

POD

BEFORE THE LAND USE BOARD OF APPEALS DEC 30 4 45 PM '86  
OF THE STATE OF OREGON

3	FRANK STOREY, WILLARD GRAFF,	)	
4	PAT ACKERMAN, DEAN ODENTHAL,	)	
5	HAROLD BRENDEN and TODD	)	LUBA Nos. 86-057/058
6	JENSEN,	)	
7		)	FINAL OPINION
8	Petitioners,	)	AND ORDER
9		)	
10	vs.	)	
11		)	
12	CITY OF STAYTON,	)	
13		)	
14	Respondent.	)	

Appeal from the City of Stayton.

Donald M. Kelley, Silverton, filed the petition for review and reply brief and argued on behalf of petitioners. With him on the brief were Kelley and Kelley.

Judy C. Wolf, Stayton, filed a response brief and argued on behalf of Respondent City.

Gregory S. Hathaway, Portland, filed a response brief and argued on behalf of Respondent-Participant Santiam Valley Mall Properties, Inc. With him on the brief were Niehaus, Hanna & Murphy.

DuBAY, Chief Referee; BAGG, Referee; KRESSEL, Referee; participated in the decision.

Ordinance 628 - REVERSED	12/30/86
Ordinance 629 - REMANDED	12/30/86

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

1 Opinion by DuBay.

2 NATURE OF THE DECISION

3 Two decisions are consolidated for review. Ordinance 628  
4 annexes 27.2 acres to the city. Ordinance 629 approves an  
5 outline plan for a planned unit development on two parcels,  
6 including the annexed tract.

7 FACTS

8 The Planned Unit Development (PUD) is comprised of two  
9 noncontiguous tracts, one of 88.7 acres (Tract B) and the other  
10 27.2 acres (Tract C). In addition to the annexation, the PUD  
11 requires an amendment of the comprehensive plan for the annexed  
12 tract, zone changes for the project area and approval of an  
13 outline plan. Approval of an outline plan is the first step in  
14 the city's three-step PUD approval process. The second step is  
15 approval of a detail plan. The third step is approval of a  
16 final development plan. Generally, more specificity in the  
17 proposal is required at each step.

18 According to the PUD ordinance, the city may consider the  
19 zone change requests concurrently with the requests for the PUD  
20 approval. The applicant requested designations for eight  
21 zones: Low density residential (LD), Medium Density (MD), High  
22 Density (HD), General Commercial (GC), Commercial Retail (CR),  
23 Industrial Commercial (IC), Interchange District (ID) and  
24 Public/Semi-Public (P).<sup>1</sup> Development is proposed in phases  
25 over several years.

26 The planning commission recommended approval of the

1 annexation, the plan and zone changes and the PUD outline  
2 plan. The city council adopted Ordinances 623 and 624  
3 approving the project on April 21, 1986. Both decisions were  
4 appealed to LUBA, and both were remanded at the request of the  
5 city. On July 8, 1986, the city council adopted Ordinances 628  
6 and 629 to approve the annexation and PUD. Petitioners  
7 appealed both ordinances.

#### 8 ASSIGNMENTS OF ERROR

9 Assignments of error which alleges both ordinances are void  
10 will be considered first. Next, petitioners' allegations in  
11 connection with Ordinance 628 will be considered. Following  
12 discussion of petitioners' challenges to Ordinance 628, we  
13 consider the constitutionality of annexing the 27.2 acres  
14 without an election. Finally, we consider assignments of error  
15 regarding Ordinance 629.

#### 16 ORDINANCE VALIDITY

##### 17 Assignment of Error 1

18 Section 35, Chapter VIII of the Stayton Charter reads:

19 "Section 35. Mode of Enactment. (1) Except as the  
20 second and third paragraphs of this section provide to  
21 the contrary, every ordinance of the Council shall,  
22 before being out upon its final passage, be read fully  
23 and distinctly in open Council meeting on two  
24 different days. (2) Except as the third paragraph of  
25 this section provides to the contrary, an ordinance  
26 may be enacted at a single meeting of the council by  
unanimous vote of all Council members present, upon  
being read first in full and then by title. (3) Any  
of the readings may be by title only if no Council  
member present at the meeting requests to have the  
ordinance read in full or if a copy of the ordinance  
is provided for each Council member and three copies  
are provided for public inspection in the office of

1 the City Recorder not later than one week before the  
2 first reading of the ordinance and if notice of their  
3 availability is given forthwith upon the filing, by  
4 written notice posted at the City Hall and two other  
5 public places in the City or by advertisement in a  
6 newspaper of general circulation in the City. An  
7 ordinance enacted after being read by title alone may  
8 have no legal effect if it differs substantially from  
9 its terms as it was thus filed prior to such reading,  
unless each section incorporating such a difference is  
read fully and distinctly in open Council meeting as  
finally amended prior to being approved by the  
Council. (4) Upon the final vote of an ordinance, the  
Recorder shall sign it with the date of its passage  
and his name and title of office, and within seven (7)  
days thereafter, the Mayor shall sign it with the date  
of his signature, his name and title of his office."

10 Petitioners claim this charter provision was violated when  
11 Ordinance No. 628 and Ordinance 629 were adopted.  
12 Specifically, they allege that the ordinances were read by  
13 title only at the city's hearings and that the adopted  
14 ordinances differed substantially from those filed in the city  
15 recorder's office prior to the hearings.

16 The city concedes that a collating error was committed  
17 after the ordinances were adopted. According to the city's  
18 brief, the error involved the exchange of the second page of  
19 Ordinance No. 628 with the second page of Ordinance No. 629.  
20 The city adds that the error was corrected promptly once  
21 discovered by the recorder.

22 Petitioners do not dispute the accuracy of the city's  
23 explanation. They do not contend that either ordinance was  
24 substantively amended during the hearings process (the record  
25 shows they were not amended). Rather, petitioners insist that  
26 under the charter, each ordinance is without legal effect

1 because, as enrolled, each ordinance differed from the measure  
2 filed prior to the hearing.

3 We decline to invalidate the ordinances on this ground.  
4 Petitioners have not shown that, as enacted, either Ordinance  
5 No. 628 or Ordinance 629 differed in any way from the  
6 ordinances filed prior to the hearing. As noted, no amendments  
7 were made during the hearing process. The city is entitled to  
8 a presumption that the ordinance voted on at the hearing was  
9 identical to the ordinance on file prior to the hearing.  
10 Duniway v. Portland, 47 Or 3, 81 P. 945 (1905); 4 McQuillan,  
11 Municipal Corporations, Sec. 13.37(d) (3rd ed. 1985).  
12 Petitioners offer no evidence to overcome the presumption.

13 These assignments of error are denied.

14 ORDINANCE 628

15 Assignments of Error 2, 3, 4 and 7

16 In assignments of error 2, 3 and 4, petitioners allege the  
17 annexation violates three policies in the city's comprehensive  
18 plan. The three policies are:

19 "Housing Policies:

20 \* \* \*

21 "5. Vacant lands available for residential uses shall  
22 be developed prior to annexation of lands for  
residential uses."

23 "Energy Policies:

24 \* \* \*

25 "4. Vacant lands within the corporate city limits  
26 shall be developed rather than leap-frogging to  
areas outside the city."

1 "Urban Growth Policies:

2  
3 "1. The existing boundaries of the City of Stayton  
4 should remain relatively unchanged until a major  
5 portion of the city's useable land has been  
6 developed for urban purposes."

7 Petitioners allege a substantial amount of land inside the  
8 city is now vacant, and annexation prior to development of this  
9 land violates the above policies.

10 Respondents argue that Housing Policy 5 and Energy Policy 4  
11 are not applicable. They cite to a zoning ordinance provision  
12 requiring findings that proposed annexations are compatible  
13 with the urban growth policies in the comprehensive plan.  
14 Stayton Zoning Code (SZC), Section 8.2035(6)(d). According to  
15 respondents, this provision means that only the urban growth  
16 policies are applicable to annexations.

17 We disagree. The introductory paragraph of Section 8.2035  
18 requires evidence of conformity with the comprehensive plan and  
19 specific criteria listed in the subsections that follow.  
20 Respondents' reliance on subsection (6) of Section 8.2035 to  
21 limit the applicability of comprehensive plan provisions is too  
22 restrictive when the broader mandate in Section 8.2035(1) to  
23 consider the entire comprehensive plan is taken into account.

24 The findings conclude the annexation complies with Urban  
25 Growth Policy 1 because a major portion of the city's useable  
26 land has been developed for urban purposes. The city found  
that out of the 692 acres in the city that are zoned LD, 304  
acres are already developed; 81 acres have limitations to

1 development because of steep slopes, waterways and flood  
2 plains; 121 acres are in rights-of-way, leaving 185 acres  
3 capable of development. The findings recite that all of the  
4 185 acres are not "available for development" because they  
5 either are in large blocks occupied by a farm house or are just  
6 not on the market. According to the city, only 14 of the 185  
7 acres are "readily available for sale." Record at 42.

8 Having found only 14 acres of LD zone readily available,  
9 the city applied the housing goal<sup>2</sup> in its comprehensive plan  
10 to justify addition of LD zone to the inventory by annexing the  
11 27.2 acres.<sup>3</sup>

12 The city construed Urban Growth Policy 1 to mean that land  
13 not for sale is not useable for development. While that  
14 interpretation of the plan policy may be valid, the city's  
15 examination of useable land was inexplicably restricted to land  
16 in one zoning classification, viz. the LD zone. Urban Growth  
17 Policy 1 is broader in scope, requiring examination of "the  
18 city's useable land." The findings do not show the amount of  
19 undeveloped land in other zones in the city nor explain why  
20 that land, if any exists, may not be useable to meet a need for  
21 low density housing.

22 Energy Policy 4 also requires consideration of more than  
23 vacant land in one zone. It calls for examination of "vacant  
24 lands within the corporate city limits." The findings do not  
25 consider any vacant land other than what is in the LD zone.

26 Housing Policy 5 is more restrictive than the two policies

1 previously discussed. It requires only that vacant lands  
2 "available for residential uses" shall be developed before  
3 annexation of land for residential use. But even here, the  
4 findings fail to give consideration to residentially zoned land  
5 besides land in the LD zone.

6 The failure to adequately address all undeveloped lands in  
7 the city, as these policies oblige the city to do, requires  
8 that we sustain the second, third and fourth assignments of  
9 error.

10 In the seventh assignment of error, petitioners allege no  
11 substantial evidence supports the findings addressing Urban  
12 Growth Policy 1. Because we find the city failed to explain in  
13 its decision how the cited policies are met, a review of the  
14 evidentiary support for the findings on Urban Growth Policy 1  
15 is not necessary.<sup>4</sup>

16 Assignments of Error 5 and 6

17 SZC Section 8.2035 states the finding requirements for land  
18 use actions by the city. Petitioners allege the city made no  
19 findings addressing two criteria necessary for annexation  
20 approvals. They are:

21 "(a) A need exists in the community for the use  
22 proposed to be made of the site.

23 "(b) The site is or is capable of being served by  
24 adequate public services." SZC Section 8.2035(6).

25 The city did make findings addressing these two criteria.  
26 Record at 40. Because petitioners' only claim is that no  
findings exist regarding these criteria, we deny the fifth and

1 sixth assignments of error.

2 Assignments of Error 8 and 9

3 Petitioners allege that no substantial evidence supports  
4 the city's findings that the annexation complies with the  
5 criteria in Section 8.2035(6)(a), (b) and (d) of the zoning  
6 code.

7 Subsection (a) of Section 8.2035(6) requires findings that:

8 "(a) A need exists in the community for the use  
9 proposed to be made of the site."

10 The city found this criterion satisfied because only 14  
11 acres in the city are vacant and available for low density  
12 residential use. In addition to evidence in the record  
13 supporting this finding (a staff report), the city points to  
14 testimony of a realtor that very few serviced lots are  
15 available in the city. Record at 120.

16 This evidence falls short of the substantial evidence  
17 standard. The evidence addresses the supply of land for low  
18 density residential use. Stating the quantity of land  
19 available does not by itself show that additional land is  
20 needed. Additional facts must be presented to show that the  
21 available land is insufficient to meet the city's need for LD  
22 zoned land. Without such evidence a reasonable person could  
23 not conclude additional land is needed. See Braidwood v.  
24 Portland, 24 Or App 477, 546 P2d 777 (1976).

25 The eighth assignment of error is sustained.

26 Subsection (b) of Section 8.2035(6) requires findings that

1 the site to be annexed is served or is capable of being served  
2 by adequate public services. Petitioners say the record shows  
3 the property is not served by water, sewer and storm drains,  
4 and there is no evidence showing the property is capable of  
5 being served by such services.

6 According to the city's findings the city's Master  
7 Utilities Plan evaluates the prospect of extending urban  
8 services to the annexed land. The city found:

9 "Approval of the extension of the city's urban  
10 services has been preceded by a careful evaluation of  
11 the facts, with major emphasis given to overall  
12 community costs and benefits. The Master Utilities  
Plan is the documentation of this evaluation and will  
serve as the guideline." Record at 42.

13 This general reference to the Master Utilities Plan does  
14 not describe what must be done to provide water, sewer and  
15 storm drainage to the annexed area. The city relies on the  
16 Master Utilities Plan to provide evidence that the property can  
17 be served by public utilities, yet the city's findings and  
18 brief to this board fail to describe where in the Master  
19 Utilities Plan the critical evidence may be found. Our  
20 reluctance to delve into technical planning documents on our  
21 own to discover supporting evidence was enunciated in Turner v.  
22 Washington County, 8 Or LUBA 234 (1983), aff'd 70 Or App 575,  
23 689 P2d 1318 (1984) where we said:

24 "We will not fish in the record in order to catch  
25 evidence that might be pieced together into findings  
26 showing compliance with applicable criteria. It is  
the responsibility of the county to make adequate  
findings in the first instance. If the county chooses  
to rely on existing plans and ordinances and other

1 information, the county must clearly state that  
2 reliance with specific citations." 8 Or LUBA at 247.  
3 See also City of Salem v. Families for Responsible  
Govt, 64 Or App 238, 249, 668 P2d 395 (1983).

4 Without a citation either to provisions in the Master  
5 Utilities Plan or other evidence that supports the conclusion  
6 that public services can be provided to the 27.2 acres, we  
7 cannot conclude the challenged finding is supported by  
8 substantial evidence. The ninth assignment of error is  
9 sustained.

10 CONSTITUTIONAL ISSUE

11 The recent decision in Mid-County Future Alt. v. Metro Area  
12 LGBC, 82 Or App 193, \_\_\_ P2d \_\_\_ (1986) causes us to review  
13 Ordinance 628 on a basis not raised by petitioners. The issue  
14 concerns the constitutionality of the annexation procedure  
15 followed by the city.<sup>5</sup>

16 The court in Mid-County examined the validity of  
17 annexations ordered by a local government boundary commission  
18 without an election when initiated under ORS 199.490(2). This  
19 statute allows cities to initiate annexations upon receiving  
20 the written consent of more than half the landowners in the  
21 territory proposed to be annexed, who also own more than half  
22 of the land representing more than half of the assessed value  
23 in the territory proposed for annexation. This procedure is  
24 commonly referred to as the triple majority rule. The court  
25 held ORS 199.490(2) violates Article I, Section 20 of the  
26 Oregon Constitution<sup>6</sup> because it grants to those who own land

1 in the territory proposed for annexation a privilege not  
2 granted to electors residing in the territory. The privilege  
3 is the right "to decide in favor of annexation, submit their  
4 consent to the governing body and thereby foreclose the  
5 election process if the proposed annexation is approved." 82  
6 Or App at 199. The court stated this violates the state  
7 constitution because no similar privilege is accorded electors  
8 who are not landowners.

9 The Stayton annexation was initiated by request of the  
10 owners pursuant to ORS 222.170. This statute also provides for  
11 annexation without an election in the territory if consents are  
12 received from landowners meeting the triple majority  
13 requirements.<sup>7</sup> Functionally, ORS 222.170 gives owners of  
14 land in territory proposed for annexation the same privilege to  
15 foreclose an election in the territory as given to landowners  
16 by ORS 199.490(2).

17 Respondents argue that Mid-County does not apply. First,  
18 they contend the annexation proceedings under ORS 199.490 - 505  
19 are not subject to the right of referendum as are annexations  
20 by cities under ORS 220.170. See ORS 220.120(6). Respondents  
21 contend that elections in the territory proposed for annexation  
22 are thereby not foreclosed.

23 This argument has two flaws. First, the number of electors  
24 in the territory may not be sufficient to meet local  
25 requirements for referral of city measures.<sup>8</sup> Second, even if  
26 an annexation measure is referred, a city-wide election on the

1 measure without a separate election in the territory deprives  
2 electors in the territory of the privileges granted to owners  
3 of land in the territory as described in Mid-County. We cannot  
4 accept respondents' claim that the referendum power  
5 distinguishes triple majority annexations under ORS 220.170  
6 from the procedures held unconstitutional in Mid-County.

7 Respondents also argue that the annexation of the 27.2  
8 acres is distinguishable from facts considered in Mid-County,  
9 and the difference justifies a different result. Specifically,  
10 respondents allege no electors reside in the territory proposed  
11 for annexation.

12 We express no opinion on respondents' argument.

13 Respondents cite only to a map to support their claim that no  
14 one resides in the 27.2 acres. The map shows the location of  
15 three tracts originally proposed for the project but does not  
16 disclose whether anyone resides on any tract. Without evidence  
17 in the record that no elector resides on the property, any  
18 discussion of respondents' argument would be advisory. See  
19 Babb v. Veneta, 8 Or LUBA 197 (1983).

20 We therefore reject respondents' arguments that the triple  
21 majority annexations authorized by ORS 220.170 do not suffer  
22 from the constitutional defect identified in Mid-County. ORS  
23 222.170 grants to owners of land in the territory proposed for  
24 annexation the same power the court describes in Mid-County to  
25 approve annexation without an election. The triple majority  
26 provisions of ORS 220.170 similarly violate the privileges and

1 immunities clause of the Oregon Constitution, Article I,  
2 Section 20. This requires that Ordinance 628 be reversed. ORS  
3 197.835(a)(E).

4 ORDINANCE 629

5 Assignments of Error 2 - 6 and 9

6 In these assignments of error, petitioners allege the  
7 decision violates comprehensive plan provisions governing the  
8 location of commercial development in the city.<sup>9</sup> The plan  
9 policies at issue are:

10 "Strip-type development along major transportation  
11 routes shall be discouraged." Commercial Policy 1,  
Comprehensive Plan at 50.

12 "The continued functioning and preservation of the  
13 essential business district as the primary retail area  
14 of the community shall be encouraged." Commercial  
Policy 2, Comprehensive Plan at 50.

15 "The central business area shall be preserved and  
16 maintained as the major shopping area of the  
community." Economic Development Policy 1,  
Comprehensive Plan at 59.

17 "Commercial development outside of the central  
18 business area shall be limited to convenience  
19 facilities and heavier commercial uses." Economic  
Development Policy 2, Comprehensive Plan at 59.

20 "Commercial development at Highway 22 shall be  
21 discouraged." Economic Development Policy 3,  
Comprehensive Plan at 59.

22 Petitioners allege that development according to the  
23 proposal will result in a strip of commercial use along First  
24 Avenue between the central business district described in the  
25 comprehensive plan and Highway 22. According to petitioners,  
26 the proposal will rival in size the existing downtown area and

1 will cluster 20 acres of commercial uses next to Highway 22.

2 The city states two reasons why the proposal does not  
3 conflict with plan policies emphasizing development of the  
4 central business district. First, the city found that  
5 commercial activity has extended beyond the boundaries of the  
6 central business district as it was defined in the  
7 comprehensive plan. The city found:

8 "Growth has occurred inside the geographic boundaries  
9 of the central business area as defined in 1979, and  
10 commercial growth has also expanded those geographic  
11 lines. The stated geographic boundaries have been  
allowed to expand in all directions as market  
conditions have warranted." Record at 27.

12 The second reason advanced by the city is that little  
13 undeveloped land remains inside the central business district  
14 boundary. The city concluded that the commercial area boundary  
15 should expand to allow growth.

16 Neither reason explains how the PUD will comply with the  
17 cited policies, nor do they explain how departure from the  
18 policies is justified by other plan provisions. Above all, we  
19 must reject the city's rationale that previous commercial  
20 development outside the central business area is justification  
21 for further expansion of the business core.<sup>10</sup> Land use  
22 decisions must be in consistent with the acknowledged  
23 comprehensive plans and regulations. ORS 197.175(2)(d).  
24 Consistency with prior land use actions is no substitute for  
25 compliance with applicable criteria.

26 We also reject the city's view that because only a few

1 acres remain undeveloped in the business core area, expansion  
2 of the core boundaries is justified. If conditions in the  
3 community have so changed that the boundaries of the central  
4 business area in the plan should change, the appropriate course  
5 is to amend the description in the plan. The challenged  
6 decision does not include such amendments.

7 Economic Development Policy 2 is different from the other  
8 business area protection policies cited by petitioners. It is  
9 stated in mandatory terms, prohibiting all but certain types of  
10 commercial development outside the core area. Policies  
11 prohibiting certain land uses do not express the idea that the  
12 prohibitions may be balanced against competing policies. If  
13 the city contends this policy may be balanced against  
14 conflicting policies, we have been cited to no comprehensive  
15 plan provision warranting this interpretation. Assignments of  
16 Error 3 through 6 are sustained.

17 Economic Development Policy 3 discourages development at  
18 Highway 22. The findings addressing this policy note that  
19 after the policy was adopted in 1979, the zoning ordinance was  
20 amended to permit interchange development (ID) zones. Specific  
21 uses associated with highway travellers are allowed outright in  
22 the zone. Other uses are allowed as conditional uses if they  
23 are consistent with a purpose to provide highway commercial  
24 uses at intersections of controlled access highways and  
25 arterial roads.

26 We need not consider whether creation of an ID zone at

1 Highway 22 violates Economic Development Policy 3. As  
2 Respondent City points out, the ID zone conditionally approved  
3 in the city's order is about 620 feet from Highway 22. This  
4 distance from the highway does not violate the policy's  
5 direction to discourage commercial development at Highway 22.

6 Assignment of Error 9 is denied.

7 Commercial Policy 1 discourages strip-type development  
8 along major transportation routes. Petitioners allege the PUD  
9 would line Cascade Highway with commercial uses from Highway 22  
10 to the center of town. According to petitioners, this  
11 constitutes strip-type development disfavored by Commercial  
12 Policy 1.

13 The city does not agree that the PUD would be strip-type  
14 development. The city found:

15 "This proposal does not represent strip development in  
16 that the more intensive commercial uses will front  
17 Cascade Highway, while less intensive commercial uses  
18 will be located behind and to the east of the  
19 intensive uses (except where the flood plain requires  
20 that the land be developed into parkland). Then HD  
21 (High Density) residential will be located further  
22 west [sic] until the uses transition into MD (Medium  
23 Density) residential." Record at 29.

24 Implicit in these findings is the city's view that strip  
25 development is intense development in a narrow strip along a  
26 highway that is markedly different from adjacent uses that are  
27 further from the highway. The findings describe a staged  
28 decrease in the intensity of uses on lands not adjacent to the  
29 highway. Defining strip development as a stepped decrease of  
30 development intensities away from the highway is a reasonable

1 interpretation of the city's policy. We do not read the policy  
2 to discourage commercial uses only because they happen to front  
3 on highways. The second assignment of error is denied.

4 Assignment of Error 7

5 Petitioners allege the decision violates plan provisions  
6 that require balancing the economic gain from development in  
7 the flood plain against the resulting increase in flood  
8 hazard. Petitioners refer to plan provisions declaring that  
9 filling in flood areas increases flood hazards beyond the  
10 filled area. The PUD proposal includes filling in portions of  
11 the flood plain, and petitioners say the city did not balance  
12 the benefit against the increase in flood potential as the plan  
13 policies require.

14 The plan provisions petitioners rely on to make this claim  
15 are in the plan inventory section describing floodways and  
16 flood plains. In contrast to the land use planning section of  
17 the plan, no goals or policies are stated in the flood plain  
18 provisions of the plan. The specific provision relied upon by  
19 petitioners merely states:

20 "One aspect of flood plain management involves  
21 balancing the economic gain from flood plain  
development against the increase in flood hazard."

22 This provision is not stated in terms of an approval  
23 standard in areas subject to flooding. We decline to read this  
24 provision as either a plan policy or an approval standard,  
25 since the plan does not clearly indicate that intention.

26 The seventh assignment of error is denied.

1 Assignment of Error 8

2 Petitioners allege the proposal violates the following fish  
3 and wildlife policy:

4 "Flood plain areas should remain in a natural setting  
5 unless development is compatible with the needs of the  
6 habitat."

7 A substantial portion of Tract B is in a designated flood  
8 plain, some of which is scheduled for development in the PUD  
9 proposal. Petitioners say this policy is applicable, yet the  
10 city ignored it.

11 Respondents contend that after flood control measures have  
12 been implemented, the flood plain areas remaining will be  
13 developed as a public park and recreation area. According to  
14 the city, these improvements will enhance the fish habitat.

15 The findings do not adequately address this fish and  
16 wildlife policy. The findings fail to explain how fish and  
17 wildlife habitat will be affected by the PUD. Although the  
18 outline plan is only a preliminary step, the city's order shows  
19 no consideration of the cited policy, even though development  
20 in the flood plain is proposed. Because the city made no  
21 findings recognizing the applicability of Fish and Wildlife  
22 Policy 3 and indicating what steps will be taken to comply with  
23 the policy, we sustain this assignment of error.

24 Assignment of Error 10

25 Petitioners attack Ordinance 629 on the ground that it is  
26 vague. Petitioners complain the exact location of the proposed  
zoning boundaries cannot be determined by looking at the map

1 attached to the ordinance. According to petitioners, the lack  
2 of legal descriptions for each of the zones is a fatal defect.

3 This attack fails. Petitioners cite no authority, and we  
4 know of none, for the proposition that zoning maps must be  
5 precise in order to be valid. Petitioners have failed to  
6 clearly state a legal basis for their claim that the ordinance  
7 is void because the zone boundaries are too vague. See  
8 Deschutes Development v. Deschutes Cty, 5 Or LUR 218 (1982).

9 This assignment of error is denied.

10 Assignments of Error 11 - 15

11 Petitioner alleges the city made no findings addressing the  
12 following criteria in Section 8.2035 of the zoning ordinance:

13 "(1) ...in order to grant a proposed action, the  
14 applicant shall provide evidence which allows the  
15 city to make findings that the proposal is in  
16 conformance with the comprehensive plan and that  
the following specific criteria have been  
satisfied."

17 "Conditional Use:

18 "(a) The proposed use is compatible with other  
uses in the surrounding area....

19 "Zone Change:

20 \* \* \*

21 "(b) Other properly zoned land is not available  
22 in sufficient quantity within the city to  
satisfy current and projected need.

23 "(c) There is a public need for the intended use.

24 "(d) There are adequate urban services to serve  
25 the possible use under the zone proposed."

26 Petitioners correctly point out that findings showing

1 compliance with the applicable criteria are necessary. Panner  
2 v. Deschutes Co., 14 Or LUBA 1 (1985) and Spalding v. Josephine  
3 Co., 14 Or LUBA 143 (1985). However, the city did make  
4 findings addressing the cited criteria. The city found the  
5 proposal was consistent with the comprehensive plan (Record at  
6 50); the zone change and proposed uses are compatible with the  
7 surrounding area (Record at 22); other properly zoned land is  
8 not available to satisfy current and projected needs (Record at  
9 29); a public need exists for the intended uses (Record at 39);  
10 and adequate urban services can serve the property (Record at  
11 32). Although petitioners may disagree with these findings,  
12 and we might find some not sufficient, their challenge that no  
13 relevant findings were made must fail. These assignments of  
14 error are denied.

15 Assignments of Error 16, 17 and 18, 21, 22 and 23

16 Section 8.11020 of the code lists four criteria for  
17 approval of a PUD. These assignments of error fault the  
18 decision for failure to make any or adequate findings regarding  
19 three of these criteria. Petitioners also allege any findings  
20 addressing these criteria are not supported by substantial  
21 evidence in the record.

22 Section 8.11020(2) states:

23 "The planned unit development is an effective and  
24 unified treatment of the development possibilities on  
25 the project site while remaining consistent with the  
26 comprehensive plan and making appropriate provisions  
for the preservation of natural features such a  
streams and shorelines, wooded cover and rough  
terrain."

1  
2 The findings conclude this standard is satisfied. Record  
3 at 14. The city found the property is mostly in a flood plain  
4 and that flood plain constraints have limited growth on the  
5 property. The findings explain that only a unified treatment  
6 of the flooding problem can make development of the site  
7 economically feasible. The findings also explain how some of  
8 the site will be developed as a public park with areas next to  
9 Mill Creek to be left in a natural state. However, the city  
10 expressly defers review of a specific park design and  
11 provisions for protection of natural features to the detail  
12 plan stage.

13 These findings explain the city's reasons for concluding  
14 the proposal conforms with SZC 8.11020(2). We therefore deny  
15 petitioners' general claim that findings addressing this  
16 criteria are absent.

17 We turn to petitioners' specific complaint that no  
18 provision is made for preservation of natural features of the  
19 site. As noted, the city deferred to the detail plan stage its  
20 consideration of the applicant's specific proposal for  
21 protection of natural features. While the city may review  
22 refinements to the proposal in the detail plan stage, for  
23 reasons stated below, it may not defer consideration of future  
24 proposals to determine if they comply with PUD criteria without  
25 making provisions for public hearings.

26 The city has a three step approval process for PUDs:

1 outline plan, detail plan and final plan. The ordinance does  
2 not spell out at which of the three stages the proposal must  
3 satisfy the PUD standards. Staged approval procedures are  
4 permissible so long as interested parties receive a full  
5 opportunity to be heard before the decision becomes final.

6 Meyer v. City of Portland, 67 Or App 274, 678 P2d 741 (1984).

7 However, if interested parties are denied the right to be heard  
8 on critical issues of compliance with applicable criteria, this  
9 standard is not met. If parts of the PUD proposal necessary to  
10 show conformity with the approval standards are submitted after  
11 the opportunity for public comment has ended, a public hearing  
12 required by ORS 227.175(3)<sup>11</sup> and by Fasano v. Washington Co.  
13 Comm., 264 Or 574, 507 P2d 23 (1972), is not possible.

14 However, even if the governing ordinance does not provide for  
15 public hearings to review parts of a proposal submitted after  
16 initial approval, the deciding body may require later hearings  
17 in the initial approving order. Turner v. Washington County,  
18 supra. In this way, the opportunity for public scrutiny of  
19 land use proposals for compliance with applicable criteria is  
20 preserved.

21 With these principles in mind, we note that Ordinance 629  
22 makes no provision for public hearings at the detail plan stage  
23 to review proposed measures to protect natural features.<sup>12</sup>

24 In the absence of such provisions in Ordinance 629, we must  
25 look to the city's PUD ordinance to determine what public  
26 hearings are required at the detail plan stage. Section

1 8.11055 of the zoning ordinance describes the PUD approval  
2 process. It requires a hearing on the detail development plan  
3 only when an outline plan, an optional step, has not been  
4 submitted. SZC 8.11055(5). If the city council has approved  
5 an outline plan, however, the detail plan or any phase of the  
6 detail plan may be submitted to the planning commission for  
7 approval. SZC 8.11070. The ordinance provisions describing  
8 planning commission procedures for detail plan approval state  
9 only that a hearing may be held. SZC 8.11085.<sup>13</sup>

10 After the planning commission approves a detail plan, an  
11 applicant must file a final plan within 12 months for all or  
12 part of the project. SZC 8.11095. If the commission finds the  
13 final plan conforms to the approved detail plan, it shall  
14 approve the final plan. SZC 8.11095. No hearing procedure is  
15 described for final plan approval.

16 We conclude the city's zoning ordinance requires public  
17 hearings only for approval of the outline plan. Parts of a PUD  
18 proposal submitted to show compliance with applicable criteria  
19 after the outline plan is approved may not be subject to public  
20 scrutiny. The rights of interested parties to be heard on this  
21 critical issue before the decision becomes final is not  
22 provided for by the PUD ordinance.<sup>14</sup>

23 By deferring consideration of how natural features may be  
24 preserved until a specific park proposal is submitted, the  
25 proposal's conformity with SZC 8.11020(2) may not be subject to  
26 public review and comment. Without a provision in Ordinance

1 629 for later hearings, the city may not defer its review of  
2 compliance with the PUD standards. The sixteenth assignment of  
3 error is sustained.

4 Petitioners' twenty-first assignment of error challenges  
5 the evidentiary support for the findings attacked in the  
6 sixteenth assignment of error. Because we sustain the  
7 sixteenth assignment of error, no point is served by reviewing  
8 the evidence supporting the same findings.

9 Section 8.11020(3) requires findings that PUDs place no  
10 greater demand on public facilities and services than other  
11 authorized uses for the land. Petitioners claim no findings  
12 compare the demand for public services by the PUD with the  
13 demand by other authorized uses. This is the basis for  
14 petitioners' seventeenth assignment of error.

15 Addressing this criterion, the findings state:

16 "The uses proposed for the planned unit development  
17 will not make extraordinary demand on public  
18 facilities and services beyond the levels of service  
19 projected for the area by the Master Utilities Plan.  
20 Cascade Highway has been identified as a connector of  
21 public services between Stayton and Sublimity."  
22 Record at 15.

23 Assuming the Master Utilities Plan includes data showing  
24 demand for utility services for the 119 acres based on existing  
25 zoning, Ordinance 629 fails to set forth the facts showing that  
26 demand for utilities service for development in the PUD will  
not increase.<sup>15</sup> The findings refer to no evidence of  
anticipated water consumption in the PUD. While estimates of  
such demand may be difficult at this outline plan stage, the

1 city's conclusion of compliance must nevertheless explain what  
2 facts lead the city to conclude the standard is satisfied. The  
3 city has not done so. Accordingly, the seventeenth assignment  
4 of error is sustained.

5 Petitioners' twenty-second assignment of error alleges that  
6 findings addressing this criterion are not supported by  
7 substantial evidence. As the previous discussion states, the  
8 findings are not adequate to show compliance with this  
9 criterion. Review of the evidentiary support for the findings  
10 is therefore pointless.

11 In the eighteenth assignment of error, petitioners allege  
12 the city's findings are inadequate to show compliance with  
13 Section 8.11020(4). This PUD approval standard requires the  
14 applicant to file "a performance bond sufficient to insure  
15 completion of the Planned Unit Development." The city made the  
16 following findings:

17 "The applicants will file performance bonds sufficient  
18 to assure completion of the Planned Unit Development.  
19 Subject to negotiations with the City of Stayton  
during the detail plan stage, the applicants will  
provide performance bonds in the following areas:

20 "a Assurances that all the public facilities  
21 will be completed according to City  
specifications.

22 "b. Assurances that all improvements specified  
23 for the common open spaces will be completed  
as required by 8.11040(e).

24 "c. Assurances that each phase of the Planned  
25 Unit Development will be completed as  
presented and approved." Record at 15.

26 Petitioners say these provisions, because they indicate the

1 right to negotiate the performance bonds, eliminates any  
2 present assurances the project will be completed. Petitioners  
3 add that the ordinance does not provide for surety bonds to  
4 assure completion of portions of the project. Petitioners  
5 assert SZC Section 8.11020(4) prohibits approval of the outline  
6 plan until a bond is filed in sufficient amount to assure  
7 completion of the entire project.

8 We reject this view of the ordinance. The bond provisions  
9 in the ordinance are general and lack specific guidance about  
10 what constitutes a bond that is "sufficient to assure  
11 completion of the Planned Unit Development." Under this  
12 general requirement, the city is given some discretion to  
13 specify such matters as what performance the surety bonds must  
14 assure, who they must benefit and bind, the commencement and  
15 termination of the surety obligation as well as other matters  
16 of contract. We again note that no detailed plans were  
17 submitted with the outline plan. Obviously, the cost of  
18 performance cannot be determined at this stage of the city's  
19 approval process. We, therefore, agree with respondents that  
20 the city's findings are within the range of discretion  
21 authorized by Section 8.11020(4), with one exception.

22 Petitioners correctly note that the ordinance requires a  
23 bond for the project and not for portions of the project.  
24 However, the city's findings do not clearly spell out a plan to  
25 require separate bonds for each phase of the project as  
26 petitioners claim. The findings only state that assurances

1 must be given that each phase of the project will be  
2 completed.<sup>16</sup> Although this finding may be ambiguous, we are  
3 reluctant to remand on this ground at this stage. Resolution  
4 of this issue must wait until the detail plan is approved and  
5 the requirements for bonding are specified. The eighteenth  
6 assignment of error is denied.

7 For the reasons stated above, we decline to review  
8 petitioners' claim that no substantial evidence supports the  
9 city's findings about proposed bonding requirements. Until the  
10 city adopts more specific bonding requirements, no point will  
11 be served by review of the support for the findings.

12 Assignments of Error 19 and 20

13 Petitioners allege Ordinance 629 is defective because an  
14 outline plan meeting the requirements of Section 8.11060 was  
15 not submitted by the applicants. Section 8.11060 of the code  
16 lists what information must be included in the outline plan.  
17 Petitioners allege the outline plan submitted by the applicant  
18 fails to include several of the listed elements. In essence,  
19 petitioners claim the outline plan could not be approved  
20 because it was incomplete. Petitioners take this position  
21 because SZC Section 8.11085(2) requires the planning commission  
22 to approve the detail plan if it substantially conforms to the  
23 outline plan.

24 Specifications about what must be included in permit  
25 applications are considered procedural requirements designed to  
26 enable review of the application for compliance with applicable

1 criteria. The specifications in SZC 8.11060 are not worded as  
2 standards of approval. Petitioners have not alleged how any  
3 defects in the application have prejudiced their substantial  
4 rights, nor have they alleged any outline plan specification is  
5 intended as an approval criterion. If evidence in the record  
6 at the outline plan stage fails to show the PUD standards are  
7 met, the decision is defective for that reason. It is not  
8 defective because the evidence is not in the outline plan  
9 itself.

10 This assignment of error is denied.

11 Assignment of Error 24

12 Petitioners allege no substantial evidence supports the  
13 findings of compliance with PUD approval criterion in Section  
14 8.11020(1) of the code. This provision requires findings  
15 that:

16 "the planned unit development conforms with the  
17 purpose of this code, as stated in Section 8.11001(1)  
through (7), where applicable."

18 The seven subsections of Section 8.11001 list factors that  
19 the city must "take into account" when authorizing PUD's. The  
20 city addressed each factor. We discuss the evidence supporting  
21 each of these findings.

22 "1. Advances in technology and design." SZC  
23 8.11001(1).

24 The city found this factor present in the design and  
25 construction of flood control measures necessary to complete  
26 the project.

1 Maps in the record show a substantial part of Tract B is in  
2 the Mill Creek flood plain. The zoning code restricts  
3 development in the flood plain, see SZC Section 8.9105 -  
4 .9120. The city found that construction of the part of the PUD  
5 in the flood plain requires the design and construction of  
6 adequate flood control facilities. Although no particular  
7 flood control facilities are identified, the finding takes  
8 advance design and technology into account by recognizing the  
9 need to design and construct necessary facilities. Evidence  
10 that the property is in the flood plain is sufficient evidence  
11 to support the finding that flood control facilities will be  
12 necessary.

13 "2. Comprehensive development equal to or better than  
14 that resulting from traditional lot by lot land  
15 use development in which the design of the  
16 overall unit permits increased freedom in the  
17 placement and uses of buildings and location of  
18 open spaces, circulation facilities, off street  
19 parking areas and other facilities." SZC  
20 8.11001(2).

18 The city found the PUD meets this criterion because the  
19 project will provide services for a large area, including  
20 improvements to the street system.

21 The city found the PUD proposal includes improvements to  
22 public facilities (a drainage and street system) that will not  
23 attend traditional lot by lot development. The supporting  
24 evidence is the applicant's statement of intention to construct  
25 these improvements as part of the project. This evidence is  
26 sufficient to support the city's conclusion that the large

1 scale development is equal to or better than traditional lot  
2 development that would not entail these improvements.

3 "3. Recognition and resolution of problems created by  
4 increasing population density."

5 The city found the proposal would not increase population  
6 density over the density allowable in the underlying zones.

7 The finding does not identify the underlying zones referred  
8 to. The findings may refer to the existing zoning, Medium  
9 Density, or they may refer to the new zone designations for the  
10 project. In either event, respondents cite to no evidence in  
11 the record bearing on the changes in population density  
12 resulting from the zone changes. Petitioners are therefore  
13 correct that no substantial evidence shows this factor was  
14 taken into account.

15 "4. The potential of sites characterized by special  
16 features of geography, topography, size, shape or  
17 enviromental considerations." [sic]

18 The city found the project area has had little growth  
19 because of development limitations in the flood plain.  
20 Evidence of this reduced potential for development is a flood  
21 plain map, Record at 98, the city's restrictions against  
22 development in a flood plain, SZC Section 8.9105-9120, and the  
23 staff report noting all parcels in the project are vacant.  
24 Record at 132. This evidence is adequate to support the city's  
25 findings.

26 "5. Potential for energy and natural resource  
conservation." SZC 8.11001(5).

The city found this factor primarily related to construction of

1 energy efficient buildings. However, the city deferred  
2 consideration of building design to the detail plan stage. The  
3 city also found the flood control measures would conserve and  
4 enhance fish and wildlife habitat.

5 No definite flood control measures are identified in the  
6 outline plan, and none have been cited in the record. If  
7 specific measures are submitted with the detail plan, the  
8 city's procedures do not assure that interested parties will  
9 have a right to comment on the measures proposed. The city may  
10 not defer consideration of specific proposals that are  
11 necessary to show satisfaction of this criterion without  
12 providing for hearings. The evidence is not now in the record  
13 to show compliance.

14 "6. Maximizing the efficiency of public facilities  
15 and services to the clustering of buildings."  
SZC Section 8.11001(6).

16 The city 's findings state:

17 "The maximum efficiency of public facilities and  
18 services will be assured by complying with the Master  
Utilities Plan for the City of Stayton." Record at 14.

19 This finding fails to assess how the efficiency of public  
20 services will be maximized through the clustering of  
21 buildings. The city points to no evidence in the record  
22 showing how the PUD would further this purpose. We therefore  
23 agree with petitioners that no substantial evidence in the  
24 record supports a finding that this factor has been considered.

25 "7. The height, bulk and siting characteristics of  
26 buildings can vary as long as their ratio of site  
area to dwelling units and openness of the site

1 will be in harmony with the area in which the  
2 proposed development is located." SZC 8.11001(7).

3 The findings address this factor as follows:

4 "The ratio of buildings to open space will be in  
5 harmony with the area in which the planned unit  
6 development is proposed because the dikes and  
7 detention basins required for flood control will  
8 require large areas of open space." Record at 14.

9 Evidence supporting this finding consists of two drawings  
10 of Tract B to show the proposed location of the new zoning  
11 district and the location of some buildings. No explanation is  
12 provided about the location of the dikes and detention basins.  
13 As we have noted, specific flood control measures have not been  
14 identified in the decision. Until particular flood control  
15 measures have been identified, and their physical attributes  
16 made part of the proposal, the city has no basis to evaluate  
17 the ratio of open spaces to dwelling units. No evidence of  
18 this ratio is now in the record.

19 In summary, substantial evidence is lacking in the record  
20 to support findings that the PUD advances the PUD purpose  
21 clause in respect to Factors 3, 5, 6 and 7.

22 This assignment of error is sustained.

23 Ordinance 628 is reversed. Ordinance 629 is remanded for  
24 further proceedings consistent with this opinion.  
25  
26

FOOTNOTES

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

---

1

Tract B is presently zoned MD (Medium Density Residential). Upon annexation, Tract C will be automatically zoned LD (Low Density Residential).

---

2

The housing goal says the city shall:

"provide for a variety of housing types and densities, at varying prices and rent levels to accommodate the needs of Stayton area residents." Comprehensive Plan at 49.

---

3

Section 8.1265 of the zoning ordinance provides that all annexed land is zoned LD unless changed in accordance with the zoning ordinance.

---

4

Although no discussion of the evidentiary support for adequate findings is warranted, we have doubts that the record includes evidence meeting the substantial evidence test for findings the city did make. The city found only 14 acres of LD zone were available for development. Further, the city found 170 acres of vacant land in the zone were not "readily available" because they were not for sale. However, respondents point to no evidence that the owners would not sell the property for development. The fact that a landowner is not seeking buyers may not mean that the land can not be purchased for development.

---

5

The Board requested the parties to submit briefs on the constitutional question after oral argument in this case. Our discussion of the issue is based on the arguments presented by the parties in response to our request. No party has objected to our method of reaching this issue.

---

6

Article I, Section 20 of the Oregon Constitution

1 provides:

2 "No law shall be passed granting to any citizen or  
3 class of citizens privileges, or immunities, which,  
4 upon the same terms, shall not equally belong to all  
citizens."

5 

---

7

6 ORS 222.170 provides:

7 "(1) The legislative body of the city need not call or  
8 hold an election in any contiguous territory proposed  
9 to be annexed if more than half of the owners of land  
10 in the territory, who also own more than half of the  
11 land in the contiguous territory and of real property  
therein representing no more than half of the assessed  
value of all real property in the contiguous territory  
consent in writing to the annexation of their land in  
the territory and file a statement of their consent  
with the legislative body on or before the day:

12 "(a) The public hearing is held under ORWS 222.120, if  
13 the city legislative body dispenses with submitting  
the question to the electors of the city; or

14 "(b) The city legislative body orders the annexation  
15 election in the city under ORS 222.111, if the city  
legislative body submits the question to the electors  
of the city."

16 

---

17 8

18 Article IV, Section 1(5) of the Oregon Constitution gives  
19 cities authority to regulate the manner of exercising the  
20 referendum powers. However, a city may not require the request  
of more than 10 percent of the qualified voters to order a  
referendum on legislation. In their briefs, respondents have  
not identified the city's requirement for effecting an election  
of referred legislation.

21 

---

22 9

23 Section 8.2035(1) of the city's zoning ordinance requires  
24 the city make findings of conformity with the comprehensive  
plan "in order to grant a proposed action."

25 

---

10

26 Nothing in the findings or in respondents' briefs indicate  
any commercial development outside the central business area

1 was found to be in compliance with the central business area  
2 protection policies when they were approved or that these  
3 policies were even considered at the time.

4 

---

11

ORS 227.175(3) states:

5 "(3) Except as provided in subsection (7) of this  
6 section, the hearings officer shall hold at least  
7 one public hearing on the application."

8 

---

12

The findings make reference to some public participation as  
9 follows:

10 "The exact specifications of the park (including  
11 baseball fields, bridges, bicycle and jogging paths)  
will be subject to community input at the detail plan  
stage."

12 This lone reference to "community input" is not a  
13 requirement to hold public hearings.

14 

---

13

If the detail plan is submitted in phases, the ordinance  
15 impliedly prohibits the hearing:

16 "The public hearing may be held on the entire outline  
17 plan or on the entire detail plan, not on individual  
phases of the detail plan." SZC 8.11090(1).

18 

---

14

19 A hearing may not be required at later approval stages  
20 where the evidence supports a finding that means to meet  
21 applicable criteria are capable of accomplishment, i.e.,  
compliance is feasible. See Meyer v. Portland, 67 Or App  
274, 678 P2d 741 (1984).

22 

---

15

23 Respondent's brief at page 37 notes that the Master  
24 Utilities Plan projects demand for utility services based  
on Low Density and Medium Density zone designations.

25 

---

16

26 We do not understand that dividing the total project

1 into separate units or phases creates a separate PUD for  
2 each unit. Given the emphasis in the code to a unified  
3 development scheme, there is merit in petitioners' view  
4 that the bonding requirement in SZC 8.11020(4) is intended  
5 to assure completion of the entire project.  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26