

BEFORE THE LAND USE BOARD OF APPEALS DEC 28 4 02 PM '81

OF THE STATE OF OREGON

|   |                        |   |                 |
|---|------------------------|---|-----------------|
| 3 | SHERWOOD PLAZA, INC.,  | ) |                 |
|   | an Oregon corporation, | ) |                 |
| 4 |                        | ) |                 |
|   | Petitioner,            | ) | LUBA No. 81-090 |
| 5 |                        | ) |                 |
|   | vs.                    | ) | FINAL OPINION   |
| 6 |                        | ) | AND ORDER       |
|   | THE CITY OF SHERWOOD,  | ) |                 |
| 7 |                        | ) |                 |
|   | Respondent.            | ) |                 |

9 Appeal from the City of Sherwood.

10 George Platt, Portland, filed the Petition for Review and  
argued the cause on behalf of Petitioner.

11 Derryck H. Dittman, Tigard, filed the brief and argued the  
12 cause on behalf of Respondent.

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

15 AFFIRMED 12/28/81

16 You are entitled to judicial review of this Order.  
17 Judicial review is governed by the provisions of Oregon Laws  
1979, ch 772, sec 6(a).

1 PEYNOLDS, Chief Referee.

2 INTRODUCTION

3 Petitioner appeals the city's denial of its request for a  
4 textual amendment to the acknowledged Sherwood Comprehensive  
5 Plan. This textual amendment would have allowed mobile homes  
6 as a conditional use in any area designated for community  
7 commercial use. While this textual amendment was approved by  
8 the city council, the amendment was then vetoed by the Sherwood  
9 City mayor acting pursuant to Sherwood's charter. It is the  
10 veto of this amendment which petitioner appeals.

11 ASSIGNMENTS OF ERROR

12 Petitioner challenges the mayor's veto on four grounds.  
13 The first ground is that the reasons cited by the mayor for  
14 vetoing the amendment lack support in the record. Petitioner  
15 characterizes the mayor's statement of reasons as conclusions,  
16 not factual findings, without any evidentiary support.  
17 Petitioner's second assignment of error is that the findings  
18 and decision of the city fail to set out the criteria which  
19 were required to be met for amendment of the comprehensive  
20 plan. Petitioner says the mayor was required to discuss those  
21 aspects of Section 3.03 of the Sherwood ordinance pertaining to  
22 amendment of the comprehensive plan which the mayor believed  
23 were not met. Petitioner's third assignment of error is that  
24 the findings and decision were not based on the criteria  
25 required by the Sherwood Comprehensive Plan for a decision on a  
26 comprehensive plan amendment. Petitioner says the findings

1 show, in fact, a disregard for the criteria. Petitioner's  
2 final assignment of error is that the mayor was wrong in  
3 concluding that a zone change was available to the petitioner  
4 in order to allow mobile homes in an area designated in the  
5 plan for community commercial. Petitioner claims such a zone  
6 change would violate Goal 2 because it would violate the  
7 comprehensive plan.

8 STATEMENT OF FACTS

9 Petitioner requested that the city adopt an ordinance  
10 allowing mobile homes to be placed within certain commercial  
11 zones as a conditional use. The request was approved by the  
12 planning commission with the modification that mobile homes  
13 would only be allowed as a conditional use in the community  
14 commercial zone. The planning commission's recommendation was  
15 forwarded to the city council where it was approved. Two  
16 members of the city council, however, including the mayor,  
17 voted against the proposed amendment. After the council  
18 approved the amendment, the mayor, acting pursuant to the city  
19 charter, vetoed the amendment. The Sherwood City Charter  
20 section which enables the mayor to veto a legislative enactment  
21 also required that the mayor state his reasons for doing so in  
22 writing. The mayor submitted a 7 page document setting forth  
23 his reasons for vetoing the proposed amendment. The mayor's  
24 statement of reasons is in 5 subparts plus a conclusion. In  
25 the first part, the mayor characterizes the ordinance which  
26 would amend the comprehensive plan as an "irrational

1 document." It appears that the mayor questions the adoption  
2 during times of economic chaos of a comprehensive plan  
3 amendment that attempts to alleviate present economic  
4 hardship. The mayor believes the plan and any plan amendments  
5 are supposed to serve as a long term planning guide. The mayor  
6 says that if there is truly a problem with the plan, it should  
7 be looked at at the time of its scheduled review, which is May  
8 of 1982. At this time (May of 1982) a "comprehensive review of  
9 the maps and text of the plan" could be made by the city and a  
10 determination made whether a plan map change should be  
11 allowed. The second part of the mayor's reasons characterizes  
12 the conditional use as in fact allowing a zone change to take  
13 place. One cannot, says the mayor, take a use which is  
14 incompatible with a designated use and call it a conditional  
15 use. The third part of the mayor's statement of reasons says  
16 that the amendment would "infringe on the property rights of  
17 other land holders." The other land holders referred to by the  
18 mayor include persons with mobile home applications already  
19 approved. Apparently, the mayor believes these approvals would  
20 be worth less in view of the rights which would be held by  
21 owners of commercial property who could also use their property  
22 for mobile home development. The mayor also suggests that  
23 other property owners who want to rezone their property to  
24 community commercial so as to open up a store might be  
25 prevented from doing so because of the fear that the property  
26 would, in fact, be developed for mobile home purposes. The

1 fourth subpart of the mayor's statement of reasons is that the  
2 amendment "will lead to the destruction of the comprehensive  
3 plan." Other people will demand similar treatment which will  
4 result in the placement of conditional uses in other zoning  
5 areas. The ultimate result of these demands will be a  
6 comprehensive plan that will be impossible to interpret because  
7 of the numerous possible conditional uses. The final subpart  
8 of the mayor's statement of reasons is that the amendment "may  
9 infringe on the liberty rights of the people." The mayor is  
10 concerned that when the economic situation improves, people who  
11 have developed their property as a conditional use for mobile  
12 homes in a commercial zoning district will terminate the use of  
13 the property for mobile homes and develop the property for  
14 commercial purposes. The amendment would, thus, foster  
15 insecurity in people concerned about having adequate housing  
16 opportunities available to them. In his conclusion, the mayor  
17 suggests that the applicant should request a zone change,  
18 retaining the option to reapply at a future date for a  
19 commercial designation.

20 OPINION

21 Petitioner's first assignment of error challenges the  
22 mayor's findings as not supported by substantial evidence in  
23 the record. Petitioner cites numerous opinions of this Board,  
24 all of them involving quasi-judicial land use decisions,  
25 requiring findings to be supported in the record by evidence  
26 which a reasonable person would accept as adequate. Petitioner

1 does not, however, address whether the findings and evidentiary  
2 support therefore required in a quasi-judicial decision are  
3 required for a legislative decision, particularly a legislative  
4 decision involving the denial of a request to amend textual  
5 provisions of an acknowledged comprehensive plan. Outside of  
6 the requirements of Goal 2 and the city's own charter, we are  
7 aware of no requirement that Sherwood's legislative decisions  
8 be supported by findings at all. Petitioner does not, however,  
9 allege the city's decision violates Goal 2, probably in view of  
10 the acknowledged status of the city's comprehensive plan. Nor  
11 does petitioner attack the findings as inadequate under the  
12 city's charter.

13 Given the foregoing, the only sense we can make of  
14 petitioner's challenge to the mayor's decision is that the  
15 decision is arbitrary and capricious because it has no basis in  
16 the record. We addressed what constitutes arbitrary and  
17 capricious decision-making in Realty Investment Co. v Gresham,  
18 2 Or LUBA 153, 158-159 (1981):

19 "In the present case, at least two of  
20 petitioners' six assignments of error are not rooted  
21 in the statewide planning goals. Petitioners' first  
22 assignment of error is that the city's action was so  
23 vague and uncertain that a reasonable person could not  
24 determine the actual result. Petitioners' sixth  
25 assignment of error is that the city's action as  
26 reflected on the official zoning maps was arbitrary  
and capricious. We discuss the sixth assignment of  
error first.

"The requirement that a governing body's exercise  
of its planning and zoning responsibilities not be  
arbitrary or capricious existed long before adoption  
of the statewide planning goals. As stated by the

1 Supreme Court in Fasano v. Washington County  
2 Commissioners, 264 Or 574 at 580, 507 P2d 23 (1973):

3 "'Ordinances laying down general policies  
4 without regard to a specific piece of property  
5 are usually an exercise of legislative authority,  
6 are subject to limited review and may only be  
7 attacked upon constitutional grounds for an  
8 arbitrary abuse of authority.<sup>5</sup> (Footnote  
9 omitted).

10 "In Jehovah's Witnesses v. Mullen, et al, 214 Or  
11 281, 330 P2d 5 (1958), the Supreme Court described the  
12 terms arbitrary and capricious:

13 "'The terms 'arbitrary and capricious  
14 action,' when used in a matter like the instant  
15 one, just mean willful and unreasoning action,  
16 without consideration and in disregard of the  
17 facts and circumstances of the case. On the  
18 other hand, where there is room for two opinions,  
19 action is not arbitrary or capricious when  
20 exercised honestly and upon due consideration,  
21 even though it may be believed that an erroneous  
22 conclusion had been reach.

23 "Applying the arbitrary and capricious test set  
24 forth in Jehovah's Witnesses, we conclude the City of  
25 Gresham acted arbitrarily in adopting Ordinances Nos.  
26 885 and 886 and specifically the plan map embodied in  
Ordinance No. 885 designating approximately 7 acres of  
petitioners' property below the previously approved  
subdivision as LDR...[A] review of the transcript  
concerning the city council's discussions and  
deliberations as to the southernmost 7 acres of  
petitioners' property leads us to conclude that there  
was no basis in fact for the city's decision to alter  
the designation on this property from MDR as it  
previously had been designated and as it had been  
proposed to be continued by staff to LDR...When one  
cannot look at the record and find some basis to  
support a decision made, that decision must be  
characterized as 'unreasoning action, without  
consideration and in disregard of the facts and  
circumstances of the case,' within the meaning of  
Jehovah's Witnesses v. Mullen, supra.<sup>6</sup>" (Footnote  
omitted).

27 The mayor's written findings appear, for the most part, to  
28 express his own subjective view of the desirability of the

1 proposed ordinance. But in a legislative decision such as this  
2 the inquiry is not whether the findings are supported by  
3 evidence in the record; rather, the inquiry is whether the  
4 decision can be characterized as unreasoned and in disregard of  
5 the evidence in the record. The findings where they exist are  
6 an aid to determining whether the decision made was unreasoned  
7 and contrary to the facts in the record.

8 We cannot say, viewing the mayor's findings as a whole,  
9 that they are devoid of reason or in disregard of the facts in  
10 the record. His first finding as we read it says that  
11 decisions of this potential magnitude should be made, if at  
12 all, at the time of scheduled plan review (May of 1982) when  
13 the entire plan and its growth assumptions and projections  
14 could be re-analyzed. This is reason enough, in our judgment,  
15 to support the city's decision not to amend the text of its  
16 acknowledged comprehensive plan, at least in the absence of a  
17 definitive showing that the plan, because of changing  
18 circumstances or conditions, needs to be amended in order to  
19 bring it into compliance with the statewide goals. No such  
20 showing has been made in this case.

21 Nor can we say the mayor's concern about people's  
22 insecurity over availability of housing is unreasoning or  
23 contrary to the facts in the record. As written, the ordinance  
24 affords no protection to persons who would be displaced by a  
25 change in use from a mobile home park to a commercial use. No  
26 assurance is given in the ordinance to these people.<sup>1</sup> The

1 mayor was concerned about persons who might be displaced by  
2 such a change in use and where they might go with their mobile  
3 homes. The proponent of the amendment stated on the record  
4 that he would assist in relocating people; but what he meant by  
5 this statement and how others who might take advantage of the  
6 proposed ordinance would behave when the time came to change  
7 the use are left up in the air.

8 In short, we cannot say the mayor's decision to veto the  
9 proposed ordinance is devoid of reason or in disregard of the  
10 facts in the record.

11 Petitioner's second and third assignments of error assert  
12 the city erred because the mayor's findings in support of the  
13 veto neither set out the criteria required in the comprehensive  
14 plan for amendment of the plan's text nor are based upon those  
15 criteria. Petitioner's arguments assume that Part 3, Chapter  
16 1, Section 3.03 of the Sherwood Comprehensive Plan was required  
17 to be applied by the city in denying the proposed amendment.  
18 Section 3.03 provides as follows:

19 "In order to grant an amendment to the text of  
20 the Part, the City Council shall find that:

21 "(1) The proposed amendment is in  
22 conformance to map and text portions of the  
23 Comprehensive Plan not being considered for  
24 amendment.

25 "(2) The public interest is best served by  
26 granting the amendment at this time.

"(3) The following factors in ORS 215.055  
were consciously considered; the various  
characteristics of the areas in the City; the  
suitability of the various areas for particular

1 land uses and improvements; the land uses and  
2 improvements in the areas, trends in land  
3 improvement; density of development; property  
4 values; the needs of economic enterprises in the  
5 future development of the area; transportation  
6 access; natural resources and the public need for  
7 healthful, safe and aesthetic surroundings and  
8 conditions." (Emphasis added).

9 We disagree with petitioner's assumption that Section 3.03  
10 was required to be applied by the city in order to deny the  
11 proposed plan amendment. That section states that in order to  
12 grant a textual amendment, the council must make certain  
13 findings. By unambiguous terms, therefore, the section does  
14 not require the same findings for a denial of a proposed  
15 amendment.<sup>2</sup>

16 The mayor's decision to veto the proposed textual amendment  
17 to the city's comprehensive plan is affirmed.<sup>3</sup>  
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FOOTNOTES

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1 For example, a provision in the ordinance might condition such a change in use upon the availability elsewhere in the city or nearby of adequate mobile home park facilities.

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2 We also believe a construction of Section 3.03 requiring the city to address, for example, "public need" before it could deny an amendment to its acknowledged plan would be to place the city in the position of constantly having to reassess its plan every time a textual amendment were proposed. Absent a plan provision specifically requiring such a practice, we are unwilling to read such a requirement into the plan.

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3 The city conceded at oral argument that the mayor misspoke himself in stating in his findings that a zone change was available to the proponent as a means of allowing mobile homes in areas designated for community commercial. However, this concession does not change the outcome of this case.