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BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

HOME BUILDERS ASSOCIATION OF)
METROPOLITAN PORTLAND,)
)
Petitioner,)
)
vs.)
)
METROPOLITAN SERVICE DISTRICT)
and CLACKAMAS COUNTY,)
)
Respondents.)

LUBA NO. 80-059
FINAL OPINION
AND ORDER

Appeal from Metropolitan Service District.

Kevin L. Hanway, Portland, filed a petition for review and argued the cause for Petitioner Home Builders Association of Metropolitan Portland.

E. Andrew Jordan, Portland, filed a brief and argued the cause for Respondent Metropolitan Service District.

Respondent Clackamas County did not appear.

BAGG, Referee; REYNOLDS, Chief Referee; COX, Referee; participated in the decision and Referee Cox issues a concurring opinion.

Affirmed.

10/24/80

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

1 BAGG, Referee..

2 NATURE OF THE DECISION

3 Home Builders Association of Metropolitan Portland seeks
4 invalidation of Metropolitan Service District (Metro) Ordinance
5 No. 80-89 adopted April 24, 1980. Ordinance no. 80-89 amended
6 a portion of the acknowledged metropolitan urban growth
7 boundary within Clackamas County. Petitioner argues lands
8 needed for urban expansion by the year 2000 were not included
9 within the urban growth boundary as amended.

10 STANDING

11 Petitioner's standing is not contested.

12 FACTS

13 During the development of the urban growth boundary for
14 areas within Metropolitan Service District jurisdiction,
15 several "study areas" were identified. The study areas were
16 analyzed to learn whether a need existed for their inclusion
17 within an urban growth boundary. The major study areas in
18 Clackamas County were the City of Happy Valley and the Rock
19 Creek area. In 1978, Columbia Region Association of
20 Governments (CRAG Metro's predecessor) submitted an urban
21 growth boundary to LCDC for acknowledgment that did not include
22 certain portions of the area known as Rock Creek/Sieban Lane.

23 During the public hearings on the acknowledgment request,
24 persons testified that the Rock Creek/Sieban Lane area should
25 have been included within the urban growth boundary. The Land
26 Conservation and Development Commission issued an order

1 requiring Metro to reconsider its decision to exclude the two
2 areas before February 1, 1980. Notwithstanding the order for
3 further consideration, the initial urban growth boundary was
4 acknowledged by the Commission in January of 1980.

5 In October, 1979, the Clackamas County Department of
6 Environmental Services released a proposed comprehensive plan
7 map that showed an enlarged urban growth boundary including
8 portions of the Sieban Lane and Rock Creek areas. The county
9 believed its amendments would provide an urban growth boundary
10 large enough to accommodate 7 percent more people within the
11 county than its population studies forecast.

12 Petitioners submitted testimony at that time disputing the
13 county's belief that its urban growth boundary as proposed
14 would exceed expected year 2000 population needs. Petitioners
15 evidence showed that the proposed amendment would still leave
16 the county short of land needed to accommodate approximately
17 22,000 people. The urban growth boundary finally adopted by
18 Respondent Metro included on April 24, 1980, an addition of
19 approximately 900 acres.

20 ASSIGNMENT OF ERROR NO. 1

21 Petitioner's assignment of error no. 1 alleges Metro's
22 findings establishing land needed to accommodate projected
23 population growth by the year 2000 are not supported by
24 substantial evidence in the record. Petitioner illustrates his
25 allegation in four parts.

26

1 1. The findings do not recognize planning and
2 development that has occurred since adoption of the
3 original urban growth boundary.

3 Petitioner argues that Metro estimates on developable
4 residential land within cities are too optimistic. Petitioner
5 points to the Clackamas County urbanization report showing
6 vacant residential acreage to be 374 acres short of the Metro
7 estimate of 3249 acres. Petitioner argues its figures are more
8 accurate than Metro's and, therefore, show the Metro figures to
9 be unreliable and not useful as substantial evidence.

10 Petitioner says the county had updated Metro's 1977 figures,
11 the figures upon which Metro's estimate was based, by doing
12 field checks and using a "planimeter" according to
13 comprehensive plan designations. Plan designation changes,
14 alleges petitioner, will have an effect on availability of land
15 for housing. No field checks were done by Metro, and the Metro
16 estimate does not consider plan designations in force on the
17 land.¹

18 Respondent counters by pointing out the county's estimate
19 of the supply of vacant residential land was based upon the
20 same 1977 "208" population study as used by respondent.
21 Further, respondent alleges that its figures assume the
22 existence of "constrained land" and further assumes that only
23 50 percent of such land will be developed. Constrained land is
24 land having such physical characteristics as to make it
25 difficult for development. See Clackamas County Goal 14
26 "Urbanization Report" March 13, 1980, pp. 8-11. The effect of

1 considering such constrained lands is to increase the gross
2 acreage figure, but not the net acreage figure available for
3 development.

4 Petitioner's assertion that changes in land use
5 designations must be addressed in the findings is rejected by
6 Metro. Metro posits that such a claim would be tantamount to
7 saying that respondent must accept unacknowledged land use
8 designations and change an acknowledged urban growth boundary
9 based upon such unacknowledged designations. Metro points out
10 that there has been no claim by petitioner that the new land
11 use designations in Clackamas County even meet the goals.
12 Metro does not believe it can rely on those designations.

13 The Board finds the existence of information from Clackamas
14 County based upon field checks and changes in land use
15 designations does not in and of itself mean that the Metro
16 information is incorrect, may not be relied upon, or may not be
17 "substantial evidence." Metro was entitled to select the
18 information it believed most reliable; and it is not
19 unreasonable for Metro to choose its own estimate based upon an
20 acknowledged urban growth boundary. Metro's urban growth
21 boundary was acknowledged in January, 1980, and presumably
22 Metro's factual data was reviewed and found to be acceptable
23 during the acknowledgment process.

24 We find Metro's evidence to be "substantial" within the
25 meaning of Oregon Laws 1979, ch 772, and we are not inclined to
26 say that the petitioner's data must be used instead. The Metro

1 evidence is such that a reasonable person would accept it as
2 adequate under these circumstances. Braidwood v. City of
3 Portland, 24 Or App 477, 546 P2d 777 (1976). Even if we
4 believed there were a greater degree of reliability in
5 petitioner's information, we would not be entitled to overturn
6 Metro's conclusions and require Metro to make use of
7 petitioner's information. We cannot, in short, substitute our
8 judgment as to the credibility and quality of evidence for that
9 of Metro under circumstances as we believe them to exist in
10 this case. Christian Retreat Center v. Comm. for Wash Co., 28
11 Or App 673, 560 P2d 1100 (1977).¹

12 2. Metro's assumptions of projected residential
13 development and the share of new construction between
14 multi-family and single-family dwellings are unfounded
as witnessed by planning activities of local
jurisdictions and enforcement inactivity of Metro.

15 The petitioner claims Metro assumes a regionwide housing
16 density development of 4.4 units per net acre of single-family
17 dwellings and 13.26 units per net acre of multi-family
18 dwellings and a 50/50 split between the two types of
19 development. Petitioner complains that assumption is not in
20 keeping with the Clackamas County urbanization report showing a
21 55 per cent single-family and a 45 per cent multi-family
22 split. Petitioner says Metro's density split between single
23 and multi-family dwellings is unrealistic in the light of the
24 Clackamas County report. Presumably, the Metro figures are too
25 optimistic on the total number of dwelling units per unit
26 acre. The result of this optimism is too little land in the

1 urban growth boundary. Petitioner also points to an apparent
2 failure by Metro to enforce a density requirement in Happy
3 Valley. We gather failure to enforce a density requirement
4 will result in an overall decrease in housing density.

5 Respondent defends itself by saying that the urban growth
6 boundary adopted by Metro has been acknowledged and the county
7 plan has not been acknowledged. The Metro findings about the
8 single versus multi-family housing split are, therefore, more
9 reliable. Respondent also points out that as the housing
10 densities and the urban growth boundary are regional average
11 housing densities, the density of a particular area such as
12 Happy Valley is not in and of itself conclusive of any
13 violation of a density average or of a failure by Metro to
14 enforce its own ordinance. The density for Happy Valley is to
15 be balanced with densities elsewhere to find a regional average.

16 The Board agrees with Metro's response. The Metro density
17 assumptions are a part of the acknowledged urban growth
18 boundary. There has been no other equally reliable evidence
19 to suggest that the density assumptions are so wrong as to be
20 unusable as evidence. For the same reasons announced in the
21 discussion of assignment of error no. 1 above, we conclude that
22 Metro was entitled to follow its own estimates of a split
23 between single and multi-family dwelling development.²

24 3. Metro's findings fail to recognize that actual
25 urban development within the urban growth boundary has
26 consumed land much more quickly than its urban growth
boundary projections.

1 Petitioner points out, and Respondent does not disagree,
2 that land within the Washington County portion of the Metro
3 urban growth boundary has been consumed more quickly than
4 originally projected. That fact is cited to support the
5 proposition that as available land runs dry, land prices will
6 rise and housing dislocations will occur in violation of
7 Metro's own framework policy.

8 Metro responds by saying there could be any number of
9 reasons for a higher growth rate in Washington County than
10 expected. Metro claims that a peak housing cycle a greater
11 ratio of single to multi-family units a decrease in household
12 size and a less than expected housing density may each be
13 responsible for the increased land consumption rate. Further,
14 the county is operating under a 1974 comprehensive plan and
15 Metro intimates that the development practices of Washington
16 County may have resulted in the increased consumption rates.

17 The Board will not engage in speculation as to why land
18 within Washington County is being used at a faster rate than
19 projected. The Board does not find this fact in and of itself
20 to require a change in that portion of the urban growth
21 boundary existing in Clackamas County. It is the Board's view
22 that the urban growth boundary is drawn, at least in part, to
23 accommodate regional housing needs. Simply because a
24 particular portion of the urban growth boundary is experiencing
25 growth at a greater rate than projected does not mean in and of
26 itself that some other area must be enlarged to alleviate that

1 increased growth.

2 4. The urbanization report submitted by Clackamas
3 County and upon which Metro's action is based, is no
4 more reliable than the Metro report and its
5 assumptions.

6 Petitioner here alleges that the county's projection of
7 public land consumption is too low. Petitioner also alleges
8 that the county's calculations of lot size would require a
9 minimum lot size of 7,000 square feet, a "politically
10 impossible" lot size. The result is, again, too little land to
11 meet housing needs.

12 Metro responds by claiming that Metro did not rely on that
13 report in adopting its urban growth boundary amendment. At the
14 hearing on the merits there was no proof of such reliance
15 offered, and we will accept Metro's answer in response to this
16 assertion of error.

17 CONCLUSIONS TO ASSIGNMENT OF ERROR NO. 1

18 The four points making up the first assignment of error may
19 be summarized as an attack on Metro's reliance on information
20 used to produce its first acknowledged urban growth boundary.
21 Petitioner asserts its evidence should be entitled to more
22 weight as it is more credible and more current than the old
23 Metro information. Again, this Board is not in the position to
24 decide what evidence is entitled to the greater weight. Our
25 review is limited to whether or not Metro's conclusions are
26 based on substantial evidence in the record, and we have
concluded that there is substantial evidence in the record to

1 support Metro's findings.

2 We believe we should note that part of the petitioner's
3 attack in his first assignment of error is based upon the
4 notion that:

5 "[A]ssumptions and information concerning
6 Clackamas County alone are the only ones relevant in
7 determining the adequacy of the land supply needed to
accommodate population growth in Clackamas County
alone." Petitioner's brief at 16.

8 The urban growth boundary adopted by Metro is a regional urban
9 growth boundary including lands in several counties. As a
10 regional urban growth boundary, Metro's boundary looks to
11 growth trends on a regional basis and is designed to
12 accommodate regional growth. Changes within jurisdictions
13 served by Metro may be necessary to accommodate that regional
14 growth, but the Board does not agree with the petitioner that
15 only the growth in Clackamas County is relevant in deciding
16 whether the urban growth boundary in Clackamas County needs to
17 be amended. Without a showing by petitioner as to how the
18 Clackamas County urban growth boundary is critical to the
19 regional urban growth boundary in some manner requiring it to
20 be viewed by itself, we believe we would be doing more harm
21 than good by accepting petitioner's proposition.

22 ASSIGNMENT OF ERROR NO. 2

23 Home Builders allege Metro's amended urban growth boundary
24 violates Statewide Planning Goal 14 by including insufficient
25 land "to accommodate demonstrated long-range population growth
26 needs." Petitioner's Brief at 17. Petitioner argues that if

1 insufficient land is available for urban growth within
2 Clackamas County, a shift in population growth will result and
3 that shift "will negatively impact a provision of housing,
4 energy costs and employment opportunities unnecessarily."
5 Petitioner's Brief at 21. Petitioner asserts that Metro
6 thereby violates factors 2 and 5 of the seven factors in Goal
7 14 that must be considered in establishing an urban growth
8 boundary.³ Of course, petitioner's assertion of error
9 requires us to find that insufficient land in Clackamas County
10 is included within the urban growth boundary.

11 Metro responds, in part, by noting if petitioner's argument
12 were accepted, "it would mean that no local jurisdiction could
13 update its UGB in stages but would have to solve all identified
14 problems in a single ordinance." Respondent's Brief at 9.
15 Metro points out that a showing of need for land does not
16 necessarily require that the need be met in one single
17 ordinance. Metro additionally notes that the establishment of
18 an urban growth boundary does not depend on population
19 projections alone.

20 The location of an urban growth boundary is determined by
21 consideration of public facilities, efficiency of land uses
22 within and on the fringe of existing urban areas;
23 environmental, energy, economic and social consequences; and
24 the retention and preservation of agricultural lands and
25 activities. Metro says petitioner did not argue that the urban
26 growth boundary was adopted without consideration of these

1 factors.

2 The Board agrees that population projections alone should
3 not dictate the location of urban growth boundary expansion.
4 In making this statement, however, we do not wish to imply that
5 evidence of population growth in a particular area can be
6 ignored. Here, a regional urban growth boundary has been
7 amended to accommodate projected growth in the area. Metro has
8 not ignored regional growth estimates or local conditions. We
9 find Metro to have complied with Goal 14.

10 CONCLUSION

11 Petitioner's assignments of error are denied, and Ordinance
12 80-89 is affirmed.

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1 COX, Concurring.

2 This is the first case presented to this Board wherein the
3 statistical basis for land use planning decisions by a local
4 government has been attacked. I fear that the majority opinion
5 can be misconstrued to read that a local government may base
6 its decisions concerning future use of the finite resource,
7 land, on less than the most statistically sound data and this
8 Board has to accept the decisions because of court rulings in
9 such cases as Braidwood v. City of Portland, supra, or
10 Christian Retreat Center v. Comm. for Wash. Co., supra.

11 If land use planning is to have any semblance of an
12 objective, scientific base, the making of decisions on less
13 than the most current, accurate data available or reasonably
14 obtainable must be strongly guarded against. The test which
15 this Board should use in reviewing local decisions which are
16 based on statistical projections is not one of credibility but
17 one of the scientific soundness of the statistical
18 projections. For instance, given an established set of facts,
19 a course of conduct with only a 70 percent chance of achieving
20 the desired result should not be allowed to stand on review if
21 a petitioner can show that a rejected alternative had a 95
22 percent chance of achieving the desired result. The majority
23 opinion should not be read to allow, based on a reasonable
24 person test, such an outcome. Such a choice of conflicting
25 evidence would not be considered reasonable. The same holds
26 true for reliance on excessively dated data.

1 In conjunction with the foregoing, respondent's reliance on
2 LCDC acknowledgment proceedings as a basis for selecting one
3 set of data over another should be put into proper
4 perspective. LCDC's acceptance of information submitted by a
5 local government during an acknowledgment proceeding merely
6 creates a rebuttable presumption that the incorporated
7 statistics are the most accurate when confronted with
8 alternative data.

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FOOTNOTE

1

By "plan designation" we take petitioners to mean land use designations that control uses to which specific properties may be put, e.g. "single-family residential," "commercial" and other use categories.

2

We note Metro's findings do recite the existence of Home Builders' testimony and their views on land sufficiency in Clackamas County. That recitation shows Metro considered Petitioner's evidence and simply chose its own evidence over petitioner's. See Record 46, 47, 48-54.

3

As to enforcement of the regional density, we agree that a violation of a regional density requirement cannot be determined from one area alone. Where a particular jurisdiction acts in such a manner as to threaten the regional housing density, then enforcement may be appropriate. We cannot speculate on what kinds of actions would so threaten a regional urban growth boundary. In MSD v. Washington Co., Or LUBA _____ (1980) (LUBA No. 80-034), involving Washington County's approval of a large lot subdivision, the Board agreed that a finding on the development's affect on density was needed to show the approval would not threaten the county's ability to meet its share of regional density requirements.

4

"Establishment and change of the boundaries shall be based upon consideration of the following factors:

"(1) Demonstrated need to accommodate long-range urban population growth requirements consistent with LCDC goals;

"(2) Need for housing, employment opportunities, and livability;

1 "(3) Orderly and economic provision for public
2 facilities and services;

3 "(4) Maximum efficiency of land uses within and
4 on the fringe of the existing urban area;

5 "(5) Environmental, energy, economic and social
6 consequences;

7 "(6) Retention of agricultural land as defined,
8 with Class I being the highest priority for retention
9 and Class VI the lowest priority; and,

10 "(7) Compatibility of the proposed urban uses
11 with nearby agricultural activities."
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BEFORE THE LAND CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF OREGON
LAND USE BOARD OF APPEALS

OCT 16 1 50 PM '80

Home Builders Assoc. of
Metropolitan,

Petitioner(s),

v.

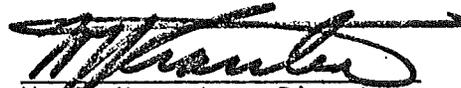
Metropolitan Service District and
Clackamas County,

Respondent.

LUBA 80-059
LCDC Determination

The Land Conservation and Development Commission hereby affirms the recommendations of the Land Use Board of Appeals in LUBA 80-059 with respect to the allegations of goal violations.

DATED THIS 15th DAY OF October, 1980.


W. J. Kvarsten, Director
For the Commission

WJK:ER:km
3457A

10/28/80

1 CERTIFICATE OF MAILING

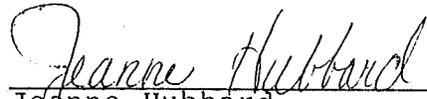
2 I hereby certify that I served the foregoing Final Opinion
3 and Order for LUBA No. 80-059, on October 24, 1980, by mailing
4 to said parties or their attorney a true copy thereof contained
in a sealed envelope with postage prepaid addressed to said
parties or their attorney as follows:

5 Kevin L. Hanway
6 Home Builders Assn.
7 3140 NE Broadway
Portland, Oregon 97232

E. Andrew Jordan
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Portland, OR 97201

8 Michael E. Judd
9 Clackamas County counsel
10 906 Main Street
Oregon City, OR 97045

11 Dated this 24th day of October, 1980.

12
13 
14 Jeanne Hubbard
15 Secretary to the Board
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