well as impeding the flow of traffic. However, application of the 400 foot spacing standard between streets would preclude development of this property since there is no alternative access point to the developable areas of this site." Record at 23.

Petitioners argue the finding is defective because it contains no discussion of the relationship between the relief granted and implementation of the comprehensive plan.

Respondent City meets this challenge by asserting specific findings regarding the plan are unnecessry because, in the proceedings below, petitioners introduced no evidence of plan violations. The city urges us to apply our reasoning in Publishers Paper Company v. Benton County, 6 Or LUBA 182 (1982) to reject this challenge.

We agree with petitioners the finding under §10.5120(3) is inadequate. The finding does not identify what aspects of the comprehensive plan, if any, are implicated by the decision in question. Further, the finding offers no explanation of how the facts pertaining to this proposal advance or impede plan implementation - the explicit subject of the approval criterion at issue. As the Supreme Court has stated:

> "Findings are important only insofar as they relate to the objectives and policies to which the planning jurisdiction is committed by its plan or by state law, goals or guidelines. Consequently, findings must make clear what these objectives or policies are as applied in the concrete situation. Thereafter, findings must describe how or why the proposed action will in fact serve these objections or policies." South of Sunnyside Neighborhood League v. Board of Commissioners of Clackamas County, 280 Or 3, 22-23, 569 P2d 106 (1977).

The city relies on our opinion in Publishers Paper Company v. Benton County, supra, but our discussion of findings in that case is inapplicable here. The question under consideration in Publishers Paper was the extent to which detailed findings are necessary where the record contains virtually no conflicting evidence pertaining to the approval criterion. The finding we found adequate in that case, in contrast to the one we consider

here, related directly to the approval criterion and contained an explanation, albeit in general terms, of why the criterion was satisfied.[9] Because the city's finding in this case does neither of these things, we cannot sustain it.

3. SECTION 10.5120(4) (DETRIMENT TO PUBLIC WELFARE)

Section 10.5120(4) of the Gresham Development Code authorizes relief where "the hardship relief authorized will not be materially detrimental to the public welfare or materially injurious to other property in the vicinity." The city's finding under this criterion reads as follows:

> "The proposed variation to the street standard would not result in any significant threat to the general public or other properties in the vicinity.
>
> "The coalition claimed this hardship relief request will result in an extreme traffic hazard. While the intersection spacing is closer than allowed in the standard, adequate sight distance is maintained as required in Standard Section 6.0433(F). Also, the east cul-de-sac is aligned with an existing street to provide a predictable access for motorists." Record at 23.

Petitioners challenge this finding in three respects. First, they claim the finding is inadequate because it does not discuss concerns they raised with respect to safety hazards. Second, they contend the meaning of the issues which the city did discuss in the finding is unclear. Third, they claim the city was obligated to explain, in advance of making the finding, what was meant by each subjective phrase appearing in the criterion in question.

The question presented by petitioners' first challenge is

whether the finding quoted above is adequate to demonstrate compliance with §10.5120(4), in light of the facts and arguments relevant to that criterion which petitioners brought out during the city's hearings. We must answer the question in the negative.

The first sentence in the finding constitutes only a conclusion of law; it is not a finding of fact. The second sentence states the nature of the concern (traffic hazards) raised by petitioners. Undeniably, the possibility that substandard intersection distances might contribute to traffic hazards is relevant to the broadly worded approval criterion in question. Further, our review of the record indicates the concern was raised, albeit in somewhat general terms,[10] at various phases of the city's proceedings. We believe the city was obligated to address this issue in responsive findings. Norvell v. Portland Area LGBC, 43 Or App 849, 853, 604 P2d 896 (1979).

The obligation was not carried out by the remaining portion of the city's finding. The statement that "...adequate sight distance is maintained as required in Standard Sections 6.0433(F)" is at best conclusory and at worse misleading. The cited code standard relates to "access control," not to "sight distance" as the finding indicates. We find no explanation of the sight distance concept in the city's findings or in the portions of the development code discussed in the city's argument. The remaining statement (that the proposed

cul-de-sac on the eastside of the lake is aligned with an existing street to provide "predictable access for motorists") is similarly elusive. An explanation of the concept inherent in the term "predictable access" is necessary.[11]

Based on the foregoing we conclude the city's finding under §10.5120(4) is inadequate.[12]

4. SECTIONS 10.5120(5) and 10.5120(6) (ECONOMIC USE)

Petitioners next attack the city's findings under Sections 10.5120(5) and 10.5120(6) of the development code. These provisions, and the relevant findings adopted by the city read as follows:

"Section 10.5120

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

"The Coalition claims that denial of the hardship will not preclude economic use of the land. The Coalition claims that it is not the City's obligation to guarantee the number of lots that can be developed or the profit. The City has an obligation to allow development consistent with the land use designation of the property. The Coalition states that alternative economic uses for the property can be achieved, and the alternative access points are available. But the Coalition does not identify any alternative economic uses or alternative access points."

"Section 10.5120(6)

"(6) The development will be the same as development permitted under this code and city standards to the greatest extent that is reasonably possible

while permitting some economic use of the land.

> "The relief to the intersection spacing requirement is the minimum necessary to allow public access to the internal portions of the site which is necessary for development of the site as proposed.
>
> "The Coalition claims that the applicant is requesting two variances, not one. The applicant is requesting just one variance to the intersection spacing requirement. The Coalition claims other alternatives are available but does no [sic] identify what they are. The Coalition does not identify a less severe diversion from the standard."

We agree with petitioners the above quoted findings are not responsive to the criteria in Sections 10.5120(5) and 10.5120(6). While the findings reflect the idea hardship relief should be liberally available in order to accommodate a development as proposed, the criteria, particularly Section 10.5120(6), are stated in more stringent terms. See, Faye Wright Neighborhood Planning Council v. Salem, supra; Patzkowsky v. Klamath Falls, supra. That is, the city code is written in terms barring relief where "some economic use" of the land is available without relief. The criteria cannot be met in the present instance because, manifestly, Hallberg Homes can make "some economic use of the land" without offending the intersection spacing requirement. Intensive development of the land may be impossible without relief, as the city's findings indicate, but the hardship relief provisions in the city's code protect "some economic use," not intensive development.[13]

Accordingly we must sustain this challenge. If the city wishes to authorize this development as proposed, it would

appear legislative modification of either the intersection spacing requirement or the hardship relief criteria is necessary.

5. SECTION 10.5120(7) (SPECIAL CIRCUMSTANCES)

Section 10.5120(7) of the Gresham Development Code authorizes hardship relief where "special circumstances or conditions apply to the property or to the intended use that do not apply to other properties in the same vicinity." With respect to this criterion the city's finding states as follows:

> "The minimum 400 foot spacing requirement did not exist when the previous phase of the PUD were approved and developed. This qualifies as a special circumstance which did not apply to other properties in the vicinity.
>
> "The coalition claims that this criteria [sic] was not addressed by the applicant. The criteria [sic] was addressed in the applicant's supplemental narrative." Record at 24.

Petitioners contend this finding is not responsive to the criterion. They argue the criterion cannot be satisfied by reference to the historical development of the area and the passage of the intersection spacing requirement in 1980, but rather can only be satisfied where "...there is some unique physical circumstance of property which prevents its use without a variance." Petition at 23. (emphasis in original).

We do not read the criterion in question to rule out the approach taken by the city. The city finds "special circumstances or conditions" in the facts that surrounding property was developed so as to render this tract inaccessible

without hardship relief. As noted, the circumstances necessitating relief were not of the applicant's making because the code provision from which applicant sought relief was enacted after the land development pattern was established. Moreoever, it is undisputed that the only property in the vicinity subject to the 400 foot requirement is the property in question. The other property in the vicinity was developed prior to passage of the request.

Petitioners urge us to reject the city's rationale under Patzkowsky v. Klamath County, 8 Or LUBA 64 (1983) and Lovell v. Independence Planning Commission, supra. However, neither case is controlling here.

Although Patzkowsky involved a somewhat similar factual situation (city allowed variance from limitation on length of cul-de-sac, based on existing development pattern), the ordinance in question was materially different from the one at issue here. Section 10.5120(7) of Gresham's code permits relief where there are "special circumstances or conditions" that do not apply in the vicinity. The Klamath Falls provision we considered in Patzkowsky authorized relief only in the event of "exceptional or extraordinary circumstances." 8 Or LUBA at 69. Our reading of the latter provision in Patzkowsky to establish a strict variance standard does not control us here, where we address a criterion expressed in more open ended terms. Although we have read other portions of the Gresham code to establish the kind of strict requirements

conventionally associated with variance relief, we need not do so in this instance.[14]

Accordingly we do not sustain this aspect of petitioners' challenge.

In conclusion, petitioners' challenge to allowance of hardship relief from the intersection spacing requirement must be sustained in part. The city's findings under paragraph (3) through (6) of Section 10.5120 are inadequate. The findings under paragraph (3) and (4) necessitate a remand by the Board. OAR 661-10-870(1)(C)(1). However, the findings under paragraph (5) and (6) require reversal. OAR 661-10-870(1))A)(3).

THIRD ASSIGNMENT OF ERROR

In this assignment of error, petitioners allege the city's decision violates a number of substantive provisions of the development code. The provisions relate to lot size, the Hillside Physical Constraint District, storm water runoff and parks and open space. We consider each challenge separately. None of the challenges is sustained.

1. SECTION 3.0150 (LOT SIZE IN "ESTABLISHED DISTRICT")

As noted earlier, the approved development consists of 20 attached units (duplexes) on 40 lots.[15] The average lot size in the plat approved by the city is 5,476 square feet. Record at 17. Nineteen of the 40 lots were found by the city to be less than 5,323 square feet. Id. It appears none of the lots is 7,000 square feet or greater in size. The land is within the boundaries of an "established district."

The city relied on Section 3.0150, "Site Size Consistency in the Established District," of its community development standards to determine the minimum lot size for the subdivision. Section 3.0150, in pertinent part, reads as follows:

> "Section 3.0150 - Site Size Consistency in the Established District
>
> "Any residential development proposed in an Established District shall create lots with an average lot size equal to the adjusted median of the same type as required by Section 10.3102 of the Community Development Code. However, in no case shall a lot use by a single dwelling unit be created which is greater than 12,000 sq. ft. (unless it is within a Physical Constraint District) or less than 7,000 square feet or less than 4,000 square feet for an existing lot of record."

The findings adopted by the city state "the proposed development is consistent with Section 3.0150 of the standards document since the average lot size (5,476 sq. ft.) is grater [sic] than the adjusted median lot size for the same type of development in the area (or 5,323 sq. ft.)." Record at 17.

Petitioners do not challenge the city's calculations under Section 3.0150. Instead, they claim the code section, as applied to this subdivision, flatly prohibits lots smaller than 7,000 sq. ft. They rely on the portion of Section 3.0150 which states: "However, in no case shall a lot for use by a single dwelling unit be created which is...less than 7,000 sq. ft...." (emphasis added). Petitioners insist the attached structures proposed by Hallberg Homes consist of "single dwelling units," each of which requires 7,000 square feet under the code

standard. Petition at 27.

The city adopted a finding which addresses this argument. According to the finding, the reference in the code to "single dwelling unit" is inapplicable in this instance. This is because the developer proposes multiple dwelling units, not "single dwelling units." Record at 17. In its brief, the city describes petitioners' argument as erroneous because:

> "Single dwelling units [as the term is used in Section 3.0150] obviously means the same as single dwelling structures. Using petitioners' analysis, it would be difficult to understand what a 'two-dwelling unit' would be, a term also found in Section 3.0150. The clear intent of Section 3.0150 is to require minimum lot sizes of 7,000 sq. ft. for typical single family houses. This section applies to single dwelling units, not to attached dwelling units." Brief of Respondent City at 19.

The courts and this Board have consistently held that a reasonable interpretation of ordinance criteria by local government officials will be given weight. Fifth Avenue Corp. v. Washington County, 282 Or 591, 599, 581 P2d 50 (1978); Allius v. Marion County, 7 Or LUBA 98, 102 (1982). We find the city's interpretation in this instance reasonable. It is reasonable to characterize the proposed duplex development as one involving 20 multi-dwelling structures,[16] rather than 40 "single dwelling units." Petitioners' approach has some support in the text of Section 3.0150, but it is not consistent with the remainder of the code. For example, we note in the underlying low density residential districts, separate minimum lot sizes are provided for "single dwelling structures" (7,000

sq. ft.) and for "multi-dwelling structures" (4,000 sq. ft.). Section 2.0112(B) Community Development Standards of 1980. It would be unreasonable to disregard the separate status of multi-dwelling structures and single dwelling structures when they are proposed to be located in an established district.

Based on the above, we reject petitioners' claim under Section 3.0150.

2. SECTIONS 2.0510 - 2.0515 (HILLSIDE CONSTRAINT DISTRICT)

As noted, a portion of the land in question (land to the west of Binford Lake) falls within the boundaries of a special purpose district known as the "Hillside Physical Constraint District." Under the city code, development of land in this district is subject to a variety of limitations. See Section 2.0510 et seq, Gresham Community Development Standards of 1980. In approving this subdivision, the city authorized a modification of the district so as to exempt the lots on the west side of the lake from district limitations. The modification was granted under Section 10.6112 of the community development code. That section authorizes an administrative adjustment of any special district boundary where "...new information has been obtained establishing that the boundary should be different than shown [on the code map] to fulfill the purposes of the district."

The city's finding with respect to the boundary adjustment states:

"The applicant has submitted a detailed topography map

> and another topography map which has the 15%+ slopes shaded...
>
> "When detailed slope analyses are made, it is not uncommon for the field study to indicate the Code Map is in need of revision since the Code Map represents a generalized analysis of both slopes and flood plains. Exhibit 'C', Map '2', indicates that none of the lots on the west side of the lake will encroach into the revised Hillside Physical Constraint District." Record at 7.

We read the finding to indicate applicant had demonstrated that the land proposed for development west of Binford Lake did not contain slopes 15 percent or greater.

Petitioners attack the boundary adjustment in two respects, neither of which can be sustained. First, they complain they did not receive advance notice of this aspect of the proposal, although Section 10.2130 of the development code requires such notice. However, petitioners make no effort to demonstrate how they were injured by this procedural defect. Indeed, the record indicates they were given ample opportunity to make known their objections to the proposed adjustment of the constraint district. Record at 219. Under the circumstances, we find no error requiring a remand or reversal. ORS 197.835(8)(a)(B).

Second, petitioners object to the above-quoted findings on grounds they fail to set forth the purpose of the district "...and how that purpose will be unaffected by the change in the district and subsequent development." Petition at 29. However, this objection would require the city to adopt additional findings stating only the obvious - i.e., that land

containing slopes of less than 15 percent need not be included in the district.[17] The city's finding that site-specific, detailed topograhpic information, (showing the slopes proposed for development were less than 15 percent) warranted a boundary adjustment was sufficient.[18]

Petitioners make an additional argument in connection with the hillside development approved by the city. They point out that on the east side of Binford Lake, there are slopes exceeding 15 percent which are not shown as within the Hillside Physical Constraint District. According to petitioners, it was error for the city to approve development on these slopes. Even if the constraint district requirements were not applicable on the east side of the lake, petitioners claim the city's action violated two comprehensive plan policies, No. 10.212 (Soil Constraints) and No. 10.213 (Topographic Constraints). Id.

The proposal for residential development of the lots east of Binford Lake was considered reviewable by the city for conformance with comprehensive plan policies concerning topographic and soil constraints. The city found in favor of plan conformance by relying on the detailed report of an expert in engineering geology. Record at 7. Petitioners attack the city's finding as conclusory and on grounds it contradicts other data concerning topographic constraints. The contradicted data is contained in the "findings" component of the city's development plan. Record at 218-219. In

petitioners' view, the city did not sufficiently explain why it resolved the conflict between the applicant's geological report[19] and the city's prior study in favor of the applicant. Petition at 31.

Plan Policy 10.212 (Soil Constraints) reads:

"10.212 SOIL CONSTRANTS

"POLICY

> "IT IS THE CITY'S POLICY TO MINIMIZE DEVELOPMENT ON SOIL CONDITIONS WHICH MAY BE HAZARDOUS."

Plan Policy 10.213 (Topographic Constraints) reads:

"10.213 TOPOGRAPHIC CONSTRAINTS

"POLICY

> "IT IS THE CITY'S POLICY TO MINIMIZE OR PREVENT DEVELOPMENT ON STEEP SLOPES WHICH ARE HAZARDOUS TO LIFE AND PROPETRY [sic]."

Our reading of the city's findings causes us to reject petitioners' challenge. The critical findings state:

> "On the east side of the lake, there are slopes exceeding 15% which are not mapped as being within the Hillside Physical Constraint District. Construction of dwellings on the sections of these slopes is projected by the applicant. Appendix "A" of the applicant's narrative is a report prepared by an Engineering Geologist. A conclusion of this report indicates that 'The proposed construction is located in areas of stable slopes free of any apparent geologic hazards and the site is suitable for the proposed use.' Based upon the preceding information, the proposal can be found to be consistent with Sections 10.213 and 10.214 of the Community Development Policies Document.
>
> "The Binford Lake Coalition claims this proposal is inconsistent with topographic Constraints Policy

> Section 10.213, Hydrologic Constraints Policy Section 10.214, and Soil Constraints Policy Section 10.212. The coalition relies on information in the Findings Document of the Gresham Community Development Plan. Information in the Findings Document contradicts information provided by the applicant's Engineering Geologist. The information in the findings document is general in nature. Therefore, when an applicant proposes a development within the Hillside Physical Constaint District, the city requires a thorough soils report by the applicant. Since this report is detailed, and the findings in the findings document are general, the detailed report of the Engineering Geologist prevails. Standards Section 3.1010 requires in part: '...an Engineering Geology report shall be required if the proposed development is within the Hillside Physical Constraint District.'" Record at 8.

The finding is not conclusory. Moreover, it clearly articulates a basis for preferring the data provided by the applicant's expert. We see no reason why further explanation was necessary.

3. SECTION 6.0230 (DRAINAGE)

Section 6.0230 of the city's Community Development Standards provides:

> "Where it is anticipated that the additional run-off incident to the development will overload an existing drainage facility, the approval authority shall withhold approval of the development until provisions have been made for improvement of said potential condition."

Petitioners claim the city was obligated to address this policy in its finding and did not do so. Petition at 32-33. As we read the policy, however, it is not implicated in every subdivision proposal coming before the city. Only where "it is anticipated" the development will overload an existing drainage facility does the provision come into play. Our review of the

record supports respondent's position the city had no basis on which to anticipate drainage problems. Petitioners provide citations to the record where the subject of drainage was mentioned, e.g., Record at 143, 218-219, but none of the testimony or evidence reasonably could put the city on notice drainage and overload problems could be anticipated.

Accordingly it was not error for the city's findings to pass over Section 6.0230 of the code.[20]

4. STANDARDS SECTION 4.0900-0940 (OPEN SPACE DEDICATION)

Section 4.0900 et seq of the Community Development Standards provides for the imposition of a systems development charge on certain developments. The charge is designed to finance the acquisition, development and expansion of recreational facilities, services and open space. See Section 4.0910. However, in lieu of paying the charge, a developer may choose the option of dedicating land to the city for recreation and open space uses. Section 4.0930. Hallberg Homes eventually selected this option, after the city encouraged it to take the dedication approach.

According to the city's final order, Hallberg Homes is to dedicate the Binford Lake area to the city as part of the Greenway Program. Record at 8-15, 25. The code provision governing the land dedication option states as follows, in pertinent part:

> "4.0930(A) Developers of subdivision, multi-dwelling structures, or mobile home subdivisions shall be afforded the option of dedicating

> land in lieu of the systems development charge. Any such offer may be accepted only if the land can be used for recreational or open space purposes in a manner consistent with the Recreational Facilities Service and the Open Space Elements of the Community Development Plan, Volume II. However, no dedication shall be accepted for land, as determined by the approval authority, which is inadequate in size or unsuitable in location or topography for facilities necessary to satisfy the needs of the new residents."

At the city's hearings, Petitioner Binford Coalition opposed the dedication under Section 4.0930(a). The coalition argued that although visual enhancement (passive open space use) would be provided by the lake, the land would be inadequate to meet the needs of residents of the subdivision for active open space. Record at 253-254. In this appeal, petitioners contend the city erred in not adopting findings responsive to these concerns. Petition at 34.

The city adopted extensive findings with respect to the dedication issue. Record at 8-14. The findings indicate the importance of the land in question as a link in the Greenway system. Record at 10-11. They also indicate the site has limited potential for development, but excellent potential for passive recreation. Id. Moreover, the city recognized that parts of the Binford Lake area warranted preservation in a natural state. Id.

It is true no finding specifically addresses the "active open space" argument raised by petitioners, but no such finding

was required. In effect, the city's findings negate the need to devote this open space to active recreational use. Instead, the city concluded the most appropriate use of the dedicated land was for passive recreational use. We do not read Section 4.0930(A) or any of the plan policies cited by petitioners, to bar this approach. The code provision grants the city extensive discretion in determining need and appropriate open space use. The findings reflect reasonable exercise of that discretion.

Based on the foregoing, the third assignment of error is dismissed.

FOURTH ASSIGNMENT OF ERROR

In this assignment of error petitioners allege the city's decision violated several provisions of the Gresham Development Code. The provisions in question concern development-type, siting requirements (setbacks, lot coverage, and building height), and boundary adjustments in the Hillside Physical Constraint District. Below we consider the issues raised by petitioners.

As a preliminary matter, we note Respondent Hallberg Homes takes the position that conceptual approval of the PUD in 1969 shields this development from review for conformance with the Development Code. Reliance is placed on Section 10.1071(4) of the code, which reads:

> "A PUD which conforms to the land use designations of the community development plan map and has received concept plan approval shall be valid for the purpose

of obtaining final development plan approval consistent with the appropriate standards contained in the Community Development Standards Document."

Respondent Hallberg Homes contends the effect of this provision, taken in conjunction with the city's concept approval of the PUD in 1969, is to make Phase 7 of the PUD reviewable only for conformance with the city's Community Development Standards (discussed under Assignment of Error 3). We do not accept this contention, although the question is by no means free of doubt.

The city acknowledges the applicability of Section 10.1071(4) to this case, but its interpretation does not coincide with the interpretation given by Hallberg Homes. Rather, the city reads Section 10.1071(4) more narrowly, to protect only the use at issue here (a PUD consisting of attached dwelling units) from development code requirements. Record at 16. The city states in its brief:

> "In 1980, the city adopted a very liberal nonconforming use provision which is found in Code Section 10.1071. The city's comprehensive plan no longer has a typical PUD provision (actually, all developments are treated as PUD's). Since this proposal is the last phase of a PUD, it falls within subsection 4 of Section 10.1071. This subsection states: [quotation omitted]
>
> "Therefore, the applicant's PUD was grandfathered indefinitely." Brief of Respondent City at 29. (emphasis added).

In line with this reading of Section 10.1071(4), the city's final order addresses the relationship between the proposed subdivision and (1) the Community Development Plan, (2) the

Community Development Code and (3) the Community Development Standards. Record at 6. The city's interpretation may stem from a number of considerations, such as ambiguity in Section 10.1071(4) itself,[21] ambiguity in the nature of the PUD concept approval given in 1969,[22] and the fact this phase of the PUD differs from the original, very generalized PUD concept.[23] Thus, although there is merit to the interpretation of Section 10.1071(4) given by Respondent Hallberg Homes, we defer to the city's interpretation that only the status of the proposal as a PUD was "grandfathered" by Section 10.1071(4). Therefore, we proceed to consideration of petitioners' challenges under the development code.[24]

1. SECTION 10.3106 (DEVELOPMENT-TYPE CONSISTENCY)

Section 10.3106 of the Development Code contains requirements designed to promote consistency between the type of housing proposed in an "established district" and the type of housing existing on abutting parcels. Petitioners raise a number of challenges to the city's action under this provision of the code. The challenges reflect petitioners' central contention that, as applied to this site, Section 10.3106 prohibits the construction of the two story structures proposed by Hallberg Homes and approved by the city.[25] This is because development on the abutting land consists only of one story structures.

We take up each of petitioners' challenges under Section 10.3106 below.

Petitioners' first argument is that Section 10.3106 prohibits two story structures in the Binford Lakes subdivision because there is no abutting two story development. They point out that abutting lots on the north, east and west contain one story structures only. However, the city contends, and we agree, that petitioners have misinterpreted Gresham's scheme for determining development-type consistency.

Section 10.3106 provides two alternatives for detemining development-type consistency. In each case, the critical element is whether the proposed is for "the same type" of development as exists on abutting parcels. The provision reads as follows:

"10.3106 Development Type Consistency

"(1) Except as authorized by section 10.3120, the proposed development shall either be of the same type as is found on abutting parcels of land or shall be evaluated for consistency under the Type III procedure as described in subsection (2). To determine where development is of the same type, the 'same type matrix' found in the Development Standards Document shall be used. Parcels that meet all of the following conditions shall be considered in making comparisons for type consistency.

"(a) The parcel abuts the proposed development or is directly across a street from the proposed development.

"(b) The parcel has either been developed beyond the preliminary plat approval state or is committed to a specific type of development by issuance of a building permit.

"(c) The parcel is within the established district.

"(d) The development on the parcel is not an area

accessory development or a nonconforming development.

"(2) If the same type of development does not exist on each abutting parcel to be considered, a development of the same type as any abutting development may be allowed, subject to approval after satisfactory fulfillment of the following criteria...

"(a) New development shall be arranged and constructed to protect adjacent development that is of a different type from detrimental effects due to noise, odor, fumes, dust, glare, heat, reflection, traffic, vibration and conflicting appearance.

"(b) The scale of the development proposed shall not cause detrimental effects due to noise, odor, fumes, dust, glare, heat, reflection, traffic, vibration and conflicting appearance on the general area out of proportion to that due to the existing development of the same type."

The city concedes the type of development proposed for the Binford Lakes subdivision is not the same as development on each abutting parcel. Subdivision (1) of Section 10.3106 therefore is inapplicable. However, as the city points out under Section 10.3106(2), if any abutting development is the same type as proposed, it remains possible to find development-type consistency. This is accomplished by reviewing the proposed development for conformance with the criteria contained in paragraphs (a) and (b) of the above-quoted code provision.[26]

We find Section 10.3106(2) of the code permitted the city to approve the plan for two story duplex development in this case because abutting development of the "same type" existed to

the north. This conclusion is reached by reference to a chart, the "same type matrix", appearing at Section 4.0110 of the city's development standards.

According to the matrix,[27] an existing, attached dwelling of one story is the "same type," for purposes of Section 10.3106, as a proposed attached dwelling of two or more stories. Since abutting development to the north of the proposed subdivision contains attached, one story dwellings, Record at 271, it was permissible for the city to conclude, under Section 10.3106(2), that the proposal for two story attached structures met the code's consistency requirement.

Next, petitioners complain the city failed to explain how certain standards relating to buffering and screening this development from its neighbors would accomplish the goal of maintaining housing-type consistency. We are cited to no authority, however, and we are aware of none, which would require the city to explain, on a site specific basis, the precise manner by which these objective zoning provisions[28] would operate. Accordingly, we cannot sustain this objection.

Petitioners further complain the city adopted inadequate findings under Section 10.3106(2)(b) of the code. As noted above, this is one of two provisions guiding the determination of development type consistency where the proposed type of development differs from some, but not all abutting development. The first provision, Section 10.3106(2)(a), calls for protecting any adjacent development of a different type

from the detrimental effects of the proposed development. The second section, Section 10.3106(2)(b), calls for a comparison between the detrimental effects caused by the proposed development and those caused by the abutting development of the "same type".

Section 10.3106(2)(b) reads as follows:

> "The scale of the development proposed shall not cause detrimental effects due to noise, odor, fumes, dust, glare, heat, reflection, traffic, vibration and conflicting appearance, on the general area out of proportion to that due to the existing development of the same type."

Petitioners contend the city adopted inadequate findings under this provision. Further, they argue the above requirement could not be met because the scale of the single story detached housing to the north of the site is

> "...clearly in proportion to the single story detached housing to the west. The same cannot be said for the proposed two story dwellings." Petition at 41-42 (emphasis in original).

Although the city adopted fairly extensive findings under Section 10.3106(2)(a) of the code, the finding under Section 10.3106(2)(b) is skeletal. The finding states:

> "The scale of the proposed development will not cause detrimental effects due to noise, traffic, conflicting appearance on the general area out of proportion to that generated by existing development of the same type which is found north of the subject site.
>
> "The coalition contends that the proposed housing is out of scale with the adjacent one story housing to the west. The section requires that the city compare the proposed housing with the same type of housing. The attached dwellings which are the same type as the proposed development are located to the north, not the west." Record at 20.

The finding does little more than reiterate the terms of Section 10.3106(2)(b). It does not describe the scale of the attached housing to the north, (the housing deemed the "same type" as the proposed development by the city's matrix, see page 33-34, supra) or its impact on the detached single family housing pattern to the east and west of the site. In the absence of such a discussion, we are unable to assess petitioners' challenge, or determine whether the city had a basis for concluding the provision was satisfied. There may well be a basis for such a positive conclusion under Section 10.3106(2)(b), but none has been stated in the final order. Accordingly, a remand is necessary. OAR 661-10-070(1)(C)(1).

2. SECTION 10.3104 (SITING CONSISTENCY)

Petitioners next attack the city's findings in connection with Section 10.3104 of the Community Development Code. This section provides:

> "(1) Building setbacks from property lines, lot coverage, and building heights shall be consistent with the same type of development on adjacent parcels but not less than those contained in the Development Standards Document.
>
> "(2) Building height shall be determined by the Development Standards Document."

The city's finding with respect to Section 10.3104 reflects the fact Hallberg Homes had not submitted specific house plans when the hearing on the subdivision was held. Accordingly the findings merely state:

> "Siting Consistency. The proposed dwellings will have

> to have building setbacks and building heights consistent with adjacent developments and/or specified by the provisions found in the Standards Document." Record at 18.

Petitioners correctly observe there is ambiguity in how Section 10.3104 will apply to building heights in the Binford Farm subdivision. It is unclear from the finding, for example, whether building height is to be determined under objective standards in the development standards document or under a more subject "consistency" approach. However, we are unable to discern the nature of the petitioners' challenge to this aspect of the final order. The petition states:

> "In the absence of clear standards, a finding that delegates this major issue to a vague future staff review is not consistent with the requirements of the code section. The city must define what the standard 'adjacent development' means in this instance." NESO Properties, Inc. v. Tillamook County, 8 Or LUBA 51, 57-58 (1983). Petition at 43.

We find nothing in the code section which is inconsistent with the city's findings. The findings merely reflect that the code section must be satisfied. Petitioners do not appear to be arguing that this condition must be applied at the plat approval stage, rather than at the time of design review. Because petitioners have not advanced a legal theory supporting their contention the city was obligated to define the term "adjacent development" as it is used in Section 10.3104(1), we proceed no further.[29]

3. SECTION 10.6112 (SPECIAL PURPOSE DISTRICT ADJUSTMENT)

Petitioners' final challenge under this assignment of error

reiterates their objections to the city's allowance of an adjustment to the boundaries of the Hillside Physical Constraint District. We have addressed this challenge in the third assignment of error. Accordingly, we proceed no further.

In conclusion, most of petitioners' challenges under the Community Development Code cannot be sustained. However, the city's findings under Section 10.3106(2)(b) are insufficient. The provision requires an explicit comparison between the proposed development and existing development of the same type, in terms of the impacts of each on the general area. No such comparison appears in the final order.

Based on the foregoing, this assignment of error is sustained in part.

FIFTH ASSIGNMENT OF ERROR

Under this assignment of error petitioners generally reiterate objections previously discussed. We do not accept their objections to the adequacy of the city's findings under Plan Policy 10.212 (Soil Constraints), 10.213 (Topographical Constraints) and 10.315 (Open Space). These have been addressed under the third assignment of error.

CONCLUSION

Petitioners have raised valid objections to the city's issuance of hardship relief in connection with the intersection spacing standard. The city's findings under criteria (3) and (4) of the hardship relief provision in the code are unduly

vague. Further, the city's approach under criteria (5) and (6) of the code represent an erroneous construction of its standards.

The city miscontrued the code by assuming the right protected by subsections (5) and (6) of Section 10.5120 is the right to develop the property as proposed. As we read it, the code protects only the more limited right to "some economic use of the land." Manifestly that right could be preserved without hardship relief.

We hasten to add the city has a good deal of discretion in legislatively establishing standards governing hardship relief. There may well be good reasons for enacting strict variance standards, such as avoiding piecemeal subversion of planning policies. On the other hand, a municipality might adopt a more liberal policy on the theory that zoning requirements should not be rigidly applied.

In any event, the function of this Board is to apply the standards for variance relief as they are written.

Apart from the hardship relief issue, we sustain only one other aspect of petitioners' challenge. This is the challenge to the city's findings under Section 10.3106 of the Community Development Code. In all other respects, the petition is denied.

Reversed in part, remanded in part.

FOOTNOTES

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1 The significance of "established district" designation is discussed at pp. 32-37 infra.

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2 We found the city erred under its code by using nearby lots developed with detached housing as the basis for comparison with the size of proposed lots on which attached housing was to be constructed. 7 Or LUBA at 149.

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3 See Order Denying Petitioners' Objection to Record, January 5, 1984.

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4 At no point in the city's order, or its brief, are we informed of the extent of the deviation(s) from the 400 foot requirement, although the issue might well be relevant under some of the criteria for hardship relief, e.g., Section 10.5120(3) and (4).

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5 In its brief the city contends that, because we did not direct it to reconsider the developer's request for hardship relief on remand, the city was bound by its previous determination. Respondent City's brief at 9. However, if the city considered itself "bound" with respect to this issue, it was not due to any action of this Board, but rather to its own reluctance to reopen the variance question. As the planning commission minutes of June 14, 1983 state: "Since the original final order stated that the hardship relief request to vary the intersections spacing requirement was satisfied, the city is in a difficult position to now say the same request does not satisfy the requirements." Record at 204. (emphasis added).

The city's suggestion this Board required readoption of the hardship findings is not well-taken. The city's position brings to mind certain remarks by Edmund, a character in Shakespeare's tragedy, King Lear. Observing the tendency of men to attribute events brought on by their own actions to the overwhelming influence of other (celestial) forces, Edmund states:

"This is the excellent foppery of the world, that when we

are sick in fortune - often the surfeits of our own behavior - we make guilty of our disasters the sun, the moon and stars;...and all that we are evil in by a divine thrusting on." William Shakespeare, King Lear, Act I, Scene 2; VI, The London Shakespeare, p. 921 (John Munro, ed. 1957).

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6 The criteria are as follows:

"(1) The circumstances of any hardship are not of the applicant's making.

"(2) The grant of hardship relief will not cause a use of property not otherwise permissible.

"(3) Granting of the hardship relief will not adversely affect implementation of the comprehensive plan.

"(4) The hardship relief authorized will not be materially detrimental to the public welfare or materially injurious to other property in the vicinity.

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

"(6) The development will be the same as development permitted under this code and city standards to the greatest extent that is reasonably possible while permitting some economic use of the land.

"(7) Special circumstances or conditions apply to the property or to the intended use that do not apply to other property in the same vicinity."
Section 10.5120 Gresham Development Code.

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7 Another argument presented by respondents in defense of the decision is that the overall configuration of the PUD was heavily influenced by various governmental proposals to construct the Mt. Hood Freeway. The configuration of Phase 7 was dictated by prior phases of this PUD, they argue, and those prior phases were themselves heavily influenced by forces beyond the control of Hallberg Homes.

Although we find logic in this rationale, we note it is stated in highly general terms. More importantly, it is not reflected in the city's findings. Since the city did not rely on the rationale, we do not consider it.

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8 Petitioners urge us to read Section 10.5120(1) as an embodiment of the "strict" variance approach because it employs the word "hardship." Petition at 17-18. However, we see no reason to do so. The code itself does not define "hardship." As we discuss later, the code sets forth other variance criteria which expressly invoke the strict approach. Under the circumstances, it is neither necessary nor desirable to attribute special significance to the use of "hardship" in Section 10.5120.

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9 Publishers Paper Company v. Benton County, supra, concerned a land division in a forest area. One criterion for approval required compatibility between the proposal and existing forest uses. 6 Or LUBA at 186. The challenged finding stated creation of the parcel would not be incompatible with adjacent forest uses because the parcel would itself be put to forest use. Id at 184. We concluded more detailed findings were unnecessary because the record contained no credible evidence of incompatibility. Had the finding made no reference to the compatibility question, or had it provided no explanation of how the proposal interrelated with adjacent forest uses, the finding would have shared the defect of the one challenged here.

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10 See Record at 256, 294.

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11 We note such an explanation would, by itself, not be sufficient to justify the relief allowed by the city. The alignment with an existing street pertains only to the cul-de-sac on the east side of the plat. There is no such alignment on the west side, yet hardship relief, seems to apply to that side of the plat.

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12 Petitioners' additional argument the criterion itself is vague and could not be applied by the city without refinement

in advance of decisionmaking cannot be sustained. Lee v. City of Portland, 57 Or App 798, 803, 646 P2d 662 (1982).

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[13] The city urges us to give a more permissive reading to its hardship relief provisions, but we are unable to do so. The city's suggestion is that our analysis proceed as follows: (1) determine whether the variance is necessary to preserve "property rights" under Section 10.5120(5); if a variance is necessary then (2) refer to Section 10.5120(6) to consider whether the variance is the "minimum necessary." Brief of Respondent City at 16.

Although the sequential approach has appeal, it is not reflected in the text of the code itself. Rather, Section 10.5120(6), which employs the strict phrase "some economic use of the land" is an independent criterion which must be satisfied in each case. We cannot interrelate the two criteria as the city suggests without doing violence to the text.

In our analysis of this issue we have been mindful of some language in the introductory portions of Section 10.5120 which could suggest the city intended a more liberal variance policy. We would have to read subparagraph 6 out of the section, however, to uphold this aspect of the decision. This we decline to do.

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[14] Lovell v. Independence Planning Commission, 37 Or App 3, 586 P2d 99 (1978), on which petitioners also rely, involved a strict variance standard similar to that found in the Klamath Falls Ordinance. (exceptional or extraordinary circumstances). For this reason we do not find Lovell controlling with respect to Gresham's construction of Section 10.5120(7). See also, Erickson v. City of Portland, 9 Or App 256, 496 P2d 726 (1972) (variance allowable where there are unique, unusual or peculiar circumstances). Indeed, none of the cases cited to the Board concern the precise question presented here, i.e., whether "special circumstances" justifying variance relief can consist of changes in legal requirements affecting the developability of land. We read the Gresham Code to permit consideration of this factor.

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[15] We find it of passing interest that common-wall construction, thought by many to be a modern innovation, actually has ancient roots. A report filed with the National Science Foundation in March, 1984 indicates humans lived in crudely built rowhouses in

South America about 20,000 years ago. Squires, 20 Thousand Years Ago, Crafty Ancients Built Rowhouses, The Oregonian, March 20, 1984 at A10, Col. 1.

[16] It would perhaps be more accurate to use the term "multi-structure dwelling," a term defined by the Gresham Development Standards Document as: A building designed exclusively for occupancy by two (2) families living independently of each other." Section 1.0500, Gresham Development Standards of 1980.

[17] Section 2.0511 of Gresham's Community Development Standards of 1980 describes the Hillside Physical Constraint District as including "...all areas of the city where the slope of the land is 15 percent or greater and shown on the community development code map. (emphasis added).

[18] We note petitioners object only to the finding, not to the evidentiary basis for the finding.

[19] Respondent Hallberg Homes argues it is pointless to consider petitioners' objection to the geologic report, because the report became unnecessary once the development was placed entirely outside the constraint district. However, the city found the report relevant to plan policies considered applicable even though the land was not in the constraint district. We consider the report in that context.

[20] Petitioners also criticize the city's finding under Plan Policy 10.214 (hydrologic constraints) on grounds the findings are "limited, inadequate and unresponsive to petitioners' concerns..." Petition at 32-33. However, this charge is far too vague to merit a response by the Board.

[21] For example, Section 10.1071(4) does not explicitly shield the PUD from development code requirements. It merely characterizes a PUD approved in concept as "valid." The quoted term is not defined.

[22] As the city's findings indicate, the concept approval in 1969 included a provision that each phase of the PUD was subject to planning commission evaluation. The scope of that evaluation was not circumscribed. Record at 4.

[23] For example, the original approval contemplated 82 units, while the current proposal is for only half that amount. Record at 16.

[24] Our opinion in Hallberg Homes v. City of Gresham, 7 Or LUBA 145 (1983) gave some support to the interpretation of Section 10.1071(4) favored by Hallberg Homes in this proceeding. See 7 Or LUBA at 148. However, that interpretation was not critical to our holding in the case. Indeed although we stated the development code provisions were inapplicable to the subdivision as a consequence of the 1969 concept approval, we also proceeded to overturn the city's denial of the subdivision under a section of the development code. Id.

[25] The parties advise us only that some two story structures are proposed. The details concerning their number and locations are not clear. See our discussion of page 36, supra.

[26] As the city's findings state: The issue in Section 10.3106 is that different type housing shall be arranged and constructed to protect adjacent development that is of a different type from detrimental effects due to conflicting appearance. This section allows different type housing; it just requires that detrimental effects be mitigated. Record at 19.

[27] The matrix analyzes a variety of proposed uses in terms of their consistency with abutting uses. Whether a given proposed use is the "same type" as a given abutting use is indicated by the word "yes" or "no" on the appropriate space on the chart.

[28] Objective standards for buffering and screening neighboring

adjacent uses from one another are contained in Section 3.0700 et seq of the city's development standards.

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29 Petitioners' reliance on NESO Properties, Inc. v. Tillamook County, 8 Or LUBA 51 (1983) does not explain their theory here. In NESO Properties we required the county to define a term ("incompatibility") it had employed to deny a proposal. Here, the city has yet to make any determination at all under Section 10.3104.