

LAND USE
BOARD OF APPEALS

BEFORE THE LAND USE BOARD OF APPEALS JUL 11 8 45 PM '89

OF THE STATE OF OREGON

1
2
3 LEAGUE OF WOMEN VOTERS OF WEST)
CLACKAMAS COUNTY, an Oregon)
4 nonprofit organization, CAROL)
and WILLIAM ATHERTON, PAUL R.)
5 ASH, MIKE BRANAM, KENNETH E.)
FINK, SCOTT FOELKER, STAN)
6 JEWETT III, RICHARD H. KLOOR,)
DICK MORAN, RICHARD NOBLE,)
7 AL PATCHETT and LEONARD G. STARK,)

8 Petitioners,)

LUBA No. 88-102

9 vs.)

FINAL OPINION
AND ORDER

10 METROPOLITAN SERVICE DISTRICT,)

11 Respondent,)

12 and)

13 BLAZER HOMES, INC.,)

14 Intervenor-Respondent.)

15 Appeal from Metropolitan Service District.

16 Peggy Hennessy and Edward J. Sullivan, Portland, filed the
17 petition for review and Edward J. Sullivan argued on behalf of
petitioners. With them on the brief was Mitchell, Lang and
Smith.

18 Daniel B. Cooper and Lawrence S. Shaw, Portland, filed a
19 response brief and Lawrence S. Shaw argued on behalf of
respondent.

20 Frank Josselson and Leslie Roberts filed a response brief
21 and argued on behalf of intervenor-respondent. With them on
the brief was Josselson, Potter & Roberts.

22 KELLINGTON, Referee; SHERTON, Referee, participated in the
23 decision.

24 REMANDED

07/11/89

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

1 Opinion by Kellington.

2 NATURE OF THE DECISION

3 Petitioners appeal Metropolitan Service District (Metro)
4 Ordinance No. 88-268, which approves an amendment to the Metro
5 Urban Growth Boundary (UGB).

6 MOTION TO INTERVENE

7 Blazer Homes, Inc. moves to intervene on the side of
8 respondent in this proceeding. There is no opposition to the
9 motion, and it is granted.

10 FACTS

11 Intervenor-respondent (intervenor) filed a petition to
12 amend the acknowledged Metro UGB¹ to add 43.7 acres. The
13 subject property consists of four parcels located southeast of
14 the City of Lake Oswego. The property is zoned Rural
15 Residential Farm/Forest 5 Acres (RRFF-5) by Clackamas County,
16 and currently holds one dwelling and a church. Record 143.

17 Intervenor's petition was processed and considered under
18 Metro Code (MC) chapter 3.01 ("Urban Growth Boundary Locational
19 Adjustments"). MC chapter 3.01 was originally adopted as Metro
20 Ordinance No. 81-105 (locational adjustment ordinance). Metro
21 Ordinance No. 81-105 was submitted to LCDC for acknowledgment
22 review. LCDC issued an order acknowledging Metro Ordinance
23 No. 81-105 on October 19, 1981. MC chapter 3.01 sets out
24 procedures and criteria for certain "minor amendments" to the
25 Metro UGB, which are termed "locational adjustments."

26 On April 27, 1988, a Metro hearings officer issued a report

1 recommending denial of the petition. Record 975. Intervenor
2 and petitioners Bill and Carole Atherton filed exceptions to
3 the hearings officer's recommendation. Record 427, 435.
4 Additionally, intervenor requested permission to submit
5 additional evidence. Record 503.

6 The Metro council granted intervenor's request to submit
7 new evidence and remanded the case to the hearings officer to
8 consider such new evidence and to consider the exceptions filed
9 by intervenor-respondent and petitioners Atherton.
10 Record 1031. The hearings officer held another hearing and
11 issued a revised report still recommending denial of
12 intervenor's petition. Record 1031. Intervenor and
13 petitioners Atherton filed exceptions to the hearings officer's
14 revised report. Record 1047, 1059.

15 On September 8, 1988, the Metro council voted to reject the
16 report and recommendation of the hearings officer.
17 Record 1032. On October 27, 1988, the Metro council adopted
18 Ordinance No. 88-268, approving the Metro UGB amendment
19 requested by intervenor. Metro mailed copies of the ordinance
20 to petitioners and other parties to the proceeding on
21 November 1, 1988. Record 1179. This appeal followed.

22 MOTION TO DISMISS

23 Intervenor moves for dismissal of this appeal on the basis
24 that petitioners' notice of intent to appeal was not timely
25 filed under OAR 661-10-015(1). ORS 197.830(7) provides in
26 relevant part:

1 "A notice of intent to appeal a land use decision
2 shall be filed not later than 21 days after the date
3 the decision sought to be reviewed becomes final. A
4 notice of intent to appeal plan and land use
5 regulation amendments processed pursuant to
6 ORS 197.610 to 197.625 shall be filed not later than
7 21 days after the decision sought to be reviewed is
8 mailed to parties entitled to notice under
9 ORS 197.615. * * *."

10 The language of OAR 661-10-015(1) parallels that of
11 ORS 197.830(7) quoted above.

12 Intervenor argues that under ORS 197.830(7) petitioners'
13 notice of intent to appeal was required to be filed not later
14 than 21 days after Metro's ordinance amending the UGB was
15 signed on October 27, 1988. Intervenor says this is the date
16 Metro's ordinance was adopted and, therefore, the date the
17 ordinance became "final" for purposes of judicial review.
18 Intervenor's Motion to Dismiss Appeal 1. Intervenor argues
19 that MC 2.05.045(c) specifies that a Metro ordinance becomes
20 final upon adoption and, therefore, LUBA rule
21 OAR 661-01-010(3)² requires the same result.

22 Intervenor also argues that Metro's ordinance is neither an
23 amendment to an acknowledged comprehensive plan nor an
24 amendment to an acknowledged land use regulation adopted
25 pursuant to ORS 197.610 to 197.625. As a consequence,
26 intervenor contends that under ORS 197.830(7) and
OAR 661-10-015(1), a notice of intent to appeal the subject
ordinance is required to be filed within 21 days of the date
the ordinance became final, rather than within 21 days of when
it was mailed to parties entitled to notice under ORS 197.615.

1 Metro agrees with intervenor's position that petitioners'
2 notice of intent to appeal was timely filed under
3 ORS 197.830(7) only if the challenged ordinance is an amendment
4 to an acknowledged comprehensive plan or land use regulation
5 subject to ORS 197.610 to 197.625. Metro concedes that it
6 followed the post acknowledgment procedural requirements of
7 ORS 197.610 to 197.625 in adopting Ordinance No. 88-268.
8 However, Metro now argues that the subject UGB amendment is not
9 an amendment to an acknowledged comprehensive plan or land use
10 regulation. Metro contends that its mistaken treatment of the
11 appealed decision as a post acknowledgment amendment cannot
12 confer jurisdiction upon LUBA if none otherwise would exist
13 under the applicable statutes.

14 Petitioners argue that their notice of appeal is timely
15 because it was filed with LUBA within 21 days of the date
16 Metro's decision was served on them. Petitioners argue that
17 under MC 2.05.045(d) Metro had a duty to provide them with
18 written notice of its decision. Accordingly, petitioners
19 contend that the appeal period did not begin to run until the
20 ordinance was served on them. Petitioners argue:

21 " * * * non-performance of a duty to give written
22 notice cannot be used to defeat a party's appeal
23 rights." Memorandum in Opposition to Motion to
Dismiss 5.

24 Petitioners cite League of Women Voters v. Coos County, 82 Or
25 App 673, 729 P2d 588 (1986); League of Women Voters v. Coos
26 County, 76 Or App 705, 712 P2d 111 (1985); Ludwig v. Yamhill

1 County, 72 Or App 224, 629 P2d 536 (1985); Bryant v. Clackamas
2 County, 56 Or App 442, 447 P2d 649 (1982), and other cases in
3 support of their argument that the 21 day period for filing a
4 notice of intent to appeal of ORS 197.830(7) does not begin to
5 run until after the required notice of a local government
6 decision is given to parties to the local government
7 proceeding. As we understand petitioners' argument, they
8 contend that the requirement for notice to parties in the Metro
9 Code is analogous in its effect to the statutory requirements
10 for notice to parties upon which the above-cited cases rely.

11 Petitioners also suggest that the provision of
12 MC 2.05.045(c) stating that an ordinance is considered the
13 "final order" in a contested case "upon adoption," cannot be
14 interpreted to specify when the ordinance is final for purposes
15 of judicial review, where other Metro Code provisions require
16 service of the ordinance on parties in order to advise them of
17 their appeal rights. Petitioners say the interpretation urged
18 by intervenor would ignore the Metro Code requirement for
19 service of Metro's final order, which in this case is the
20 ordinance, on the parties. Petitioners argue that Metro cannot
21 make its final decision, fail to give notice of that decision
22 until the period for filing appeals has expired and then claim
23 that parties' appeal rights have been defeated. See, Bryant v.
24 Clackamas County, supra.

25 MC Section 2.05.045(c) and (d) state in relevant part:

26 "(c) When the proposed order in a contested case

1 necessitates the adoption of an ordinance, staff
2 shall prepare an ordinance for Council adoption.
3 The ordinance shall incorporate the rulings,
4 findings and conclusions required by subsection
5 (a) or (b) of this section. An ordinance adopted
6 pursuant to this subsection shall, upon adoption,
7 be considered the final order subject to judicial
8 review.

9 "(d) Parties to contested cases and their attorneys of
10 record shall be served a copy of the final
11 order. Parties shall be notified of their right
12 to judicial review of the order."

13 In addition, MC 1.01.060 states:

14 "Construction: The provisions of this Code and all
15 proceedings under it are to be construed with a view
16 to effect its objectives and to promote justice."

17 Additionally, the MC requires that parties be given certain
18 information before the commencement of the hearing, which
19 information must include "a description of the appeal process
20 from the determination or order of the District."

21 MC 2.05.007(a)(6).

22 We read ordinance provisions together in order to give
23 meaning to each part. See Kenton Neighborhood v. City of
24 Portland, ___ Or LUBA ___ (LUBA No. 88-119, June 7, 1989). We
25 will not construe MC 2.05.045(c) in a manner which would make
26 2.05.045(d) meaningless. See Bryant v. Clackamas County, 56 Or
27 App at 488.

28 MC 2.05.045(c) does provide that, upon adoption, an
29 ordinance amending the Metro UGB is "considered the final order
30 subject to judicial review." This subsection establishes that
31 an ordinance constitutes Metro's final order in those contested
32 case proceedings the nature of which necessitate adoption of an

1 ordinance. However, MC 2.05.045(d) establishes further
2 requirements which Metro must carry out with regard to any
3 final order in a contested case. In order for MC 2.05.045(d)
4 to be meaningful, these additional requirements must be
5 accomplished before Metro's final orders, whether in ordinance
6 or some other form, are considered final for purposes of
7 judicial review.

8 In Bryant v. Clackamas County, 56 Or App at 447-448, the
9 court held that a county ordinance requirement that appeals be
10 filed within 10 days of the oral decision of the hearings
11 officer conflicted with the requirement of former
12 ORS 215.416(6)³ that "written notice of the approval or
13 denial shall be given to all parties to the proceeding." The
14 court held that:

15 "It would make [the requirement of written notice] a
16 nullity if the county were allowed to provide that the
17 time for appeal may expire before the parties have
18 been given that required notice. We hold that the
time for taking an appeal cannot begin to run until
written notice is given." Bryant v. Clackamas County,
56 Or App at 447.

19 Although this case involves a right to notice created by the
20 MC, rather than a right granted by statute, we find the court's
21 reasoning in Bryant is relevant here. The MC section which
22 identifies what document constitutes Metro's final order,
23 subject to judicial review, also has a provision which
24 specifies what Metro must do with such final orders.
25 MC 2.05.045(c) and (d). The MC provision requiring notice is
26 substantially similar to the statutory provision relied on in

1 Bryant. It requires that Metro serve parties with a copy of
2 the "final order" and notify parties of their appeal rights.
3 MC 2.05.045(d). To interpret the MC to allow appeal rights to
4 expire before an order is served advising parties that the
5 appeal period had begun would not effect the objectives of the
6 MC or promote justice. See MC 1.01.060.

7 Our duty is to determine the interpretation of Metro's code
8 which is reasonable and correct. McCoy v. Linn County, 90 Or
9 App 271, 275-276, 752 P2d 323 (1988). We do not interpret
10 MC 2.05.045(c) to provide that an ordinance be considered final
11 for purposes of judicial review before MC 2.05.045(d) is
12 satisfied. We interpret the MC to provide that Metro's final
13 orders, including those adopted by ordinance, become final for
14 the purpose of judicial review upon the provision of notice as
15 provided in MC 2.05.045(d).

16 We conclude that under MC 2.05.045 the challenged ordinance
17 was not final for purposes of judicial review until the party
18 seeking judicial review was served with a copy of the adopted
19 ordinance containing the required information regarding appeal
20 rights, as required by MC 2.05.045(d). In this case, no one
21 disputes that petitioners are parties entitled to notice under
22 MC 2.05.045(d). Since petitioners' notice of intent to appeal
23 was filed within 21 days of when Metro served petitioners with
24 a copy of its decision, it was timely filed.

25 The preceeding is sufficient basis for denying intervenor's
26 motion to dismiss. However, we consider whether there is an

1 alternative basis for denial of the motion. In this case,
2 petitioners' notice of intent to appeal was timely filed if
3 Metro Ordinance No. 88-268 is an amendment to an acknowledged
4 comprehensive plan or land use regulation.

5 Petitioners contend that Metro's UGB is either a
6 comprehensive plan or a land use regulation and, therefore,
7 Ordinance No. 88-268 is either an amendment to an acknowledged
8 comprehensive plan or an amendment to an acknowledged land use
9 regulation.

10 Metro and intervenor (respondents) contend that the Metro
11 UGB is neither a land use regulation nor a comprehensive plan,
12 but rather some other kind of "plan." Metro argues that its

13 "regional UGB plan is not comprehensive and it is not
14 within ORS 197.835(4). Basically, it is a regional
15 application of Goal 14 to assure compact growth and
16 provide the limits to the amount of land useable by
17 city and comprehensive plans, applying all the goals
18 to the land within the regional boundary."
19 Respondent's Brief 16.

20 Intervenor states:

21 "The contortions necessary to jam [the Metro UGB] into
22 either category [comprehensive plan or land use
23 regulation] are absurd and unavailing." Intervenor's
24 Brief 14.

25 We first consider whether the Metro UGB is a comprehensive
26 plan, a land use regulation, or some other type of plan.

A comprehensive plan is defined as:

27 "* * * a generalized, coordinated land use map and
28 policy statement of the governing body of a local
29 government that interrelates all functional and
30 natural systems and activities relating to the use of
31 lands, including, but not limited to, sewer and water
32 systems, transportation systems, educational

1 facilities, recreational facilities and natural
2 resources and air and water quality management
3 programs. 'Comprehensive' means all-inclusive, both
4 in terms of the geographic area covered and functional
5 and natural activities and systems occurring in the
6 area covered by the plan. 'General nature' means a
7 summary of policies and proposals in broad categories
8 and does not necessarily indicate specific locations
9 of any area, activity or use. A plan is 'coordinated'
10 when the needs of all levels of governments,
11 semi-public and private agencies and the citizens of
12 Oregon have been considered and accommodated as much
13 as possible. 'Land' includes water, both surface and
14 subsurface, and the air." ORS 197.015(5).

8 A land use regulation is defined as:

9 " * * * any local government zoning ordinance, land
10 division ordinance adopted under ORS 92.044 or 92.046
11 or similar general ordinance establishing standards
12 for implementing a comprehensive plan. 'Land use
13 regulation' does not include small tract zoning map
14 amendments, conditional use permits, individual
subdivision, partitioning or planned unit development
approvals or denials, annexations, variances, building
permits and similar administrative-type decisions."
ORS 197.015(11).

15 Statewide Planning Goal 2 provides that "plans":

16 " * * * as used here encompass all plans which guide
17 land-use decisions, including both comprehensive and
18 single-purpose plans of cities, counties, state and
federal agencies and special districts."

19 Metro was created by Oregon Laws 1977, chapter 665, after
20 the adoption of the above-quoted statutory and goal
21 definitions. We realize that the Metro UGB does not perfectly
22 fit the definition of comprehensive plan, land use regulation
23 or plan quoted above.⁴ However, we must decide which
24 classification of the Metro UGB is the best fit in the context
25 of the overall statutory scheme for statewide and regional
26 planning. For instance, a conclusion that the Metro UGB is

1 neither a comprehensive plan nor a land use regulation would
2 lead to the anomalous result of the Metro UGB and implementing
3 ordinances not being subject to acknowledgment or periodic
4 review by LCDC. LCDC only has authority to acknowledge and
5 conduct periodic review of comprehensive plans and land use
6 regulations.⁵ ORS 197.251 and 197.640.

7 Under the definition in ORS 197.015(5), a comprehensive
8 plan is necessarily a planning document which is comprehensive
9 as to the scope of authority of the local government adopting
10 it. ORS 197.015(5). Metro is defined by statute as a local
11 government. ORS 197.015(12). Thus, Metro's comprehensive plan
12 is a plan which expresses the land use authority and
13 responsibility of Metro, as set forth in ORS 268.380 to 268.400
14 and ORS 197.190.

15 Under ORS 268.380, Metro is required to:

16 "(1) Adopt land-use planning goals and objectives for
17 the district consistent with goals adopted under
18 ORS 197.005 to 197.465;

19 "(2) Review the comprehensive plans * * * adopted by
20 cities and counties within the district and
21 recommend or require cities and counties, as it
22 considers necessary, to make changes in any plan
23 to assure that the plan conforms to the
24 district's metropolitan area goals and objectives
25 and the state-wide goals;

26 "** * * * *" (Emphasis supplied.)

27 ORS 268.390 requires Metro to:

28 "(1) Define and apply a planning procedure which
29 identifies and designates areas and activities
30 having significant impact upon the orderly and
31 responsible development of the metropolitan area,
32 including, but not limited to, impact on:

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- "(a) Air quality;
- "(b) Water quality; and
- "(c) Transportation.

"(2) Prepare and adopt functional plans for those areas designated under subsection (1) of this section to control metropolitan area impact on air and water quality, transportation and other aspects of metropolitan area development the council may identify.

"(3) Adopt an urban growth boundary for the district in compliance with applicable goals adopted under ORS chapters 196 and 197.

"(4) Review the comprehensive plans * * * adopted by the cities and counties within the district * * * and recommend or require cities and counties, as it considers necessary, to make changes in any plan to assure that the plan and any changes taken under it conform to the district's functional plans adopted under subsection (2) of this section and its urban growth boundary adopted under subsection (3) of this section."

Further, pursuant to ORS 197.190, Metro is to act as the regional planning coordinator for each county within its boundaries. ORS 197.190 specifies that Metro is responsible for coordinating

"all planning activities affecting land uses within [the Metro area] including planning activities of the county, cities, special districts and state agencies to assure an integrated comprehensive plan for the entire area [within Metro's jurisdiction]. In addition to being subject to the provisions of ORS Chapters 196 and 197 with respect to city or special district boundary changes, as defined by ORS 197.175(1), the governing body of the Metropolitan Service District shall be considered the county review, advisory and coordinative body for Multnomah, Clackamas and Washington Counties for the areas within that district." (Emphasis supplied.)

Metro's function under ORS 268.390 and 197.190 is to

1 identify and designate areas and activities having significant
2 impact on the orderly and responsible development of the
3 metropolitan area and to adopt plans to control metropolitan
4 area impact and other aspects of metropolitan area
5 development. The activities Metro is to control and plan for
6 include, but are not limited to, air quality, water quality and
7 transportation. ORS 268.390(1) and (2).

8 Under ORS 268.380(3) and ORS 197.190(1), Metro is given
9 authority to coordinate land use planning of the cities and
10 counties within its boundaries. Further, Metro has the
11 authority to review and require changes in city and county
12 plans in effect on January 1, 1979 or subsequently adopted.
13 Metro's UGB becomes a part of the comprehensive plans of the
14 local governments within its boundaries. MC 3.01.030.

15 Within the scope of its authority, Metro's duties are the
16 duties and function of comprehensive planning. Based on the
17 above, we conclude that the Metro UGB is a comprehensive plan
18 provision, even though it may not be the entire comprehensive
19 plan for Metro.⁶ See Urquhart v. Lane Council of
20 Governments, 80 Or App 176, 179, n 2, 721 P2d 870 (1986).

21 Accordingly, petitioners' notice of intent to appeal is an
22 appeal of an acknowledged comprehensive plan amendment
23 "processed pursuant to ORS 197.610 to 197.625."
24 ORS 197.830(7). No one contests that if the decision is an
25 amendment to an acknowledged comprehensive plan, petitioners
26 are parties entitled to notice under ORS 197.615. Therefore,

1 petitioners' notice of intent to appeal was filed "not later
2 than 21 days after the decision sought to be reviewed was
3 mailed to parties entitled to notice under ORS 197.615."
4 ORS 197.830(7).

5 Intervenor's motion to dismiss is denied.

6 FIRST ASSIGNMENT OF ERROR

7 "Respondent exceeded its jurisdiction and misconstrued
8 the applicable law, including Goals 2 and 14,
9 ORS 197.175, 197.190, 197.250, 197.610 to 197.625,
10 197.732, and 268.390 (3) by failing to address the
11 applicable factors of Goal 2, Part II and Goal 14,
12 Factors 1 and 2 when it granted the subject UGB
13 amendment."

14 SECOND ASSIGNMENT OF ERROR

15 "There is not substantial evidence in the whole record
16 to support a finding of compliance with Goal 2, Part
17 II, and Goal 14, Factors 1 and 2."

18 In these assignments of error, we are asked to decide if,
19 and to what extent, the Statewide Planning Goals (goals) apply
20 to this amendment of the Metro UGB. Petitioners' position is
21 that any amendment to the Metro UGB requires the application of
22 Goals 2 (Land Use Planning) and 14 (Urbanization). Petitioners
23 point out that ORS 268.390(3) requires Metro to "[a]dopt an
24 urban growth boundary for the district in compliance with
25 applicable goals adopted under ORS chapters 196 and 197."
26 Petitioners also argue that because Metro's authority to adopt
a UGB depends upon ORS 268.390(3), any changes to Metro's UGB
must also be adopted "in compliance" with the goals.
Consequently, petitioners assert that Metro is without
jurisdiction to amend its UGB unless it applies the goals to

1 the amendment.

2 Petitioners maintain that Goal 14 specifies the procedure
3 and requirements for change of a UGB. Petitioners argue that
4 under Goal 14, Metro UGB amendments must "follow the procedures
5 and requirements as set forth in the Land Use Planning goal
6 (Goal 2) for goal exceptions." Petitioners also point out that
7 Goal 14 provides that both establishment and change of the UGB

8 "* * * shall be based upon considerations of the
9 following factors:

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

13 "(2) Need for housing, employment opportunities
14 and liveability;

15 "(3) Orderly and economic provision for public
16 facilities and services;

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

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

21 "(6) Retention of agricultural land as defined,
22 with Class I being the highest priority for
23 retention and Class VI the lowest priority;
24 and,

25 "(7) Compatibility of the proposed urban uses
26 with nearby agricultural activities.

"* * * * *"

27 Petitioners contend that Metro failed to apply Goal 2 or
28 Goal 14 to the proposed UGB amendment and, therefore, Metro's
29 decision is invalid.

30 Metro argues that it has jurisdiction and authority to

1 amend its UGB solely by following the acknowledged procedures
2 and applying the acknowledged criteria of MC chapter 3.01.
3 Metro asserts LCDC explicitly determined that the "need
4 factors" (Factors 1 and 2) of Goal 14 were inapplicable to
5 individual petitions for locational adjustments of the Metro
6 UGB by acknowledging the Metro locational adjustment ordinance.

7 Metro also relies upon the decision in 1000 Friends of
8 Oregon v. LCDC and Metro, Marion County Circuit Court
9 No. 118213 (1985). In that case, 1000 Friends of Oregon asked
10 the Circuit Court to review LCDC's acknowledgment of the line
11 established by Metro as its UGB.⁷ The Circuit Court held
12 that because Metro was unique, LCDC could acknowledge the
13 establishment of the Metro UGB without finding that there
14 existed a "need" (as recognized under Factors 1 and 2 of Goal
15 14) for all of the land within the UGB.⁸

16 We understand Metro to contend the circuit court found that
17 the Metro UGB may be established or changed without
18 consideration of "need" under Factors 1 and 2 of Goal 14. We
19 also understand Metro to argue the time to complain that the
20 locational adjustment ordinance does not comply with the goals
21 has passed, and petitioners are impermissibly collaterally
22 attacking the acknowledgment of the locational adjustment
23 ordinance. Metro asserts that complaints regarding its
24 locational adjustment ordinance must wait for periodic review
25 of the Metro UGB by LCDC pursuant to ORS 197.640.

26 Intervenor takes a somewhat different approach. It

1 concedes that the goals apply to this amendment of Metro's
2 UGB. However, as we understand intervenor's argument, it
3 contends that the manner in which the goals apply to this
4 amendment has been legislatively predetermined by Metro and
5 acknowledged by LCDC. It contends that Metro and LCDC decided
6 in advance of the filing of any individual petitions, how and
7 which goals apply to "locational adjustments" of the Metro UGB.

8 Intervenor argues that Metro and LCDC considered all of the
9 factors of Goal 14 in adopting and acknowledging the Metro
10 locational adjustment ordinance, and determined that the "need"
11 factors (1 and 2) of Goal 14 should not apply to "locational
12 adjustments." Intervenor says Metro and LCDC assumed that it
13 is "impossible to verify whether there is a need for 50 acres
14 of land * * * within the 230 thousand acre urban growth
15 boundary." Intervenor's Brief 15. Intervenor argues that the
16 absence of affirmative findings on Goal 14, factors 1 and 2
17 does not prevent approval of an amendment to the Metro UGB.
18 Halvorson v. Lincoln County, 82 Or App 302, 728 P2d 79 (1986);
19 City of Salem v. Families for Responsible Govt., 64 Or App 238,
20 668 P2d 395 (1983), rev'd on other grounds 298 Or 574 (1985).

21 Intervenor also maintains that the "locational"
22 factors (3-7) of Goal 14 have been codified in Metro's
23 locational adjustment ordinance, acknowledged by LCDC, and
24 applied properly by Metro. Intervenor contends that Goal 2 has
25 by implication been applied through the locational adjustment
26 ordinance. Intervenor's Brief 23-25.

1 It is not seriously disputed that amendments to Metro's UGB
2 must comply with the goals. ORS 268.390(3) requires Metro to
3 adopt its UGB in compliance with the goals. Furthermore, the
4 Supreme Court has held that "all plan * * * amendments must
5 comply with the goals * * *." 1000 Friends of Oregon v. LCDC
6 (Curry County), 301 Or 447, 512, 724 P2d 268 (1986). Finally,
7 we are authorized to reverse or remand an amendment to an
8 acknowledged comprehensive plan for failure to comply with the
9 goals. ORS 197.835(4).⁹ We conclude that any amendment to
10 the Metro UGB must also comply with the goals.

11 Petitioners contend LCDC's acknowledgment of the locational
12 adjustment ordinance cannot foreclose an inquiry into whether
13 this UGB amendment complies with the goals. Petitioners allege
14 three goal violations in the adopted Metro UGB amendment.
15 First, petitioners argue that Metro failed to apply Factors 1
16 and 2 of Goal 14. Second, petitioners argue Metro failed to
17 apply Goal 2, Part II. Third, petitioners argue that Metro
18 failed to apply Factors 3-7 of Goal 14 correctly.

19 Before addressing petitioners' allegations of violations of
20 Goals 2 and 14, we must determine whether LCDC's acknowledgment
21 of the locational adjustment ordinance precludes us from
22 finding that a locational adjustment to the Metro UGB, adopted
23 in compliance with that ordinance, violates the goals.

24 While we have the authority and responsibility to review
25 post acknowledgment plan amendments for compliance with the
26 goals, 1000 Friends of Oregon v. Jackson Cq., 79 Or App 93, 98,

1 718 P2d 753 rev den 301 Or 445 (1986), and authority to review
2 unamended plan and land use regulation provisions to determine
3 if the amendment affects their continued compliance with the
4 goals, Urquhart v. Lane Council of Governments, 80 Or App at
5 180, we do not have authority, to review for goal compliance
6 unamended portions of the plan or land use regulations which
7 are not affected by the challenged amendment. Id.

8 In Urquhart v. Lane Council of Governments, supra, the
9 regional government (Lane Council of Governments) and the
10 City of Eugene had amended the Eugene-Springfield Metropolitan
11 Area General Plan. LUBA remanded the amendment because it
12 determined that the plan amendment required reconsideration of
13 unamended plan provisions (the acknowledged Goal 5 resource
14 inventories). The court held that

15 " * * * LCDC's periodic review [is] the only method for
16 correcting goal non-compliance that results from
17 changes in circumstances after acknowledgment, when
18 the non-compliance is not the product of an amendment
to an acknowledged plan or land use regulation."
Urquhart v. Lane Council of Governments, 80 Or App at
181.

19 Additionally, the court said that notwithstanding that it may
20 have been erroneous for the Goal 5 plan provision to be
21 acknowledged without inclusion of the affected area in the
22 original resource inventories,

23 " * * * LUBA exceeded the permissible scope of its
24 review by remanding on the basis of a defect * * *
25 which is not directly or indirectly attributable to
the plan amendment." 80 Or App at 181-182.

26 Furthermore, In 1000 Friends of Oregon v. Jackson Co., 79 Or

1 App at 98, the court said:

2 "The fact that the [comprehensive plan] amendment may
3 give rise to no goal problems independent those that
4 assertedly preexisted its adoption may be a strong (or
conclusive) reason for rejecting petitioner's goal
arguments on their merits * * *"

5 LCDC has deemed Factors 1 and 2 of Goal 14 inapplicable to
6 certain amendments of the Metro UGB by acknowledging the
7 locational adjustment ordinance. The ordinance explicitly
8 states:

9 "This chapter is intended to incorporate relevant
10 portions of Statewide Goal No. 14, and, by restricting
11 the size and character of UGB adjustments that may be
12 approved under this chapter, this chapter obviates the
13 need to specifically apply the provisions of Goal
14 No. 14 to UGB amendments approved hereunder."
(Emphasis supplied.) MC 3.01.005(b).

15 All of the goal compliance problems asserted in this case with
16 regard to the locational adjustment ordinance are goal
17 compliance problems which existed at the time of
18 acknowledgment. This is a "strong" reason for rejecting
19 petitioners' argument that Goal 14 and Goal 2, Part II, should
20 have been applied to this amendment.

21 In 1000 Friends of Oregon v. LCDC (Curry Co.), 301 Or
22 at 512, the court held that LCDC may not adopt an order
23 acknowledging county plan criteria which purport to authorize
24 adopting a post acknowledgment goal exception without applying
25 the goals. However, 1000 Friends of Oregon v. LCDC
26 (Curry Co.), was an appeal of LCDC's acknowledgment order for
Curry County. This case did not address appeal of a
post-acknowledgment exception adopted by Curry County pursuant

1 to criteria in an acknowledged plan and land use regulation.

2 LCDC acknowledged the locational adjustment ordinance as
3 the chosen mechanism to carry out the goals for small
4 locational adjustments of the Metro UGB. The ordinance does
5 not apply Factors 1 and 2 of Goal 14, it does not require an
6 exception pursuant to Goal 2, Part II and ORS 197.732¹⁰ and
7 does not apply the exact text of Factors 3-7 of Goal 14.

8 However, LCDC specifically concluded in the findings supporting
9 its October 19, 1981 order acknowledging the locational
10 adjustment ordinance that "[t]he Metropolitan Service District
11 complies with Goal 14, Factors 1-7, Goal 3 Conversion Factors
12 1-2 and 4-5, and Goal 2: Part II(C)." Respondent's Brief
13 App-A; Petition for Review App C-5.

14 The time for appealing LCDC's determination of the goal
15 compliance of the locational adjustment ordinance has passed.
16 ORS 197.650, ORS 183.482. If acknowledgment is to have any
17 function it must mean that application of unamended and
18 acknowledged plan or land use regulation criteria continues to
19 "comply with the goals" until periodic review or some other
20 event changes the acknowledged provisions. Urquhart v. Lane
21 Council of Government, supra.

22 The time to make the contentions raised by petitioners is
23 at periodic review of Metro's locational adjustment ordinance.
24 This is in accordance with 1000 Friends of Oregon v. LCDC
25 (Clatsop County), 301 Or 622, 631, 724 P2d 805 (1988) in which
26 the court stated:

1 "When LCDC issues an acknowledgement or continuance
2 order, the deliberative process is over (so far as the
3 portion of the plan found to be in compliance with
4 land use laws concern), subject to possible
5 reconsideration based on errors in the substance of
6 the order and the later action on periodic review of
7 any of the situations described in ORS 197.640(3)
8 exist."

9 Petitioners' contention that LCDC was without authority to
10 acknowledge the locational adjustment ordinance without the
11 ordinance including the goals as criteria for locational
12 adjustments is an issue which could have been raised in an
13 appeal from acknowledgment of the locational adjustment
14 ordinance. Petitioners say LCDC has "de facto" amended Goal 14
15 as it applies to Metro. This is a close question. The
16 interpretation of Goal 14 as applied through the locational
17 adjustment ordinance arguably can be said to:

18 " * * * express a new policy or standard varying in
19 substance from the existing policy and standards of
20 Goal 14, the interpretation constitut[ing] a defacto
21 goal amendment * * * " 1000 Friends of Oregon v. Wasco
22 County Court, 299 Or 344, 369, 703 P2d 207 (1985).

23 LCDC's assumption that a particular goal provision
24 (Factors 1 and 2 of Goal 14) is impossible to apply in advance
25 of an actual application for a land use action is troublesome.
26 Petition for Review App-C. However, it is not our role to
second guess the methodology chosen by LCDC to implement
Goal 14. The locational adjustment ordinance both
substantively and procedurally adopted a complete process for
considering amendments to Metro's UGB of 50 acres or less. In
the acknowledgment of this ordinance, all Goal 2 and Goal 14

1 factors were considered by LCDC. The outcome of LCDC's
2 consideration of Goals 2 and 14 is expressed in the locational
3 adjustment ordinance. Petition for Review App-C 3-7;
4 Respondent's Brief App-A. We believe that LCDC has not amended
5 Goal 14 or Goal 2 as applied to Metro. Rather, we conclude
6 that these goals were considered and applied by Metro and LCDC
7 in the locational adjustment ordinance.

8 In summary, we conclude that, whereas we are authorized to
9 review the challenged UGB amendment for compliance with the
10 goals, our determination on the applicability of Goal 14,
11 Factors 1 and 2, and Goal 2, Part II, is governed by the
12 acknowledged locational adjustment ordinance. Under this
13 ordinance, Metro is not required to address Goal 14, Factors 1
14 and 2, or Goal 2, Part II, but rather to comply with
15 MC Chapter 3.01.

16 The first and second assignments of error are denied.

17 THIRD ASSIGNMENT OF ERROR

18 "Respondent misconstrued the applicable law (i.e.
19 Goals 2 and 14 and ORS 197.732) and made a decision
20 without substantial evidence in the whole record in
21 its approval of a UGB amendment without considering
the 'secondary' effect of rendering other plan and
implementing ordinance provisions affecting land use
inconsistent with the goals."

22 Petitioners contend that Metro did not examine whether this
23 UGB amendment will cause secondary effects on the compliance of
24 the Metro UGB with the goals. Petitioners argue that Metro was
25 required to consider such secondary effects pursuant to
26 1000 Friends v. Jackson Co., supra.

1 Petitioners identify the following "secondary effect":

2 "The 'secondary effect' of allowing 'locational
3 adjustments' absent a showing of need is that
4 theoretically a corresponding amount of land within
5 the UGB will remain vacant in some unidentified
6 location." Petition for Review 17.

7 Intervenor argues that the requirement for consideration of
8 "secondary effects" of amendments to acknowledged comprehensive
9 plans, enunciated by the Court of Appeals in 1000 Friends of
10 Oregon v. Jackson Co., 79 Or App at 98, does not apply to
11 amendments to the Metro UGB because the UGB is not a
12 comprehensive plan.

13 In considering intervenor's motion to dismiss, we
14 determined that the Metro UGB is a comprehensive plan
15 provision. Because the locational adjustment ordinance
16 authorizes amendments to the UGB, such locational adjustments
17 are amendments to a comprehensive plan. Accordingly, we are
18 authorized to review any secondary effects of such UGB
19 amendments on the continued goal compliance of the Metro UGB.
20 Specifically, we must determine whether there are any secondary
21 effects of this amendment on "provisions of the [Metro UGB]
22 that it does not directly change in such a way that they will
23 have an application which is at odds with the goals and which
24 they did not have at the time of acknowledgment."

25 1000 Friends of Oregon v. Jackson Co., supra.

26 On remand, from 1000 Friends of Oregon v. Jackson Co.,
27 supra, LUBA concluded:

28 "There are no facts cited about the subject property

1 or about its relationship with other lands that might
2 be adversely affected. Without an explanation of
3 these factors we are in no position to conclude that
4 (1) secondary effects exist and (2) the secondary
5 effects undermine compliance with Goal 4." 1000
6 Friends of Oregon v. Jackson Co., 15 Or LUBA 306, 310
7 (1987).

8 In this case, petitioners do not argue that inclusion of the
9 subject property will have particular secondary effects on the
10 goal compliance of specific portions of the remainder of the
11 UGB. Rather, petitioners argue generally that failing to
12 identify a "need" under Goal 14, Factors 1 and 2, for the
13 subject property means that "theoretically a corresponding
14 amount of land within the UGB will remain vacant."

15 Petition for Review 17.

16 This is really another way of stating petitioners' argument
17 under the first and second assignments of error that inclusion
18 of land within the UGB without a demonstration of "need" is
19 prohibited. If petitioners are correct in that argument, then
20 the inclusion of the needed land would not necessarily result
21 in other land within the UGB remaining vacant. If petitioners
22 are not correct, then the creation of unneeded land within the
23 UGB is not automatically prohibited. A secondary effect
24 argument must demonstrate how the inclusion of this land within
25 the UGB would have specific effects on other properties already
26 within the UGB (e.g., with regard to drainage or service
ability).

The third assignment of error is denied.

1 FOURTH ASSIGNMENT OF ERROR

2 "Metro cannot change the UGB without a prior or
3 simultaneous comprehensive plan amendment by the
affected city and/or county governments."

4 Petitioners argue that Metro does not have statutory authority

5 "to initiate, approve or order changes in the UGB
6 after the boundary becomes part of the city and county
7 comprehensive plans. Instead, once the UGB becomes a
8 part of the city and county comprehensive plans, any
change in the UGB must take the form of an amendment
9 to the comprehensive plan of the affected city or
10 county." (Emphasis in original.) Petition for
11 Review 20.

12 Petitioners point out that ORS 197.005(3) provides that cities
13 and counties are the agencies to "consider, promote and manage
14 the local aspects of land conservation and development for the
15 best interests of the people within their jurisdictions."

16 Petitioners contend that Metro only has express authority to
17 supersede the authority of cities and counties in the initial
18 establishment of the Metro UGB, not in the adoption of
19 amendments or changes to it. Petitioners say Metro has a role
20 to play in UGB amendments in that it can

21 "say 'no' after all other local governments have said
22 'yes,' but it cannot change the boundary on its own
23 without local comprehensive plans first being amended,
24 at least until periodic review." Petition for
25 Review 21.

26 Petitioners argue we must reverse the challenged ordinance
amending the Metro UGB so that "the City of Lake Oswego and
Clackamas County can consider this land designation change
within the framework of amendments to their comprehensive plans
as required by law." Petition for Review 23.

1 Respondents argue that there is no support for petitioners'
2 argument in any statute. Citing ORS 268.390, intervenor points
3 out that the legislature gave Metro "the primary role in
4 establishing and in coordinating the urban growth boundary, as
5 well as functional plans, on a metropolitan level."
6 Intervenor's Brief 29.

7 Metro is considered the regional "advisory and coordinative
8 body" for the counties within its boundary. ORS 197.190;
9 ORS 268.385. Goal 2 requires the city and county "plans and
10 actions pertaining to land use to be consistent with the * * *
11 [regional plans] adopted under ORS 197.705 through
12 197.795."¹¹ Goal 2 also specifies that during the
13 preparation of regional plans, the regional government is
14 expected to create opportunities for review and comment by
15 affected cities and counties. Further, ORS 268.390(3) gives
16 Metro the authority to "adopt an urban growth boundary * * *."
17 (Emphasis supplied.) Metro is authorized to require cities and
18 counties be to comply with Metro's UGB adopted under
19 ORS 268.390(3).

20 Accordingly, if the authority to adopt a UGB is also the
21 authority to amend the UGB, Metro may require the cities and
22 counties within its boundaries to conform to the amended UGB.
23 Metro would then be required to "create opportunities for
24 review and comment" by affected cities and counties regarding
25 Metro's amended UGB. However, Metro would have the ultimate
26 authority to require such cities and counties to conform to the

1 amended Metro UGB under ORS 268.390(3).

2 "Adopt" is defined as follows:

3 "[t]o accept, appropriate, choose or select. To make
4 one's own (property or act) which was not so
5 originally. To accept, consent to, and put into
6 effective operation; as in the case of a constitution,
7 constitutional amendment, ordinance, court rule or
8 by-law." Black's Law Dictionary, 5th Edition.

9 This definition is contrasted with the definition of
10 "establish":

11 "* * * [t]o settle firmly, to fix unalterably; * * *
12 [t]o make or form * * *.

13 "To enact permanently. To bring about or into
14 existence." Black's Law Dictionary, 5th Edition.

15 We believe it is significant that Metro has the authority
16 to "[a]dopt an urban growth boundary for the district,"
17 ORS 268.390(3), rather than merely to "establish" an urban
18 growth boundary. We note that the legislature has used the
19 terms "subsequently adopted" to describe amendments to city or
20 county comprehensive plans which Metro must review.
21 ORS 268.390(4). We also note that the legislature has
22 specified that Metro's power to "adopt" ordinances is vested in
23 the council.

24 It would not make sense for Metro to have only the
25 authority to establish a UGB which it would never have the
26 power to change, viewing Metro's enabling legislation as a
27 whole. We do not believe the legislature intended that the
28 cities and counties within Metro's boundaries have permanent
29 UGBs. This would be the result, however, if Metro's UGB once

1 "adopted," could not be amended because under ORS 268.390(4),
2 such cities' and counties' comprehensive plans must reflect the
3 Metro UGB.

4 We conclude that Metro's power to adopt a UGB necessarily
5 includes the authority to amend such UGB. We also agree with
6 respondents that the Metro regional government has primary
7 authority with respect to the Metro UGB.

8 Accordingly, we conclude that the Metro's authority to
9 amend its UGB is not dependent on a simultaneous or prior UGB
10 amendment by the affected city and county governments.

11 The fourth assignment of error is denied.

12 FIFTH ASSIGNMENT OF ERROR

13 "Metro misconstrued its own 'locational adjustment'
14 process in allowing a second amendment in the same
15 area, thus allowing the piecemeal inclusion of over 50
acres without compliance with the UGB amendment
process set forth in Goals 14 and 2.

16 A. Addition of More Than 50 Acres to the UGB in Any
17 Single Location

18 Petitioners contend that in 1984 Metro authorized a
19 "locational adjustment" to Metro's UGB of 8.8 acres.
20 Petitioners point out that those 8.8 acres are contiguous with
21 the 43.7 acres sought to be included within the Metro UGB in
22 this case. Petitioners reason that the cumulative result of
23 these separate UGB amendments is to add 52.5 acres to the UGB,
24 a violation of the locational adjustment ordinance.

25 Petitioners cite the following MC provisions:

26 "'Locational adjustment' means an amendment to the
District UGB which includes an addition or deletion of

1 50 acres or less * * *." MC 3.01.010(h).

2 "No petition to add * * * more than fifty acres of
3 land in one location will be accepted under this
chapter * * *." MC 3.01.020(e).

4 "Additions shall not add more than 50 acres of land to
5 the UGB and generally should not add more than 10
acres of vacant land to the UGB. * * *"
MC 3.01.040(d)(3).

6 Petitioners argue that these provisions are intended to
7 protect against the cumulative impacts of adjustments to the
8 Metro UGB and to avoid "speculation" on the fringe of the UGB.
9 Petition for Review 25. Petitioners rely on the following
10 language in Jurgenson v. Union County Court, 42 Or App 505,
11 508, 600 P2d 1241 (1979):

12 "Viewed in isolation, it is likely that no single
13 partitioning has a significant impact on present or
14 future land use; viewed cumulatively, it is likely
15 that all partitionings in a given county have a
significant impact on present or future land use. It
would be an elevation of form over substance not to
look at the cumulative impact."

16
17 Petitioners conclude that MC 3.01.020(e) prohibits Metro from
18 adding more than 50 acres in any one area to the UGB through
19 the locational adjustment process, even as separate UGB
20 amendments.

21 Intervenor agrees that the Metro Code requires assessment
22 of cumulative effects of locational adjustments. However,
23 intervenor argues that this is accomplished through compliance
24 with MC 3.01.080. Intervenor also points out the code includes
25 provisions requiring minimization of locational adjustment.
26 MC 3.01.040(d)(2).

1 MC 3.01.020(e) states that no petitions to add or remove
2 more than 50 acres of land may be accepted under the locational
3 adjustment provisions of MC chapter 3.01. The focus of
4 MC 3.01.020(e) is on what a particular petition seeks to do,
5 not what has gone on before or what will take place in the
6 future. However, the Metro Code does have provisions for
7 monitoring the total amount of locational adjustments made to
8 the UGB. MC 3.01.080 provides as follows:

9 "(a) These procedures are designed for small
10 adjustments to the UGB which generally should
11 not, in total, result in a net addition to or
removal of more than 2,000 acres of urban land
over the next twenty years.

12 "(b) If, at any time after December 31, 1983, the
13 total net change in the size of the urban area
14 resulting from locational adjustments made
15 pursuant to this chapter since its adoption is
16 greater than an average net addition or removal
17 of 100 acres per year, the District shall either
amend this chapter to change the standards under
which petitions may be approved or adopt findings
demonstrating why such ordinance amendment is not
necessary to insure continued compliance with the
Statewide Goals.

18 "(c) The District action provided for in paragraph (b)
19 of this section shall occur before any additional
UGB amendments are approved."

20 Thus, monitoring of the cumulative impact of amendments to
21 the Metro UGB under the locational adjustment procedure is
22 specifically provided for in MC 3.01.080.¹² We do not
23 interpret MC chapter 3.01 to prohibit Metro from approving, as
24 a result of separate petitions, adjoining locational
25 adjustments which, combined, total more than 50 acres.

26 This subassignment of error is denied.

1 B. A Second Amendment that Results Primarily in
2 Service Benefits to a Previous Adjustment Area

3 Petitioners point to the following finding made by Metro in
4 1981 to support its adoption of the locational adjustment
5 ordinance:

6 "Metro finds that where an addition confers a benefit
7 to land already within the UGB, the increase of the
8 efficiency in the development of the land which
9 results can outweigh the cost of leaving land
10 elsewhere within the UGB undeveloped in consequence."
11 (Emphasis in original.) Petition for Review 26.

12 Petitioners contend this finding means that all relevant
13 criteria of the locational adjustment ordinance must measure
14 benefits to land within the original Metro UGB and may not
15 measure benefits to land which has been added to the Metro UGB
16 after acknowledgment through the locational adjustment process.

17 Intervenor argues that "non compliance with a 'rationale'"
18 for adoption of the locational adjustment ordinance, is not a
19 ground for LUBA's reversal or remand of a Metro decision.

20 Intervenor's Brief 33. Further, Metro objects to petitioners'
21 claim because Metro asserts that the claim is an impermissible
22 collateral attack on the locational adjustment ordinance.

23 We agree that a finding in support of Metro's adoption of
24 its locational adjustment ordinance is not an approval
25 criterion for subsequent locational adjustments. Accordingly,
26 this subassignment of error is denied.

The fifth assignment of error is denied.

25 SIXTH ASSIGNMENT OF ERROR

26 "Metro misconstrued the requirements of Goal 14,

1 Factors (4) and (5) in finding that code provision
2 3.01.040 (a) (2) and (a) (3) incorporate such factors
and that there was substantial evidence to support
3 findings of compliance with such factors."

4 A. Incorporation of Goal 14, Factors 4 and 5 in
MC 3.01.040(a)(2) and (3)

5 In this subassignment of error, petitioners contend that
6 the locational adjustment ordinance does not properly
7 incorporate Factors 4 and 5 of Goal 14.

8 Under the first assignment of error, we determined that
9 whether the locational adjustment ordinance properly
10 incorporates the standards of Goal 14 is an issue which could
11 have been raised, but was not, in an appeal of the LCDC order
12 acknowledging the ordinance. Accordingly, petitioners'
13 contentions in this subassignment of error that Goal 14,
14 Factors 4 and 5 are not adequately reflected in the MC
15 locational adjustment approval criteria which purport to mirror
16 those requirements must be taken up with LCDC and Metro at the
17 time of periodic review.

18 This subassignment of error is denied.

19 B. Compliance with MC 3.01.040(a)(2)

20 MC 3.01.040(a)(2) states:

21 "(a) * * * locational adjustments shall be consistent
with the following factors:

22 "* * * * *

23 "(2) Maximum efficiency of land uses.

24 Considerations shall include existing
25 development densities on [sic] the area
included within the amendment, and whether
26 the amendment would facilitate needed
development on adjacent existing urban land."

1 Petitioners claim that Metro's only finding on this criteria is
2 the following:

3 "Since the site presently only has one residence and
4 the Bethlehem Church, with the rest of the site
5 vacant, the site is susceptible to highly efficient
6 development. Furthermore, inclusion of the site may
7 facilitate development of four additional residences
8 on a small portion of the Ridge Pointe subdivision, if
9 that portion really is landlocked, and will facilitate
10 development of a four to five acre area north of
11 Bethlehem Church, between the Church and Overlook
12 Drive." Record 1021.

13 Petitioners argue this finding is improperly limited to
14 "current densities and potential facilitation of development,"
15 and does not address Metro's standard of "whether the
16 facilitated development is 'needed.'" Petition for Review 29.
17 Petitioners argue that the finding of compliance with
18 MC 3.01.040(a)(2) are inadequate and conclusory. Petitioners
19 also argue that the finding is not supported by substantial
20 evidence.

21 Intervenor contends that petitioners did not look at all of
22 the relevant Metro findings. Intervenor's position is that
23 Metro's findings do support compliance with MC 3.01.040(a)(2).
24 Intervenor contends that Metro finding XII (Record 15-18), not
25 attacked by petitioners, provides adequate findings on maximum
26 efficiency of land uses.

27 Finding XII, cited by intervenor, discusses whether the
28 proposed UGB amendment would result in a net improvement in the
29 efficiency of public facilities and services in adjoining areas
30 within the UGB. These findings appear relevant to "maximum

1 efficiency of land uses." Petitioners do not attack
2 finding XII, nor do they explain why it is inadequate to
3 address MC 3.01.040(a)(2). See Vizina v. Douglas County, ___
4 Or LUBA ___ (LUBA No. 88-014, August 26, 1988), slip op 11.
5 Because petitioners have not done so, this subassignment of
6 error is denied.

7 C. Compliance With MC 3.01.040(a)(3)

8 MC 3.01.040(a)(3) provides:

9 "* * * locational adjustments shall be consistent with
10 the following factors:

11 "* * * * *

12 "(3) Environmental, energy, economic and social
13 consequences. Any impact on regional
14 transit corridor development must be
positive and any limitations imposed by the
presence of hazard or resource lands must be
addressed."

15 Petitioners contend that the following is the sole Metro
16 finding adopted to satisfy MC 3.01.040(a)(3):

17 "There would be no impact on regional transit corridor
18 development. There are no significant limitations
19 imposed by the presence of hazard or resource lands."
Record 1021.

20 Petitioners contend that Metro's finding is inadequate because
21 it fails to address the first part of the approval criterion
22 which requires an analysis of the environment, energy, social
23 and economic consequences of the proposal. Petitioners argue
24 that "such a limited consideration [of environmental, energy,
25 economic, and social consequences] is insufficient," citing
26 Halvorson v. Lincoln County, 14 Or LUBA 730, 738-739, aff'd 82

1 Or App 302 (1986). Petition for Review 30.

2 Intervenor contends the "order viewed as a whole supports
3 the ultimate conclusion that the requirements of the code were
4 satisfied. Intervenor's Brief 37. Intervenor also contends
5 that:

6 " * * * what should be considered within the broad
7 scope of the ESEE factors must be determined by the
8 circumstances of a particular amendment. What Metro
9 had to consider, here, were the reasonably relevant
10 environmental, energy, economic and social
11 consequences of a change which implied a somewhat more
12 intensive use of residential and (presently classified
13 rural but not agricultural), so that the use would be
14 consistent with adjacent urban land. Having
15 considered schools, traffic, fire and police
16 protection, water, sewer, and compatibility with
17 nearby agriculture, Metro had covered the subject of
18 reasonably relevant ESEE consequences. Petitioners do
19 not suggest what Metro may have left out."
20 Intervenor's Brief 36-37.

21 Findings need take no particular form. See
22 ORS 197.835(10)(b). Petitioners' position is that a particular
23 finding is inadequate. However, intervenor points to other
24 findings in addition to the finding cited by petitioners, which
25 intervenor contends supports Metro's decision. Petitioners
26 must identify why the findings cited by respondent are
27 inadequate. Vizina v. Douglas County, supra. Petitioners have
28 not done so. Accordingly, this subassignment of error is
29 denied.

30 The sixth assignment of error is denied.

31 SEVENTH ASSIGNMENT OF ERROR

32 "Metro has misconstrued the requirements of code
33 section 3.01.040(d)(3) imposing a higher burden of
34 proof as the site size approaches the 50-acre maximum

1 by not articulating the nature of the burden, but
2 merely finding compliance therewith in a conclusory
3 manner. There is not substantial evidence in the
4 whole record to support its finding of compliance with
5 that standard."

6 Petitioners point out that MC 3.01.040(d)(3) requires a
7 "graduated burden of proof for more drastic land use changes."
8 Petition for Review 32. This code section states in relevant
9 part:

10 "Additions shall not add more than 50 acres of land to
11 the UGB and generally should not add more than 10
12 acres of vacant land to the UGB. The larger the
13 proposed addition, the greater the differences shall
14 be between the suitability of the proposed UGB and the
15 suitability of the existing UGB, based upon
16 consideration of the factors in subsection (a) of this
17 section."

18 Petitioners state that the findings in support of the adoption
19 of Metro's locational adjustment ordinance provide:

20 "[t]he standards for additions must therefore ensure
21 that the chances that any particular piece of land
22 outside the UGB could be approved for inclusion are so
23 small that speculation along the perimeter of the UGB
24 will be held to a minimum." Petition for Review 33.

25 Petitioners point out that because the subject site is
26 43.7 acres, intervenor was required to show that the proposed
27 UGB is "significantly superior to the existing one." Petition
28 for Review 33; MC 3.01.040(2). Petitioners conclude that Metro
29 failed to articulate the nature of the burden of proof and
30 failed to support its decision that the burden was carried with
31 substantial evidence.

32 Intervenor argues that Metro did articulate the burden of
33 proof and that Metro's decision is supported by substantial

1 evidence. Intervenor points out Metro found:

2 "* * * that the proposed UGB is greatly superior to
3 the existing UGB based on a consideration of the
4 factors in MC Section 3.01.040(a). Because of the
5 substantial improvements that would result in traffic,
6 water, sewer, storm sewer, and police facilities and
7 services to adjoining areas currently within the UGB,
8 the UGB as proposed is sufficiently more suitable than
9 the existing UGB, based on consideration of the
10 factors in MC Section 3.01.040(a), that even though
11 its size approaches the 50-acre limit for locational
12 adjustments, we find that it is justified." (Emphasis
13 supplied.) Record 18.

14 Further, intervenor states that Metro's finding that the
15 proposed UGB was "greatly superior" to the existing UGB by
16 "uncontested evidence of 'substantial improvements' * * * in
17 almost every category of service, and is supported by the City
18 of Lake Oswego, the local planning authority." Intervenor's
19 Brief 38.

20 MC 3.01.040(d) identifies levels of proof necessary to
21 establish or to change the Metro UGB. MC 3.01.040(d)(1) states
22 that for amendments of less than two acres the amendment must
23 be shown as not "clearly inconsistent" with the factors of
24 MC 3.01.040(a). Further, MC 3.01.040(d)(2) requires that
25 additions to the UGB in excess of two acres be found "superior
26 to the UGB as presently located," based on the factors in
27 MC 3.01.040(a). Finally, MC 3.01.040(d)(3) states that as
28 additions to the UGB are larger:

29 "The greater the differences shall be between the
30 suitability of the proposed UGB and the suitability of
31 the existing UGB based upon consideration of the
32 factors in (a) of this section."

33 Metro articulated that the challenged amendment was a large

1 amendment (47 acres) under the locational adjustment
2 ordinance. Metro also found that the UGB with this proposed
3 amendment is "greatly superior" to the existing UGB.

4 We agree with Metro that the "level of proof" provision of
5 MC 3.01.040(d)(3) is satisfied, with respect to a 47 acre UGB
6 amendment, by a finding that the amendment will result in a
7 "greatly superior" UGB, based on consideration of the factors
8 in MC 3.01.040(a). Metro's finding of "greatly superior,"
9 however, relies upon its findings that the proposed amendments
10 resulted in "substantial improvements" in all of the service
11 categories listed in MC 3.01.040 (a)(1). Under the eighth
12 assignment of error we conclude that the evidence upon which
13 Metro based its decision that there was a substantial
14 improvement in sewer and transportation services does not
15 support that conclusion. MC 3.01.040(a)(1) requires Metro to
16 find that a locational adjustment will result in a 'net
17 improvement' in service efficiency in several categories. We
18 do not know whether Metro would find that the proposed UGB is
19 "greatly superior" to the existing one based only on the
20 unchallenged substantial improvements in services categories of
21 MC 3.01.040(a) other than sewer and transportation.
22 Accordingly, we agree with petitioner that there is not
23 substantial evidence to support Metro's finding that the
24 proposed UGB amendment is "greatly superior" to the existing
25 UGB.

26 The seventh assignment of error is sustained.

1 EIGHTH ASSIGNMENT OF ERROR

2 "Metro misconstrued the requirements of 3.01.040(a)(1)
3 findings that the amendment will result in improved
4 efficiency of services inside the existing UGB and
three [sic] is not substantial evidence in the whole
record to support such a finding."

5 MC 3.01.040 ("Standards for Petition Approval") provides in
6 relevant part:

7 "(a) * * * locational adjustments shall be consistent
8 with the following factors:

9 "(1) Orderly and economic provision of public
10 facilities and services. A locational
11 adjustment shall result in a net improvement
12 in the efficiency of public facilities and
13 services, including but not limited to,
14 water, sewerage, storm drainage,
transportation, fire protection and schools
in the adjoining areas within the UGB; and
any area to be added must be capable of
being served in an orderly and economical
fashion."

15 Petitioners contend that Metro's findings that the
16 amendment will result in improved efficiency of sewer and,
17 street and traffic services within the existing UGB are not
18 supported by substantial evidence in the whole record.

19 A. Sewer Services

20 Metro's finding that the proposal results in a net
21 improvement in sewer services in the adjoining areas within the
22 UGB states:

23 "An approximately 15 acre area immediately north of
24 petitioner's site, between the site and Overlook
25 Drive, has no sewer service even though it is within
26 the UGB. The area is too low to be served by gravity
flow or by an existing pump station. If petitioner's
site were brought with the UGB, the new pump station
that would be added would serve this presently
unserved area. Moreover, addition of this site to the

1 UGB would improve the efficiency of the gravity flow
2 system serving the Ridge Pointe subdivision by adding
more users to the system." Record 16.

3 Petitioners argue that Metro's finding that a fifteen acre
4 site within the existing UGB could be served by a new pump
5 station added to serve the challenged locational adjustment
6 area is incorrect. Petitioners maintain the evidence in the
7 record demonstrates that the new pump station "may serve four
8 to five undeveloped acres directly north of the site, not 15
9 acres." Petition for Review 34.

10 Petitioners also argue that another site within the UGB,
11 which would be served by the proposed new pump station, is
12 "currently being served by its own pump station which would
13 become a wasted capital investment if replaced by the new
14 station." Id. Petitioners suggest Metro must explain why this
15 alleged "wasted capital investment" is an improvement in the
16 efficiency of sewer service.

17 Intervenor contends the record shows that the area to the
18 north of the subject site, between it and Overlook Drive, has
19 no sewer service, although it is within the UGB. According to
20 intervenor, this area includes several large, undeveloped
21 parcels totalling approximately four acres. There is also
22 about two acres at the end of Ridge Pointe without sewer
23 service. The rest of the area between the subject locational
24 adjustment site and Overlook Drive is presently used as high
25 school athletic fields. Intervenor contends that the proposed
26 amendment would benefit six currently undeveloped acres, other

1 than the athletic fields, with regard to sewer services.
2 Intervenor concedes that the taped testimony on this issue is
3 somewhat ambiguous as to whether the athletic fields themselves
4 can be served with sewers. However, intervenor maintains the
5 fifteen acre estimate for the total amount of unsewered land in
6 adjoining areas within the UGB is accurate. Intervenor argues
7 that whether Metro was correct to include the acreage of the
8 athletic fields in the total which could be served by a new
9 pump station "is of no significance in the context of the
10 entire order." Intervenor's Brief 41.

11 Intervenor also contends that there is no evidence in the
12 record regarding the "amortization" of the existing pump
13 station. Intervenor claims that the burden was on petitioners
14 to provide evidence that the existing pump station would be a
15 "wasted capital investment" due to installation of the new pump
16 station contemplated by the UGB amendment proposal.

17 The applicant for a locational adjustment must show that
18 there is substantial evidence in the whole record that the
19 proposed UGB amendment will result in improved efficiency in
20 the sewer services which exist within the UGB. MCC 3.01.040(a).

21 The main dispute involves whether the high school athletic
22 fields should properly be included in Metro's finding as an
23 "unserved area" which could be serviced by a new pump station
24 associated with the challenged locational adjustment. The
25 hearings officer found that it should not be. Specifically,
26 the hearings officer stated:

1 "it is important to make clear that the large, upside
2 down 'L' shaped piece of property to the left of the
3 area marked 'Unserviced area' on petitioner's Map
4 Belongs to the high school across Overlook. This area
5 is used for tennis courts and playing fields and
6 should not be mistaken for part of the unserviced
7 area. The total area within the existing UGB which
8 could be benefited by applicants pumping station is
9 shown by the cross-hatching on the attached portion of
10 tax map 2 1E 16D(Attachment D). The area to be
11 benefited by the addition of 43.69 acres is 4.18
12 acres. (It may be 4.93 acres as it is unclear whether
13 the 7.75 acre parcel 900 is now part of the school
14 property). At any rate, a benefit to 4 plus acres
15 hardly justifies the inclusion of an additional 43
16 plus acres in the UGB." Record 299.

17 The only evidence cited by intervenor to support Metro's
18 finding that fifteen acres could be served by the proposed
19 amendment is tape recorded testimony which intervenor concedes
20 is ambiguous. Furthermore, intervenor does not identify the
21 name of the witness and does not provide us with a transcript
22 of the relevant portion of the tape.¹³

23 Our rules require minutes of the decision maker's meetings
24 to be submitted as part of the local government record, as well
25 as a verbatim transcript of audio tape recordings, if one has
26 been prepared. OAR 661-10-025(1)(c). Our rules do not require
27 submittal of audio tape recordings of local government
28 proceedings. In this case, intervenor did not object to the
29 accuracy of the minutes of Metro's meetings, and cites no
30 portions of those minutes as supporting Metro's finding that
31 fifteen currently unserviced acres within the UGB could be
32 serviced by the sewer pump station proposed to accompany the
33 challenged locational adjustment. Rather, intervenor points

1 only to a tape recording, without identifying the speaker, and
2 admits the testimony is ambiguous. Under these circumstances,
3 we will not search through the tape recording to find testimony
4 to support intervenor's position.

5 Accordingly, we determine the challenged finding and,
6 therefore, Metro's determination of compliance with
7 MC 3.01.040(a)(1), is not supported by substantial evidence in
8 the record with regard to sewer services.¹⁴

9 This subassignment of error is sustained.

10 B. Streets and Traffic

11 Metro's finding that the proposal results in a net
12 improvement to streets and traffic in the adjoining areas
13 within the UGB states:

14 " * * * Development of the site will permit completion
15 of Meadowlark Lane, St. Clair Drive, and Ridge Pointe
16 Drive, which are currently stubbed at the UGB. It
17 would therefore increase the traffic bearing capacity
and utilization of those existing roadways within the
UGB, and, hence, their efficiency.

18 "Development of the site will facilitate completion
19 of Westview road, which dead-ends southwest of the
20 site. Since Petitioner would dedicate right-of-way
21 for the Westview extension, and construct much of the
22 roadway at its own expense, development of
23 Petitioner's site would make completion of Westview
much easier and less expensive for the City. The
completion of Westview would provide residents of
large residential areas southwest of the site inside
the UGB with direct access to Stafford Road, which
they do not now have, and would reduce travel distance
and time from these residential areas to Stafford Road.

24 "Development of the site would also permit development
25 of four currently landlocked lots in the Ridge Pointe
26 subdivision, within the UGB, by providing them street
access via Westview." Record 16-17.

1 Petitioners challenge the adequacy of these findings to
2 comply with the standards of MC 3.01.040(a)(1) because the
3 findings rely upon the extension of Westview Road. Petitioners
4 also challenge the substantiality of the evidence supporting
5 Metro's decision on streets and traffic.

6 1. Extension of Westview Road

7 Petitioners contend that intervenor is not proposing to
8 extend Westview Road to Stafford Road (Westview extension).
9 Petitioners point out that there is nothing in the record to
10 establish that Westview Road will be extended. Accordingly,
11 petitioners conclude that Metro's finding that this UGB
12 amendment will result in the improved circulation for
13 Lake Oswego and improved emergency access because of the
14 Westview extension is wrong.

15 Intervenor contends that Metro decided only that the
16 amendment "* * * facilitates the prompt completion of Westview
17 at reduced public expense." Intervenor's Brief 47. Intervenor
18 also contends, however, that the Westview extension will be
19 built. Intervenor says this is evidenced in the Lake Oswego
20 Comprehensive Plan (Lake Oswego plan) which states that
21 Westview Road is a collector street, "which will be developed
22 to serve" traffic in the year 2000. Intervenor's Brief 47.

23 There is no dispute that Metro found, in the findings
24 quoted above, that completion of the Westview extension would
25 improve traffic and street conditions in adjoining areas
26 already within the UGB. However, in order to resolve this

1 subassignment of error, we must determine what Metro found to
2 be the relationship between this amendment to the UGB and the
3 completion of the Westview extension. Metro stated:

4 "Development of the site will facilitate completion of
5 Westview road, which dead-ends southwest of the site.
6 Since Petitioner would dedicate right-of-way for the
7 Westview extension, and construct much of the roadway
8 at its own expense, development of Petitioner's site
9 would make completion of Westview much easier and less
10 expensive for the city. * * *" Record 17.

11 Metro also found:

12 "The inclusion of the proposed area facilitates the
13 prompt completion of Westview at reduced public
14 expense * * *." Record 21.

15 Metro's conclusion that this UGB adjustment would result in
16 a substantial improvement to traffic and street service within
17 the UGB is based, at least in part, on a premise that the
18 Westview extension will be built as a result of this
19 amendment. However, we find no nexus between this amendment
20 and building the Westview extension. Metro's findings state
21 only that improvements to Westview Road to be made by
22 intervenor "would make completion of Westview much easier and
23 less expensive for the city," not that such improvements will
24 be made by the city. Record 17. To demonstrate compliance
25 with the "net improvement" in service requirement of
26 MC 3.01.040(a)(1), Metro must find that this amendment will
result in improved efficiency of roads and traffic services
within the UGB. Metro must base its determination on the
improvements of services which will occur as the result of this
amendment. Metro has not done so.

1 2. Evidentiary Support

2 Metro found that transportation facilities and services can
3 be provided to the amended UGB area in an orderly and
4 economical manner. Metro found:

5 "The proposed addition area is adjacent to Stafford
6 road, a major arterial. Three local streets,
7 Meadowlark Lane, St. Clair Drive, and Ridge Pointe
8 Drive, are stubbed into the north side of the
9 property. Westview Drive, a collector street, is
planned in the city's comprehensive plan (see, e.g.,
page 156) to be extended so that it lies along the
southern boundary of the site.

10 "A single family home is assumed to generate 10
11 vehicle trips per day. See, In re Ray, Metro
12 Contested Case No. 84-1. On this basis, the expansion
13 area, with 80 homes constructed on it, could generate
14 a maximum of 800 vehicle trips per day.³ The Lake
15 Oswego Comprehensive Plan (at page 156) establishes a
16 policy that local streets, like Meadowlark and Ridge
17 Pointe, should accommodate 1200 vehicle trips per
18 day. Meadowlark and Ridge Pointe currently have 51
19 and 26 lots along them, respectively. Therefore,
20 these two streets currently have combined unused
capacity of 1,630 trips per day. Thus, if 80 homes
were built on the expansion area and if every vehicle
trip generated used only Ridge Pointe and Meadowlark
to enter and exit, Meadowlark and Ridge Pointe would
still have unused capacity exceeding 830 trips per
day. In other words, Meadowlark and Ridge Pointe have
more than twice the capacity needed to carry all the
traffic entering and leaving the expansion area if
Stafford Road, and the Westview Extension, are not
used at all.

21 "The Lake Oswego comprehensive plan contains
22 projections of year 2000 traffic volumes on all major
23 city streets, and of the street improvements necessary
24 to enable major streets to accommodate those volumes.
25 The year 2000 traffic projections were based upon
26 assumptions that the 44-acre site under review herein,
the Ray UGB amendment, and a far greater area would
develop to urban densities and contribute traffic to
this area by the year 2000. Exhibit 60, Appendix I,
page 8 contains a map showing the areas the city, in
enacting the comprehensive plan, assumed would
urbanize by the year 2000. Large areas that the city

1 planners thought would urbanize, including
2 petitioner's site and the Ray parcel, subsequently
3 were excluded from the UGB. In the vicinity of the
4 subject property, most of traffic analysis zones 34
5 and 35 (are now zoned for 5-acre development) and 40
6 (now zoned for Exclusive Farm Use (20-acre minimum)),
7 was not included in the UGB. Zones 34, 35, and 40
8 would, at full development contribute some 7,178
9 vehicle trips per day over traffic volumes surveyed in
10 1976. See Exhibit 60, p. 8. The Ray amendment and
11 this one, which represent only a small fraction of the
12 area of zones 34, 35, and 40, would add a maximum of
13 1310 trips per day. Thus, a substantial portion of
14 the remaining 5868 trips that the city planners
15 projected for year 2000 will not occur, unless the
16 remainder of zones 34, 35 and 40 are brought into the
17 UGB in the future.

18 "Page 152 of the Lake Oswego Comprehensive Plan
19 contains a map identifying improvements that the city
20 plans to make to all the city's major streets to
21 enable them to accommodate predicted year 2000 traffic
22 loads. In this map, left turn lanes are shown as
23 being added to Stafford Road, and McVey is shown to
24 increase in width from its current two lanes to four
25 with a left turn lane. The city planned these
26 improvements to accommodate urban growth at
27 petitioner's property and the other area discussed
28 above.

29 "There is no countervailing evidence that the City of
30 Lake Oswego will not carry out its plans to improve
31 Stafford and McVey as the comprehensive plan states it
32 will. This Council presumes these plans will be
33 carried out.

34 "For these reasons, the Council finds that the streets
35 serving petitioner's site will be capable of
36 accommodating the traffic to be generated from urban
37 development of petitioner's site in an orderly and
38 economical fashion." (Footnote omitted.)
39 Record 10-13.

40 Petitioners argue that Metro's finding that the efficiency
41 of street and traffic services will improve due to this UGB
42 amendment are based upon unreliable information. Petitioners
43 maintain that Metro relied upon the "Carl H. Buttke Initial

1 Report" (Initial Report), which is more than 10 years old, to
2 support its finding that transportation facilities and services
3 can be provided in an orderly and economic manner."

4 Record 10-11. Additionally, petitioners claim that the author
5 of this report recommended that the city update it in
6 "approximately 5 years" from the date of its submission.

7 Petition for Review 35. The Initial Report states, in relevant
8 part:

9 "It is recommended that the City reassess the Major
10 Streets Plan in approximately 5 years to determine if
11 changes are necessary as a result of land use
12 developments and changes in transportation patterns
13 and uses other than what were assumed in these
14 analyses." Record 829.

15 Petitioners maintain that there is no evidence in the
16 record concerning the capacity of the streets Metro determined
17 to have excess capacity to accommodate the proposed UGB
18 amendment. Petitioners contend that Metro relied instead upon
19 a Lake Oswego plan provision which provides that the subject
20 streets should have a capacity of 1200 trips per day.

21 Petitioners argue that the Lake Oswego plan estimate of street
22 capacity is based upon the Buttke reports, which petitioners
23 claim are outdated. Petitioners point out that the Lake Oswego
24 plan states that

25 "* * * the traffic projections and control maps should
26 be monitored continuously and amended where changes in
27 land use, traffic volumes or street conditions
28 warrant." Petition for Review 36.

29 Petitioners say that from the assumption of capacity the

1 streets should have, Metro calculated the "excess capacity"
2 that should exist. Further, petitioners contend that it was
3 based on this assumed "excess capacity" that Metro found the
4 proposed UGB amendment area could be efficiently served by
5 existing streets.

6 Finally, petitioners state that Metro cannot rely upon the
7 letter from the Lake Oswego city manager stating that
8 transportation facilities could be provided to the site in an
9 orderly and economical fashion. Record 925. Petitioners
10 contend that the city manager's letter also relies
11 unjustifiably upon the Buttke reports. Petition for Review 37.

12 Intervenor asserts that "* * * petitioners cite no finding
13 which is contradicted by evidence more persuasive than the
14 city's traffic engineering study." Intervenor's Brief 43.
15 Intervenor argues that this study (the Buttke Reports) is part
16 of the acknowledged Lake Oswego plan. Intervenor contends
17 Metro was entitled to rely on the acknowledged Lake Oswego plan
18 and the traffic study incorporated into it.

19 Intervenor further argues that it is not important to this
20 assignment of error that Metro found that the "planned capacity
21 of the neighborhood streets could serve the demand from the
22 adjustment area." Intervenor's Brief 45. According to
23 intervenor, Metro alternatively found that "the area was served
24 by collector and arterial streets, including Stafford Road,
25 which also have a design capacity sufficient to serve the area
26 in question * * *." Id.

1 Intervenor also contends that the city manager's testimony
2 do not depend upon the Buttke reports for its validity.
3 Rather, intervenor asserts that the city manager's testimony
4 "* * *" in a simple and straightforward fashion adds the
5 observation of the Lake Oswego City Manager that the locational
6 adjustment would have a variety of beneficial effects on
7 transportation, emergency and police services." Intervenor's
8 Brief 48.

9 Even if it is true that the Buttke reports are part of the
10 acknowledged Lake Oswego plan, this does not avoid the effect
11 of the recommendation of those reports for a "reassessment of
12 the Major Streets Plan" in approximately 5 years. We review
13 the Buttke reports, on which all parties agree Metro's findings
14 regarding transportation facilities rely, to determine whether
15 they constitute substantial evidence permitting a reasonable
16 person to reach the conclusion Metro reached. Younger v. City
17 of Portland, 305 Or 346, 360, 752 P2d 262 (1988).

18 We believe a reasonable person could rely on the Buttke
19 reports if it was shown that no significant changes have
20 occurred to trigger the Buttke recommendation for update of the
21 city's streets plan. The Buttke reports are 10 years old and 5
22 years past the recommended time for update. Metro must explain
23 why it may rely upon the Buttke reports to provide traffic
24 projections and capacities of "neighborhood," collector and
25 arterial streets, when the Initial Report specifically provides
26 that its accuracy depends upon update of the assumptions

1 made.¹⁵ Metro has not provided any explanation as to whether
2 these reports are still accurate. Furthermore, both the
3 Lake Oswego plan and the testimony of the city manager rely
4 upon the Buttke reports. Record 926, 927.

5 Accordingly, we agree with petitioners that without an
6 explanation from Metro of why the Buttke reports and the
7 traffic projections in the Lake Oswego plan continue to be
8 valid, notwithstanding the admonition in both that they should
9 be updated, these reports and the other documents which rely
10 upon them cannot constitute substantial evidence in support of
11 Metro's determination that the efficiency of street and traffic
12 services will improve due to this UGB amendment.

13 Metro's determination of compliance with MC 3.01.040(a)(1)
14 with regard to traffic and streets improperly relies on
15 extension of Westview Road, and is not supported by substantial
16 evidence in the whole record.

17 This subassignment of error is sustained.

18 The eighth assignment of error is sustained.

19 Metro's decision is remanded.
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FOOTNOTES

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The Metro UGB was initially acknowledged by the Land Conservation and Development Commission (LCDC) pursuant to ORS 197.251 on January 16, 1980. That acknowledgment order was remanded by the Marion County Circuit Court. 1000 Friends of Oregon v. LCDC, Marion County Cir. Ct. No. 118213 (1985). On February 6, 1986, LCDC adopted a revised order acknowledging the Metro UGB. LCDC Compliance Acknowledgment Order 86-ACK-002 (February 6, 1986).

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OAR 661-10-010(3) provides:

"'Final decision': A decision becomes final when it is reduced to writing and bears the necessary signatures of the decisionmaker(s), unless a local rule or ordinance specifies that the decision becomes final at a later time, in which case the decision is considered final as provided in the local rule or ordinance."

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ORS 215.416(6) has been recodified as ORS 215.416(10).

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With regard to the Goal 2 definition of "plans," we note that Metro is neither a city, county, state agency, federal agency nor special district.

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5

Metro's argument that ORS 197.015(1) provides LCDC with authority to acknowledge "plans," in addition to comprehensive plans and land use regulations, is not well taken. ORS 197.015(1) defines acknowledgment as follows:

"'Acknowledgment' means a commission order that certifies a comprehensive plan and land use regulations, land use regulation or plan or regulation amendment complies with goals."

24
25
26
This statute states that (1) a comprehensive plan and land use regulations, (2) a land use regulation, or (3) amendments to comprehensive plans or land use regulations may be certified by LCDC as "acknowledged." Its reference to "plan or regulation

1 amendments" does not, as Metro suggests, refer to "plans" as
2 defined in Goal 2. Rather, it is clear that the abbreviated
3 terms "plan" and "regulation" refer back to the terms
4 "comprehensive plan" and "land use regulation" employed earlier
5 in the sentence.

6

7 We also conclude that the locational adjustment ordinance
8 is a land use regulation designed to implement the Metro UGB.
9 The locational adjustment ordinance specifically states that
10 the ordinance was submitted to LCDC for acknowledgment as
11 "* * * an implementing measure to the district UGB."
12 MC 3.01.985. Further, the locational adjustment ordinance
13 implements the Metro UGB, as its purpose is to maintain and
14 attain precision for the UGB.

15

16 Legislative removal of Circuit Court jurisdiction occurred
17 after LCDC issued the acknowledgment order under review in
18 1000 Friends of Oregon v. LCDC and Metro.

19

20 We note the October 19, 1981 acknowledgment of Metro's
21 locational adjustment ordinance was not challenged, and was not
22 before the Circuit Court in this case.

23

24 ORS 197.835(4) provides:

25 "* * * the board shall reverse or remand a decision to
26 adopt an amendment to an acknowledged comprehensive
27 plan or land use regulation or a new land use
28 regulation if the amendment or new regulation does not
29 comply with the goals. The board shall find an
30 amendment or a new land use regulation in compliance
31 with the goals, if:

32 "* * * * *

33 "(b) The amendment to an acknowledged comprehensive
34 plan or land use regulation or a new land use
35 regulation, on the whole, comply with the
36 purposes of the goals and any failure to meet
37 individual goal requirements technical or minor
38 in nature."

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An acknowledgment of compliance with the goals does not necessarily establish compliance of a plan provision or regulation with statutory requirements. Newcomer v. Clackamas County, 92 Or App 174, 186, n 5, 758 P2d 450, modified, 94 Or App 33 (1988); Greenwood V. Polk County, 11 Or LUBA 230, 236 (1984).

However, we believe that in this case, the applicability of ORS 197.732 is a goal issue. ORS 197.732 is a codification of the Goal 2, Part II exception process (required for changes to UGBs by Goal 14). While ORS 197.732 did not exist at the time of LCDC's acknowledgment of Metro's locational adjustment ordinance, the requirements of the statute reflect goal requirements in effect at the time of acknowledgment.

11

ORS 197.705 through ORS 197.795 were repealed in 1977. Or Laws Chapter 665 Section 24. This legislation provided the statutory framework for CRAG, Metro's predecessor. However, the statutory framework for Metro's authority was codified in 1977 in the same chapter as the chapter repealing the CRAG legislation. Goal 2 was never amended to reflect this change.

12

Furthermore, in Jurgenson v. Union County Court, supra, cited by petitioners, the question was whether the statewide planning goals applied to a partition of land. The court determined whether a partition was a planning and zoning responsibility under then ORS 197.175(1). The standard for determining whether a particular land use action was a planning and zoning responsibility was whether the planning activity would have a "significant impact on present or future land uses * * *." Peterson v. Klamath Falls, 279 Or 249, 566 P2d 1193 (1977). In that context, the Jurgenson court held that a single partition, viewed cumulatively, could have a significant impact on present or future land uses and, accordingly, is a planning and zoning responsibility which must be carried out in conformity with the statewide planning goals. Jurgenson does not require that the cumulative impacts of any particular proposed land use be a consideration in approving that proposed use.

13

Intervenor could have transcribed the relevant portions of the tape for review. See Hammock and Associates v. Washington County, ___ Or LUBA ___, (LUBA No. 87-037, Sept. 11, 1987),

1 slip op 33-34, n 2, aff'd 89 Or App 407 (1987).

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4 Because of our disposition of this assignment of error we
5 need not resolve where the pump station will serve "four to
6 five acres," as the petitioner says, or five to six acres, as
7 the intervenor says.

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10 We note that the findings concerning capacity of collector
11 and arterial streets, including Stafford Road, to serve the
12 area in question, which intervenor contends are an alternative
13 basis for Metro's conclusion, also rely upon the Buttke
14 reports.