

LAND USE
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS

JAN 26 4 34 PM '89

OF THE STATE OF OREGON

SUNBURST II HOMEOWNERS)
ASSOCIATION, STEVEN BREUM)
and RICHARD BARAKAT,)
Petitioners,)
vs.)
CITY OF WEST LINN,)
Respondent.)

LUBA No. 88-092

FINAL OPINION
AND ORDER

Appeal from City of West Linn.

Margaret D. Kirkpatrick, Portland, filed the petition for review and argued on behalf of petitioners. With her on the brief was Stoel, Rives, Boley, Jones and Grey.

John H. Hammond, Jr., West Linn, filed a response brief and argued on behalf of respondent. With him on the brief was Hutchison, Hammond, Walsh, Herndon and Darling, P.C.

HOLSTUN, Chief Referee; SHERTON, Referee; participated in the decision.

REMANDED 01/26/89

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

1 Opinion by Holstun.

2 NATURE OF THE DECISION

3 Petitioners appeal the city's final order granting
4 conditional use and design review approvals for a water tower
5 on an approximately one acre parcel in the Single-Family
6 Residential Detached (R-10) zone.

7 FACTS

8 The proposed water tower site is located in Sunburst II, a
9 residential subdivision in the Rosemont Pressure Zone.¹ A
10 significant portion of the rapidly growing ridge top area of
11 the City of West Linn is within the Rosemont Pressure Zone.

12 The Rosemont Pressure Zone does not have a water storage
13 reservoir, and water is supplied to users by a pump station.
14 Low water pressure in the zone has been a problem since 1980,
15 and the water pressure is not adequate for fire flows during
16 peak demand periods. Further, without a reservoir, pump
17 failure would leave the zone without water for domestic or fire
18 protection purposes.

19 In 1982, the city prepared a Comprehensive Water System
20 Plan (water plan). The water plan recommended the proposed
21 site (at an elevation of 760 feet, the highest point in the
22 city) for construction of a 1.93 million gallon reservoir. In
23 1983, the city incorporated this recommendation as a policy
24 objective in the city's acknowledged comprehensive plan. City
25 of West Linn Comprehensive Plan (plan), Public Facilities and
26 Development Element, Policy 8.

1 In March, 1982, as a condition of tentative subdivision
2 plan approval for Sunburst II, the proposed site was dedicated
3 to the city for water reservoir use. In 1987, the water plan
4 was updated and the proposed size of the reservoir was reduced
5 to 400,000 gallons. In September, 1987, the city voted to
6 approve a general obligation bond measure to fund construction
7 of the reservoir.

8 The city appointed a citizen committee in December, 1987 to
9 make recommendations on the Rosemont reservoir site
10 improvements. In May, 1988, the committee recommended the city
11 make the improvements approved by the city in the order
12 challenged in this proceeding.²

13 FIRST ASSIGNMENT OF ERROR

14 "The decision violates applicable design review
15 standards because the scale of the proposed tower is
16 not comparable to the scale of the structures on
17 adjoining lots, the tower does not have architectural
18 features similar to the architectural features of the
19 structures on adjoining lots, and the tower is not
20 adequately screened and buffered from the residential
21 uses on adjoining lots."

22 The West Linn Community Development Code (CDC) lists, as a
23 conditional use in the R-10 zone, "Utilities; Major."³
24 CDC 11.060.7. In relevant part, the CDC defines "utilities" as
25 follows:

26 "Utilities. Services and utilities which can have
substantial visual impact on an area. Such uses may
be permitted in any zoning district when the public
interest supercedes the usual limitations placed on
land use and transcends the usual restraints of the
district for reasons of necessary location and
community-wide interest. There are two classes of
utilities--major and minor.

1 "Utility, major utility. A utility which may
2 have a significant impact on the surrounding uses
3 or the community in terms of generating traffic
4 or creating noise or visual effects and includes
5 utility, substation, pump station, water storage
6 tank, sewer plant or other similar use essential
7 for the proper function of the community.

8 "Utility, minor utility. A utility which has a
9 minor impact on the surrounding uses or on the
10 community in terms of generating traffic or
11 creating noise or visual effects and includes the
12 overhead or underground electric, telephone or
13 cable television poles and wires, the underground
14 gas and water distribution systems and the
15 drainage or sewerage collection systems or other
16 similar use essential for the proper functioning
17 of the community." (Emphasis added.) CDC 02.030.

18 The parties agree that under the above provisions, water
19 towers may be allowed as a conditional use in the R-10 zone.
20 The parties further agree that under CDC 11.090.B, all uses in
21 the R-10 zone except detached single-family dwellings are
22 subject to the design review requirements set forth in Chapter
23 55 of the CDC.

24 In addition, the parties do not appear to dispute the basic
25 facts relevant to this assignment of error. The water tower
26 would be 110 feet high with a sphere of approximately 50 feet
27 in diameter atop a column approximately 16 feet in diameter and
28 a base 35 feet in diameter. The closest home to the proposed
29 water tower is 85 feet away and the average distance of homes
30 from the water tower is 118 feet. Record 14. The city
31 proposes to plant trees around the water tower. Some of the
32 trees will be 25 feet high when planted and will grow to 50
33 feet in 15 years and will eventually reach a mature height of

1 80 feet.

2 In the first assignment of error, petitioners argue design
3 review requirements for comparable scale and architectural
4 features and for buffers are violated by the city's decision.

5 A. Comparable Scale and Architectural Features

6 CDC 55.100 specifies design review approval standards and
7 requires the city to find the specified approval standards are
8 met before granting design review approval. CDC 55.100.A.2.d
9 requires:

10 "The proposed structure(s) shall be of comparable
11 scale with existing structure(s) on site and on
12 adjoining sites and shall have comparable
13 architectural features with the structures on the site
14 and on adjoining sites. This does not require the same
15 architectural styles." (Emphasis added).

16 The city's findings of compliance with CDC 55.100.A.2.d are
17 as follows:

18 "52. Section 55.100(A.2.d) requires that 'the
19 structure be of comparable scale with the
20 existing structures and have comparable
21 architectural features with the structures on the
22 site and on adjoining sites.'

23 "It is agreed that there is a difference in
24 elevation between a 110 foot reservoir and
25 adjacent 40-45 foot tall homes. However, the
26 reservoir will be surrounded by trees which are
27 expected to mature to a height of over 80 feet.
28 Thus, combining the trees and the average 118
29 foot buffer, the visual transition in scale from
30 40-45 foot tall homes to the top of the reservoir
31 will be acceptable. A potentially larger scale
32 reservoir was also avoided by switching from a
33 standpipe configuration to a pedestal design.
34 The visual impact was further reduced by the
35 selection of an overcast grey color scheme by the
36 Citizens' Design Review Committee. This color
37 should blend in well with the typical Oregon sky.

1 "Although every reasonable attempt has been made
2 to adequately screen and buffer the reservoir, it
3 is impossible to build a reservoir that possesses
4 the same architectural features of the adjacent
5 homes. We do not interpret this code provision
6 to require this. Obviously, if every public
7 facility (power transformers, school, etc.)
8 permissible by conditional use were held to such
9 a test, then none would be built. It is our
10 interpretation that this section requires the
11 imposition of conditions which will result in a
12 reasonable accommodation of the proposed use with
13 adjacent existent uses. We find that this
14 standard is met by this proposal and by the
15 conditions of approval.

16 "53. The photographs and montages provided by the
17 homeowners were found to be gross
18 misrepresentations of the visual effect of the
19 reservoir on adjacent properties since they fail
20 to show any screening or landscaping, they are
21 not prepared to any verifiable scale, and the
22 reservoir is shown as being black rather than
23 pale overcast grey which greatly exaggerates its
24 impact. For these reasons, their probative value
25 was discounted." Record 14.

26 Petitioners first argue the city did not find compliance
with the comparability standard but rather tried to "explain
why the standard need not be met." Petition for Review 10.
According to petitioners, our decision in McNulty v. City of
Lake Oswego, 15 Or LUBA 16, 24-25 (1986), aff'd without
opinion, 83 Or App 275 (1987), requires that the city, in its
findings, identify the facts and the reasoning leading it to
conclude the comparability standard is met. Petitioners argue
the above findings do not do this.

Petitioners next argue the city improperly attempts,
through interpretation, to amend the code's standard requiring
"comparable scale" to impose a requirement of "visual

1 transition in scale" between the proposed water tower and
2 adjoining residences.

3 Finally, petitioners argue the city conceded "* * * it is
4 impossible to build a reservoir that possesses the same
5 architectural features of the adjoining homes." Record 14.
6 Petitioners argue the city was, therefore, required to deny the
7 request for failure to satisfy the comparable architectural
8 features requirement. According to petitioners, the city
9 erroneously interpreted the comparable architectural features
10 requirement to be satisfied if "conditions can be imposed which
11 will result in a reasonable accommodation of the proposed use
12 with adjacent existing uses." Id.

13 In a nutshell, the city argues (1) it has a critical need
14 for a water tower on this site, (2) provisions in the CDC
15 recognize this critical need, and (3) it correctly and
16 reasonably interpreted the comparability requirement in CDC
17 55.100.A.2.d. The city argues this Board may properly defer to
18 the city's interpretation of its code. See McCoy v. Linn
19 County, 90 Or 271, 275-276, 752 P2d 323 (1988); Allius v.
20 Marion County, 64 Or App 478, 481, 688 P2d 1242 (1983).

21 The city first points to code and plan provisions it argues
22 support the interpretation of CDC 55.100.A.2.d adopted in its
23 findings, quoted supra. The city first cites the definition of
24 utility at CDC 2.030 and notes it provides major utilities such
25 as water reservoirs "* * * may be permitted in any zoning
26 district when the public interest supercedes the usual

1 limitations placed on land use and transcends the usual
2 restraints of the district for reasons of necessary location
3 and community-wide interest."⁴ The respondent then notes the
4 acknowledged plan identifies the site for construction of an
5 elevated water reservoir.⁵ A 1987 update of the city's water
6 plan proposes a reservoir of 400,000 gallons on the site, but
7 says nothing about the style, type or height of the water
8 tower. That update was never adopted as part of the city's
9 acknowledged comprehensive plan.

10 The city finally points to the extensive review by the
11 Citizens Water System Task Force that (1) led to the specific
12 proposal at issue in this appeal, and (2) emphasized the
13 urgency of water pressure problem existing within the Rosemont
14 Pressure Zone. We understand respondent to argue this proposal
15 supports its interpretation because it is evidence that an
16 elevated water tower at the subject site is critical to the
17 welfare of the community.

18 The city cites our decision in McNulty v. City of Lake
19 Oswego, supra, and argues in that case we deferred to the
20 city's interpretation of a design provision similar to CDC
21 55.100.A.2.d and concluded:

22 " * * * by their nature, design criteria are not
23 amendable to precise, quantifiable formulations."
Id. at 21.

24 The city argues similar deference is warranted in this
25 proceeding. Citing Fedde v. City of Portland, 8 Or LUBA 220
26 (1983), the city further suggests we should defer to its

1 requirement that the color of the tower blend with the sky as a
2 way to make the tower less obtrusive and therefore reduce the
3 difference in relative scale.

4 We have no reason to question the city's claim that a water
5 tower is critically needed within the Rosemont Water Pressure
6 Zone, nor do we understand petitioners to question the need for
7 a water tower.⁶ However, the issue critical to resolving
8 this subassignment of error is the meaning of the design review
9 standards which the city has imposed upon itself. The critical
10 inquiry is not what other sections of the code, plan provisions
11 or even the critical water pressure situation itself suggest
12 the city should require of itself in approving this public
13 facility. See West Hills and Island Neighbors v. Multnomah
14 County, ___ Or LUBA ___ (LUBA No. 83-018, June 29, 1983), slip
15 op at 15-16, n 6, aff'd 68 Or App 782, rev den 298 Or 150
16 (1984).

17 In this case, we believe the city attempts to accomplish by
18 interpretation what perhaps can only be accomplished by an
19 amendment to the CDC. We cannot agree with the city that the
20 110 foot water tower and the adjacent houses shown in the
21 record at pages 303 through 312 have comparable architectural
22 features. Neither can we agree that the proposed 110 foot
23 water tower is of comparable scale with those houses.
24 Record 267.

25 In McNulty v. City of Lake Oswego, 15 Or LUBA 283 (1987),
26 we affirmed the city's interpretation and application of the

1 city's design review standard that required buildings "to
2 complement and preserve existing buildings, streets and paths,
3 bridges and other elements of the built environment" and
4 required buildings to be "complementary in appearance to
5 adjacent structures." (Emphasis added). McNulty, supra at
6 285. The design review standard in McNulty allowed the city
7 far more discretion than the standard at issue in this
8 subassignment of error. Fedde v. City of Portland, 8 Or LUBA
9 220 (1983), similarly involved significantly different code
10 language and provides no assistance to respondent's argument
11 under this subassignment of error.⁷

12 The code does not define what the city means by "comparable
13 scale" and "comparable architectural features." We agree with
14 the city that the meaning of the code language is somewhat
15 ambiguous and that some deference on our part to the city's
16 interpretations, therefore, is warranted. See Hillsboro v.
17 Housing Devel. Corp., 61 Or App 484, 488, 657 P2d 726 (1983);
18 Hay v. City of Cannon Beach, ___ Or LUBA ___ (LUBA Nos.
19 88-054/88-093, December 27, 1988). However, the commonly
20 understood meaning of comparable is equivalent or similar.⁸
21 We are unable to defer to the city's recasting of the code
22 requirements in a way that substantially changes their
23 meaning. See Hillsboro v. Housing Devel. Corp., supra at 489.

24 If there is a critical need for this particular water tower
25 at this location, the city may well have a reason to amend its
26 code to allow the water tower, notwithstanding adjacent

1 residences of non-comparable scale and architectural features.
2 The city may not, however, use a critical need for this water
3 tower as a basis for not applying the requirements of CDC
4 55.100.A.2.d as they currently exist. West Hills Island
5 Neighbors v. Multnomah County, 68 Or App 782, 787, 683 P2d
6 1032, rev den 298 Or 150 (1984). This subassignment of error
7 is sustained.

8 B. Adequacy of Buffers

9 CDC 55.100.A.3.a requires:

10 "In addition to the compatibility requirements
11 contained in Chapter 33, buffering shall be provided
12 between different types of land uses (for example,
13 and residential and commercial) and the following
14 factors shall be considered in determining the
15 adequacy of the type and extent of the buffer:

- 14 "1. The purpose of the buffer, for example to
15 decrease noise levels, absorb air pollution,
16 filter dust or to provide a visual barrier.
- 16 "2. The size of the buffer required to achieve the
17 purpose in terms of width and height.
- 18 "3. The direction(s) from which buffering is needed.
- 19 "4. The required density of the buffering.
- 20 "5. Whether the viewer is stationary or mobile."

21 The city's findings of compliance with buffering
22 requirements are as follows:

23 "Section 55.100(A.3.a) deals with Compatibility
24 Between Adjoining Uses, Buffering and Screening.
25 After reviewing this criteria [sic], the Planning
26 Commission found that the main purpose of the buffer
is to screen views of the reservoir from stationary
viewers in adjacent homes. The proposed landscaping
plan with a mixture of year-round conifers, deciduous
trees, shrubs and bushes, some of which will mature to

1 over 80 feet in height is adequate to achieve
2 necessary screening. The distance to the adjacent
3 homes provides an additional buffer. We concur in
4 these findings.

5 "** * * The vegetation around the entire site should
6 adequately screen low angle views. The mixture of
7 conifers and deciduous trees will provide year-round
8 screening. Apart from the tower, there will be no
9 other on-site structures." Record 15.

10 Although petitioners agree with the city "that the main
11 purpose of the buffer is to screen views of the reservoir from
12 stationary viewers in adjacent homes," petitioners argue the
13 evidence shows the buffer is not adequate to perform this
14 purpose adequately.

15 Petitioners note the city admits the trees will not hide
16 the structure. Record 241. According to petitioners, "a
17 buffer that does not hide an offensive use from houses on
18 adjoining lots clearly does not adequately screen the view of
19 the use from the houses." Petition for Review 16. Petitioners
20 also argue the county cannot rely on trees that will be 25 feet
21 high when planted, 50 feet high in 15 years and 80 feet at
22 maturity to screen a 110 foot water tower. Petitioners argue
23 the design review standard is not met now by relying on trees
24 that will not be 80 feet high until many years in the future.
25 Petitioners further note the trees will never be tall enough to
26 totally obscure the large sphere atop the 110 foot structure.

The city argues it candidly stated the purpose of the
buffer was not to hide or completely obscure the water tower.
The city notes its landscape architect stated:

1 "I feel that the trees are not there to hide the
2 structure, they are there to provide a buffer and add
to the overall aesthetics of the area.

3 "We can't guarantee how fast they are going to grow
4 because they are living things. What we used were
5 Douglas Fir and they can attain a height of 80 feet,
6 but at no time is it intended that these are going to
hide the structure. Because in our lifetime we aren't
going to see them reach their fullest height. They
will offer a screen to the structure." Record 241.

7 The city argues it found the tower will use a small portion
8 of the middle of the .93 acre site and the average distance to
9 nearby residences is 118 feet. The city concludes it properly
10 determined the proposed landscaping and distance from adjoining
11 houses would provide an adequate buffer.

12 Unlike the comparability standard in CDC 55.100.A.2.d, the
13 above quoted requirement of CDC 55.100.A.3.a for an adequate
14 buffer vests considerable discretion in the approval
15 authority. The CDC simply requires that an adequate buffer⁹
16 be provided and requires that certain factors be assessed in
17 determining the adequacy of the buffer.

18 Although trees 25 feet tall can hardly eliminate the view
19 of the water tower from adjoining houses, they presumably will,
20 to some degree, block views of the base of the tower and a
21 portion of the column. As the trees mature, they will visually
22 screen at least a portion of the sphere. There will be some
23 visual screening in all directions. Record 499. In view of
24 the subjective nature of what constitutes an adequate buffer,
25 we cannot say the proposed separation from adjoining houses and
26 landscaping is inadequate to perform the required function.

1 There can be no doubt that the upper portion of the tower will
2 be visible from adjoining properties. However, the evidence
3 also shows the landscaping will be capable of providing
4 screening of a portion of the tower from the adjoining homes
5 and that screening will become more effective over time.

6 In Fedde v. City of Portland, supra, we reviewed the city's
7 determination that a 95 foot radio tower, located in the center
8 of a 6 acre site of which 99% remained in its natural
9 condition, was adequately buffered from adjoining uses as
10 required by the city's plan. We agreed with the city that the
11 plan did "not require the use to become invisible or
12 undetectable." Id at 230.

13 Although the facts in this case convince us the visual
14 impact of this water tower on adjoining uses will be far
15 greater than was the case in Fedde, we are persuaded by the
16 very subjective nature of the question of the adequacy of the
17 buffer to defer to the city's determination in this case as
18 well. Considering all the evidence the parties cite, we cannot
19 say a reasonable person could not conclude the proposed buffer
20 is adequate to perform the function envisioned by CDC
21 55.100.A.3.a.¹⁰ See Younger v. City of Portland, 305 Or 346,
22 360, 752 P2d 262 (1988).

23 This subassignment of error is denied.

24 The first assignment of error is sustained, in part.

25 SECOND ASSIGNMENT OF ERROR

26 "The city's findings that the tower's adverse effects

1 on adjacent residential uses will be mitigated by the
2 proposed design are not supported by substantial
evidence."

3 In this assignment of error, petitioners argue the city's
4 findings of compliance with one of the approval standards for
5 conditional uses are not supported by substantial evidence.
6 CDC 60.070.A provides in relevant part:

7 "The Planning Commission shall approve, approve with
8 conditions, or deny an application for a conditional
use * * * based on findings of fact with respect to
each of the following criteria:

9 "1. The site size and dimensions provide:

10 "a. Adequate area for the needs of the proposed
11 use, and

12 "b. Adequate area for aesthetic design treatment
13 to mitigate any possible adverse effect from
the use on surrounding properties and uses."

14 The county interpreted the term "mitigate" as follows:

15 "The term 'mitigate' does not require the removal of
16 impacts. Rather, it requires the reasonable reduction
of impacts in a manner which will accommodate the
proposed use and adjacent uses." Record 3.

17 Petitioners appear to concur with this interpretation.

18 Petition for Review 19. Petitioners argue, however, the
19 evidence in the record does not support the city's findings
20 that the above mitigation requirement is met.¹¹

21 A. Visual Impacts

22 Petitioners first argue the findings concerning impacts on
23 views are not supported by the evidence because the trees
24 initially will be only 25 feet tall and will not reach their 80
25 foot height at maturity for many years. Petitioners argue
26

1 "because the proposed landscaping plan does not
2 appreciably soften the negative view affects of the
3 proposed tower on adjoining uses, the city's finding
4 on this point is not supported by substantial evidence
5 in the record." Petition for Review 20.

6 The city first points out it approved a substantially
7 smaller, and therefore presumably less obtrusive, reservoir
8 than the 1.93 million gallon reservoir identified in the
9 acknowledged comprehensive plan. The city further states that
10 the same evidence that supports its findings concerning
11 adequacy of the buffer support its findings concerning visual
12 impacts.¹²

13 We understand the city to argue that, regarding visual
14 adverse effects, the code simply requires the city to take
15 reasonable mitigative steps to reduce impacts, keeping in mind
16 the importance of the proposed water tower. We agree with the
17 city, and we agree that the condition and design features it
18 cites are sufficient to support its conclusion that it has
19 taken reasonable steps to reduce impacts.

20 The landscaping and siting features, as we have noted
21 previously, clearly do not eliminate adverse affects on
22 adjoining properties. However, CDC 60.070.A.1.b. does not
23 require elimination of such affects; it only requires them to
24 be mitigated. The parties agree mitigation merely requires
25 reasonable reduction of impacts. We believe the evidence in
26 the record is sufficient to support the city's determination
27 that its requirement under CDC 60.070.A.1.b to mitigate adverse
28 visual effects is satisfied.

1 B. Property Values

2 Petitioners next argue there will be significant adverse
3 impacts on adjoining property values. Petitioners cite a
4 letter signed by a real estate appraiser concluding that an
5 "executive quality" home adjoining the tower currently valued
6 at \$200,000 would suffer a loss of value in the range of
7 \$20,000 to \$35,000" if the tower is built. Record 353.
8 Petitioners also cite a separate letter from an appraiser
9 concluding houses adjoining the tower may expect an approximate
10 10 percent decrease in value "depending on the relative degree
11 of visibilty, shadow field and other factors." Record 355.
12 Petitioners finally cite a 1982 report showing the property
13 value of lots adjoining water towers to be negatively
14 impacted. Record 280-324.

15 Petitioners argue the above evidence makes it "clear if the
16 tower is built, petitioners will suffer substantial adverse
17 affect, through thousands of dollars of lost property
18 value."¹³ Petition for Review 22. Petitioners argue the
19 city's findings that these losses will be mitigated by the
20 tower's color, landscaping and shape are not supported by
21 substantial evidence.

22 The city notes there is no specific requirement in the
23 ordinance that it find there will be no adverse impact on
24 adjoining property values. However, the city appears to agree
25 that since petitioners clearly raised property value impacts as
26 an issue in the city's proceedings, the city was required to

1 respond. See Norvell v. Portland Metro Area LGBC, 43 Or App
2 849, 853, 604 P2d 896 (1979); City of Wood Village v. Portland
3 Metro Area LGBC, 48 Or App 79, 87, 616 P2d 528 (1980); Grovers
4 Beaver Electric Plumbing v. Klamath Falls, 12 Or LUBA 61, 66
5 (1984).

6 Although the city found the design, color and landscaping
7 would reduce any impacts on property values, petitioners are
8 correct that there is no expert testimony explicitly supporting
9 that proposition. However, respondent city cites the expert
10 opinion contained in the appraisal letters submitted by
11 petitioners, noted supra, and argues those appraisers state it
12 is the visual impact on adjoining properties by the water tower
13 that will affect property values. Therefore, according to the
14 city, the evidence it relied upon in support of its findings
15 that it has appropriately mitigated visual impacts also
16 supports its findings that it mitigated (i.e., reasonably
17 reduced the impact on) property values.

18 We agree with the city that the cited evidence is
19 sufficient to support its determination that it mitigated any
20 impacts on property values as required by CDC 60.070.A.1.b.
21 Again, it may well be that the adjoining properties would
22 suffer a reduction in property value if the tower is
23 constructed. However, the city has designed the tower and
24 imposed landscaping requirements that will reduce the visual
25 impact of the tower on those properties. The testimony
26 submitted by the appraisers supports the city's conclusion that

1 these reduced impacts will reduce loss of property value. We
2 agree with the city that the record is adequate to show such
3 measures are sufficient to comply with CDC 60.070.A.1.b.¹⁴

4 The second assignment of error is denied.

5 The decision of the city is remanded.¹⁵

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FOOTNOTES

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1 A water pressure zone is the geographical area that can be served by a water source within a specified range of water pressures.

2 The recommended improvements "called for a 110 foot steel water tower, consisting of a narrow pedestal topped by a spheroid storage area, approximately 50 feet in diameter with a 400,000 gallon capacity." Petition for Review 6; Record 491-500.

3 In the R-10 zone there are "Permitted Uses," CDC 11.030, "Uses and Development Permitted Under Prescribed Conditions," CDC 11.050 and "Conditional Uses," CDC 11.060. The CDC describes these different categories of uses as follows:

- "A. A use permitted outright * * * is a use which requires no approval under the provisions of this code * * * .
- "B. A use permitted under prescribed conditions * * * is a use for which approval will be granted provided all the conditions are satisfied * * * .
- "C. A conditional use * * * is a use, the approval of which is discretionary with the planning commission. The approval process and criteria for approval are set forth in Chapter 60, Conditional Uses * * * ." CDC 11.020.

4 Respondent suggests throughout its brief that this definition gives the city the authority to approve critical major utilities even though the proposal may violate standards imposed by the applicable zone. Respondent suggests the definition allows "modification of [the inhibiting] standard * * * " without first amending the code. Respondent's Brief 24. There is nothing in CDC 02.000-02.030 suggesting code definitions have such effect, and we do not read the definition of utility to grant such power.

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Respondent appears to argue the acknowledged comprehensive plan contains a policy for "this specific water tower at this specific location." Respondent's Brief 7. Although the plan provisions respondent cites do identify this site for a reservoir, the plan calls for a much larger capacity reservoir and states nothing about the style or design of the reservoir, or whether buffers or landscaping should be required.

6

There is testimony in the record suggesting alternative sites may be feasible for a water tower, although apparently they are not owned by the city and are at a slightly lower elevation, necessitating a higher water tower.

7

But see our discussion under the second subassignment of error, infra.

8

Webster's Third New International Dictionary defines comparable as follows:

"capable of being compared: * * * having enough like characteristics or qualities to make comparison appropriate * * * permitting or inviting comparison * * * EQUIVALENT, SIMILAR * * * ". Id. at 461.

9

"Buffer" is not defined in the CDC. Webster's Third New International Dictionary defines "buffer" as follows:

"* * * any of various devices, apparatus, or pieces of material designed primarily to reduce shock due to contact * * * something that serves to separate two items * * * ." Id. at 290.

10

For the same reasons stated by the city in finding number 53, quoted supra under our discussion of scale and architectural features, we agree the photographs submitted by petitioners overstate the visual impact of the water tower.

2 The city's findings are as follows:

3 "20. Section 60.070(A)(1)(b) requires that the area is
4 adequate for aesthetic design treatment to
5 mitigate any possible adverse effect from the use
6 on surrounding properties and uses. Potential
7 impacts will occur as a result of the proposed
8 use. The main impacts will be shadows, some loss
9 of existing views, and possible diminution of
property value. The term 'mitigate' does not
required the removal of impacts. Rather, it
requires the reasonable reduction of impacts in a
manner which will accommodate the proposed use
and adjacent uses. We find that this standard is
met by this proposal.

10 "21. The Planning Commission, Planning Staff, and the
11 Citizen's Design Review Committee independently
12 found that the proposed landscape plan will
13 substantially minimize the visual impact of the
14 structure on adjacent lots. The selection of a
15 pedestal shape over a standpipe reservoir will
16 minimize the blocked views of the Tualatin
17 Valley. Short-range views will be improved by
18 landscaping. In the event that the land had been
developed for housing instead of a reservoir,
many of the existing views would also be
blocked. The overcast grey pedestal color will
blend in with the typical Oregon sky. The
landscaping, some of which will mature to a
height of over 80 feet, will soften and screen
the views of the reservoir.

19 "22. The impact of shadows have [sic] been kept to a
20 maximum of two (2) hours per day as demonstrated
21 in the City of West Linn Rosemont Reservoir Site,
22 Sun-shadow Evaluation and in the discussion of
23 that study by Murray, Smith & Associates. We
24 adopt those findings. The opponents offered
25 evidence of greater shadow impacts, but we find
26 that that evidence is not supported by credible
scientific process and data. According to a
solar specialist from the Oregon Department of
Energy, two hours of shade results in only an
eight (8) percent loss in passive solar heating
effectiveness. We accept that evidence as
credible. Most of the adjacent homes on Suncrest
Drive are on a north-south axis which is not as
solar effective as homes on an east-west axis.

1 This means that these homes were never oriented
2 to take full advantage of passive solar heating
3 in the first place. The Solar Access Ordinances
4 recently adopted by most metro-area jurisdictions
5 requires homes to be oriented within 38 degrees
6 of the east-west axis to receive solar benefits.
7 It should also be noted that the location and
8 type of this reservoir will mitigate or lessen
9 the shadows cast by alternate standpipe reservoir
10 designs that were originally considered.

11 "23. There was contradictory evidence regarding
12 diminution of adjacent property values. Staff
13 reported that the original sale price of adjacent
14 lots had been reduced because of their proximity
15 of the reservoir. We find that there was some
16 reduction in the original sales price of some of
17 the adjacent parcels. The homeowners stated
18 otherwise. The Planning Commission found that at
19 no time was there any attempt to hide the fact
20 that a reservoir would be built on the subject
21 tract. * * * We concur with this finding: There
22 was no evidence presented that would lead a
23 prospective purchaser to believe that an at-grade
24 or below-ground reservoir would be built. The
25 property owners knew or should have been aware of
26 the reservoir site since it was identified on the
27 recorded plat and they had the option to either
28 buy or not buy at that location. The homeowners'
29 evidence package * * * also includes a property
30 appraisal conducted in 1982 for the developers of
31 the subdivision. That appraisal was premised
32 upon the fact that an above-ground standpipe
33 reservoir would be built. The Planning
34 Commission found that the spheroid design with
35 tapered base, the 'overcast' grey color scheme,
36 the setback of 118 feet (average) and the
37 landscaping will reduce or lessen any diminution
38 in property value that may occur as opposed to
39 the construction of a reservoir without those
40 mitigating features." Record 3-4.

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44 This evidence includes testimony by the applicant's
45 landscape architect that the trees provided are to screen, not
46 hide the structure. Record 241. The city also asserts:

47 "the reservoir would occupy only six (6) percent of
48 the .93 acre site, would be located in the middle of
49 the parcel, that the base of the tower is

1 approximately 34 feet across, and that the sphere is
2 approximately 51 1/2 feet in diameter at its widest
3 point * * *." * * * * [T]he average buffer between the
4 water tower and surrounding residences [is] 118 feet * * *."

5 "Additional buffering is provided by a six foot high
6 aluminum fence separating the site from surrounding
7 residences * * *."

8 * * * * [T]his site is surrounded by residences and the
9 landscaping plan requires buffering separation and
10 landscaping and visual screening on all sides * * *."
11 Respondent's Brief 17-18.

12 Although respondent does not specifically site to evidence
13 in the record to support each of these assertions, the facts do
14 not appear to be in dispute.

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17 Petitioners specifically object to the county's claim that
18 the prior designation of this site in the comprehensive plan
19 and dedication of this site for water tower use as a condition
20 of subdivision approval were the cause of any depreciation in
21 property values. The city cites us to no evidence establishing
22 that the plan designation or site dedication in and of
23 themselves cause a reduction of property value, independent of
24 the actual construction of the water tower. Without such
25 evidence, we agree with petitioners that the prior planning and
26 site dedication are irrelevant to the question of compliance
with CDC 60.070.A.1.b.

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29 We also note one of petitioners' appraisers identified the
30 "shadow field" as affecting adjoining property values. The
31 city found it had taken steps to mitigate shadows from the
32 tower. See n 11, finding 23. Neither this finding nor its
33 evidentiary basis is challenged by petitioners.

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36 We remand the city's decision rather than reversing as
37 petitioners request. Although we have serious doubts that the
38 city could adopt supportable findings demonstrating the
39 proposed water tower is of comparable scale and has comparable
40 architectural features with surrounding uses and structures,
41 there is sufficient doubt in our mind on that point that we
42 remand rather than reverse under the first subassignment of the
43 first assignment of error.