



Opinion by Holstun.

NATURE OF THE DECISION

Petitioners appeal a Marion County Board of Commissioners decision denying an application to amend the comprehensive plan designation for a 50 acre parcel and to include the parcel within the City of Hubbard Urban Growth Boundary (UGB).

FACTS

The subject 50 acre parcel is located east of, and adjacent to, the City of Hubbard (city). The property adjoins both the city limits and the UGB, is designated Primary Agriculture by the county comprehensive plan and is zoned Exclusive Farm Use by the county zoning ordinance.<sup>1</sup> The property includes SCS Class II and III soils and is currently in farm use. Farm uses adjoin the property on three sides.

Petitioner seeks to develop a retirement housing community with individual living units, assisted care units and nursing facilities. The retirement housing community would be developed in phases over 10 years and ultimately would include a total population of 500 persons. At present, the entire city of Hubbard includes approximately 2000 persons.

Petitioner submitted to the city his application to annex the property and amend the Hubbard Comprehensive Plan to include the property within the UGB and to designate the property residential. Following hearings before the city planning

---

<sup>1</sup>Where the property adjoins the city limits, the UGB and city limits are coterminous.

1 commission and city council, the city council adopted a  
2 resolution of intent to approve the application. Section 1 of  
3 the resolution provides as follows:

4 "The -City Council of the City of Hubbard hereby  
5 declares its intention to approve the proposed  
6 amendment of the Hubbard Comprehensive Plan and  
7 annexation of the property to the City of Hubbard, and  
8 hereby asks the Marion County Board of Commissioners  
to consider and act on the application and refer its  
decision back to the City for final action."  
(Emphasis in original.) Record 244.

9 After a public hearing on the application, the board of  
10 commissioners adopted an order denying the application based on  
11 its determination that the application failed to meet the  
12 standards for amending the UGB. This appeal followed.

13 FIRST ASSIGNMENT OF ERROR

14 "The Marion County Board of Commissioners exceeded its  
15 jurisdiction in purporting to deny Petitioner's  
16 application, since there was no application made to  
17 amend the Marion County Comprehensive Plan, and the  
Marion County Board of Commissioners had no other  
basis for issuing an order on the merits of this  
matter \* \* \*."

18 SECOND ASSIGNMENT OF ERROR

19 "The Marion County Board of Commissioners failed to  
20 follow the procedures applicable to the matter before  
21 it in a manner that prejudiced the substantial rights  
22 of the petitioner, in purporting to deny Petitioner's  
23 application, since there was no application made to  
24 amend the Marion County Comprehensive Plan, the Marion  
25 County Board of Commissioners had no other basis for  
issuing an order purporting to dispose of the merits  
of this matter, and the Marion County Board of  
Commissioners failed to refer its findings to the City  
Council for the City of Hubbard for final action, as  
the matter was submitted to the Board of Commissioners  
under the terms of the resolution by the City of  
Hubbard \* \* \*."

26 Petitioner argues that in adopting the resolution of intent

1 and forwarding the application to the county, the city was  
2 simply performing its coordination obligations under the  
3 Statewide Planning Goals and Urban Growth Boundary and Policy  
4 Agreement between the city and county.<sup>2</sup> Petitioner concedes the  
5 city is required to coordinate planning decisions concerning the  
6 UGB and the unincorporated area within the UGB.<sup>3</sup> However,  
7 petitioner argues the county incorrectly assumed authority to  
8 rule on the merits of the request when it purported to deny the  
9 application.

10 Petitioner points out that under ORS 215.130(2)(a) the  
11 county plan and zoning designations for the property would  
12 continue to apply after the property was annexed until the city  
13 provided otherwise.<sup>4</sup> We understand petitioner to argue the  
14 county should have returned the application to the city with the  
15 county's recommendation rather than take final action to deny  
16

---

17  
18 <sup>2</sup>The city and county entered an "Urban Growth Boundary and Policy  
19 Agreement" (UGBPA) in 1978. A copy of that agreement is not included in  
the record, but is attached to respondent's brief, and we take official  
notice of it. We discuss the UGBPA further below.

20 <sup>3</sup>The UGBPA uses the term "urban growth area." The "urban growth area"  
21 includes the area inside the UGB and outside the city limits. UGBPA 3.

22 <sup>4</sup>ORS 215.130(2) provides in part:

23 "An ordinance designed to carry out a county comprehensive plan  
and a county comprehensive plan shall apply to:

24 "(a) The area within the county also within the boundaries of  
25 city as a result of extending the boundaries of the city  
or creating a new city unless, or until the city has by  
ordinance or other provision provided otherwise \* \* \*

26 "\* \* \* \* \*"

1 the application. Petitioner points out the application was  
2 submitted to the city, not the county, and since no application  
3 for county approval was submitted, the county's action was  
4 erroneous.

5 A. The County's Decision

6 The property at issue in this appeal is located outside the  
7 city limits and, therefore, is subject to the county's land use  
8 decision making jurisdiction.<sup>5</sup> In this case, however,  
9 petitioner's application was submitted to the city, not the  
10 county.<sup>6</sup> Although the city's resolution of intent to approve  
11 the application does not explicitly say so, we interpret that  
12 resolution and the application submitted by petitioner to  
13 constitute a city initiated amendment to the UGB, governed by  
14 the UGBPA provisions discussed below.

15 The scope of the county's decision is not clear. The order  
16 concludes that the "applicant has not demonstrated that the  
17 standards and criteria for amendment of the Marion County  
18 Comprehensive Plan and the City of Hubbard Urban Growth Boundary  
19 have been met." Record 244. However, the explanation for its  
20 decision given by the county elsewhere in its order makes it

---

21  
22 <sup>5</sup>UGBPA § II(1) provides:

23 "The County shall retain responsibility for land use decisions and  
24 actions affecting the urban growth area. The urban growth area has been  
25 identified by the City as urbanizable and is considered to be available  
over time, for urban expansion." (Emphasis added.)

26 <sup>6</sup>We assume the application was submitted to the city because the  
application included a request for annexation by the city.

1 clear that the county determined only that the applicant failed  
2 to justify the requested UGB amendment and denied the  
3 application on that basis.<sup>7</sup>

4 B. City/County Urban Area Agreement

5 In December 1978, the city and county entered an "Urban  
6 Growth Boundary and Policy Agreement (UGBPA), see n 2, supra.  
7 The UGBPA specifically addresses UGB amendments and other plan  
8 amendments affecting the urban growth area. The UGBPA includes  
9 separate sections concerning (1) "City Initiated Amendments to  
10 the City Comprehensive Plan," (2) "City Initiated Amendments to  
11 the Urban Growth Boundary," (3) "County Initiated Amendments to  
12 County Comprehensive Plan Within the Urban Growth Area," and (4)  
13 "County Initiated Amendments to the Urban Growth Boundary."

14 City initiated amendments to the urban growth boundary are  
15 permitted as follows:

16 "A. City shall forward any proposed boundary  
17 amendment to the County along with all exhibits  
18 and findings and a written request for County to  
19 consider the boundary change and adopt it.

18 "B. Thereafter, County at its option, may adopt the  
19 boundary amendment, or may convene a joint  
20 meeting with the City to further consider the  
21 change.

21 "C. If mutual agreement is reached as to the  
22 proposed boundary amendment, City and County  
23 shall formally amend their respective  
24 Comprehensive Plans, by ordinance, to reflect

---

25 <sup>7</sup>Presumably because the county determined the requested UGB amendment  
26 had not been justified, the county did not consider the requested plan  
designation change from agricultural to residential. Neither did the  
county express an opinion on or address the request for annexation.

1 the agreed upon change."<sup>8</sup> UGBPA § III(2).

2 UGBPA § III(6) provides as follows:

3 "In the event that no mutual agreement can be achieved  
4 in the course of amendments \* \* \*, each party retains  
5 its right to appeal to the LCDC, or seek a judicial  
6 remedy."

7 The above quoted UGBPA provisions establish a procedure  
8 whereby either the city or county may initiate a UGB amendment.  
9 The initiating jurisdiction forwards the proposed UGB amendment  
10 to the other jurisdiction with a request that it adopt the  
11 amendment. Under UGBPA § III(2) and (4), the jurisdiction  
12 receiving a request to adopt a proposed UGB amendment initiated  
13 by the other jurisdiction may (1) adopt the amendment, or (2)  
14 convene a joint meeting to consider the change.

15 UGBPA § III(2) and (4) make it clear that the UGB agreed  
16 upon by the city and county in 1978 can only be amended if both  
17 the city and county agree that the UGB should be amended.  
18 Neither UGBPA § III(2) nor UGBPA § III(4) provides a procedure  
19 to be followed in the event the non-initiating party objects to

20 \_\_\_\_\_  
21 <sup>8</sup>UGBPA § III(4) similarly provides for county initiated UGB amendments  
22 in the urban area as follows:

23 "A. County shall forward proposed boundary amendment to City  
24 along with all exhibits and findings thereon, and a  
25 written request for City to consider the boundary change  
26 and adopt it.

"B. Thereafter, City at its option, may adopt the boundary  
amendment, or may request a joint meeting with the County  
to further consider the change.

"C. When mutual agreement is reached as to the proposed  
boundary amendment, City and County shall formally amend  
their respective Comprehensive Plans, by ordinance, to  
reflect the agreed upon change."

1 the proposed UGB amendment.<sup>9</sup> See DLCD v. Clatsop County, 14 Or  
2 LUBA 358 (1986).

3 Although UGBPA § III(2) and (4) do not explicitly provide a  
4 third option for the non-initiating jurisdiction to deny the  
5 proposed UGB amendment, we believe that option is implicit in  
6 those sections when they are read in conjunction with UGBPA  
7 § III(6), quoted supra. UGBPA § III(6) makes it clear that the  
8 parties did not intend that the objection of one party prevent  
9 the other party from obtaining review of the merits of the  
10 proposal.<sup>10</sup> The only way to obtain review by this Board is for  
11 a final decision to be adopted by one or both of the  
12 jurisdictions concerning the proposed UGB amendment. As neither  
13 UGBPA § III(2) nor UGBPA § III(4) permits the initiating  
14

---

15 <sup>9</sup>Similarly, UGBPA § III(1), which governs city initiated amendments to  
16 the city comprehensive plan provisions applicable to the urban area,  
17 appears to provide that the county must agree to such amendments and  
18 provides "[u]pon concurrence by County, both City and County shall formally  
19 amend their respective Comprehensive Plans, by ordinance, to reflect the  
20 agreed upon change."

21 In contrast, UGBPA § III(3), which governs county initiated amendments  
22 to the county comprehensive plan provisions applicable to the urban area,  
23 appears only to require the county to consider city comments concerning  
24 such plan amendments. ("\* \* \* County shall consider the City's comments.")  
25 See also UGBPA § II (1), quoted supra at n 5 ("\* \* \* County shall retain  
26 responsibility for land use decisions and actions affecting the urban  
27 growth area."). These UGBPA provisions suggest the county may amend its  
28 plan (provided the plan amendment does not involve a UGB amendment),  
29 notwithstanding the city's objection. Of course, as noted below, such  
30 action by the county would be subject to appeal by the city to this Board.

31 <sup>10</sup>LUBA was created in 1979, after the UGBPA was agreed to by the  
32 parties. While UGBPA § III(6) refers only to review by LCDC or a judicial  
33 remedy, we construe the agreement also to reserve the right to seek review  
34 by LUBA because our jurisdiction replaces, in part, the jurisdiction  
35 exercised by circuit courts and LCDC in 1978, when the agreement was  
36 entered into.

Page

1 jurisdiction to approve the UGB amendment over the objection of  
2 the other party, a decision to deny the application under UGBPA  
3 § III(6) is the only way a decision reviewable by this Board  
4 could be made where the non-initiating party objects.

5 C. Conclusion

6 We conclude that under the UGBPA, where the non-initiating  
7 jurisdiction concludes a UGB amendment initiated by the other  
8 jurisdiction does not comply with the standards applicable to  
9 UGB amendments, the non-initiating jurisdiction may adopt a  
10 decision denying the requested UGB amendment. In such  
11 circumstances, UGBPA § III(6) provides that the initiating  
12 jurisdiction may challenge the denial before this Board.

13 The county properly followed the procedures applicable to  
14 city initiated UGB amendments governed by the UGBPA and did not  
15 exceed its jurisdiction. Accordingly, petitioner's first and  
16 second assignments of error are denied.

17 SIXTH ASSIGNMENT OF ERROR

18 "Marion County's conclusion that 'the addition of 500  
19 \* \* \* residents in this area would not be compatible  
20 with the established agricultural uses in the area' is  
not supported by substantial evidence in the whole  
record.\* \* \*"

21 Statewide Planning Goal 14 (Urbanization) factor 7 requires  
22 that a UGB amendment be based upon consideration of the  
23 "[c]ompatibility of the proposed urban uses with nearby  
24 agricultural activities." In addition, in amending a UGB, the  
25 procedures and requirements for goal exceptions must be met,  
26 including Goal 2, Part II (c)(4), which requires that:

1 "The proposed uses are compatible with other adjacent  
2 uses or will be so rendered through measures designed  
to reduce adverse impacts."

3 See also ORS 197.732(1)(c)(D); OAR 660-04-010(1)(c)(B)(iv).

4 Petitioner argues the county's findings that the proposed  
5 retirement community would not be compatible with existing  
6 adjoining agricultural uses are not supported by substantial  
7 evidence. Petitioner contends the county improperly speculated  
8 "that the farm uses would interfere with aesthetic enjoyment of  
9 the residential use of the annexed property." (Emphasis in  
10 original.) Petition for Review 17. Petitioner further contends  
11 there is no evidence that there would be functional interference  
12 with adjoining agricultural uses.

13 Petitioner goes on to point out the proposed retirement  
14 community is intended to provide a rural setting, and many of  
15 the retirees are expected to be retired farmers. Petitioner  
16 also notes the proposal's design includes buffers to minimize  
17 impacts on adjoining agricultural operations. Petitioner  
18 finally argues the proposal will have no more of an impact on  
19 adjoining agricultural uses than is the case in other areas of  
20 the city where residential development at the periphery of the  
21 urban area adjoins agricultural uses.

22 Respondent concedes that the record includes a large number  
23 of letters, some of which claim the residential community could  
24 coexist compatibly with existing adjoining agricultural  
25 activities. Record 137-207. However, respondent contends those  
26 letters are not sufficient to demonstrate as a matter of law

Page

1 that "[a] multi-phased, multi-care residential facility for 500  
2 persons is \* \* \* compatible with commercial farming \* \* \*."

3 Respondent's Brief 14. Respondent points out

4 "The subject property is currently in farm production.  
5 It is surrounded on three sides by commercial farm  
6 operations. This proposal would increase the  
7 population of the City of Hubbard by 25%. All of the  
8 increase would be absorbed on the 50 acre subject  
9 property. The increase would not be spread throughout  
10 the community. Services necessary to serve the  
11 residents would relocate, resulting in a major  
12 commercial shift toward this area. \* \* \*

13 "\* \* \* There is no reason to believe that the noise,  
14 dust, and odors associated with spraying, harvesting  
15 and cultivation early in the morning and late at night  
16 are compatible with retirement living. Given the  
17 substantial evidence in the record and the relevant  
18 standards and criteria, the Marion County Board of  
19 Commissioners rightly decided that the addition of 500  
20 residents in this area would not be compatible with  
21 the established agricultural use in the area."  
22 (Emphasis in original.) Respondent's Brief 14-15.

23 In McCoy v. Marion County, \_\_\_ Or LUBA \_\_\_ (LUBA No.  
24 87-063, December 15, 1987), slip op 3-4, we explained the burden  
25 a petitioner must overcome in challenging, on evidentiary  
26 grounds, a local government's finding of noncompliance with a  
required approval criterion.

19 "\* \* \* In reviewing a local government's decision to  
20 deny a requested approval or permit, we perform our  
21 review function by examining the decision to determine  
22 whether there are findings supporting a conclusion  
23 that any one of the required approval criteria is not  
24 met. Portland City Temple v. Clackamas County, 11 Or  
25 LUBA 70, 78 (1984); Weyerhaeuser v. Lane County, 7 Or  
26 LUBA 42, 46 (1982). If there are adequate findings  
regarding noncompliance with a required approval  
criterion and those findings are supported by  
substantial evidence in the record, the denial will be  
affirmed. In such cases affirmance is required even  
if the local government's findings on other applicable  
criteria are erroneous or unsupported by substantial

1 evidence in the record. This is an extremely heavy  
burden for petitioners to overcome.

2 "As we explained in Weyerhaeuser, supra at 46, the  
3 petitioner challenging a denial generally must show  
4 the denial was erroneous as a matter of law.  
5 Therefore, it is not sufficient for petitioners to  
6 argue there is evidence supporting their position on  
all applicable criteria. Rather, the 'evidence must  
7 be such that a reasonable trier of fact could only say  
the [petitioner's] evidence should be believed.' Id.  
Finally, in Weyerhaeuser we also noted that this heavy  
burden increases as the applicable standards become  
more subjective. \* \* \* "

8 The county found there was evidence in the record that the  
9 proposal would be compatible with adjoining farms use and there  
10 was also evidence in the record that the retirement community  
11 would not be compatible with "the noise and hazards created by  
12 commercial farming" on adjacent properties. Record 7.

13 The record includes a letter from a farmer in the area in  
14 which he argues farming activities common in the area would not  
15 be compatible with a retirement community of the scale proposed.  
16 Record 221. There are other letters to the same effect. E.g.,  
17 Record 291, 292. The opinions expressed in these letters are  
18 not overwhelming evidence that the proposal would be  
19 incompatible with adjoining agricultural uses. However, whether  
20 the proposed retirement community would be compatible with  
21 existing adjoining agricultural uses is a subjective  
22 determination. Recognizing that it is the applicant's burden to  
23 establish compatibility rather than the county's obligation to  
24 establish incompatibility, we cannot say the applicant carried  
25 its burden as a matter of law. Although the site plan provides  
26 buffer areas and there is a greater number of letters expressing

Page

1 the opinion that the proposal would be compatible with existing  
2 agricultural uses in the area, the evidence cited by petitioner  
3 falls substantially short of demonstrating compatibility as a  
4 matter of law. In these circumstances, the choice of which  
5 evidence to believe properly lies with the county, not LUBA.  
6 See Jurgenson v. Union County Court, 42 Or App 505, 510, 600 P2d  
7 1241 (1979); McCoy v. Marion County, *supra*; Chemeketa Industries  
8 Corp. v. City of Salem, 14 Or LUBA 159, 163 (1985).

9 The sixth assignment of error is denied.

10 Because we sustain the county's determination that one of  
11 the applicable approval criteria for the requested UGB amendment  
12 is not satisfied, no purpose would be served by reviewing the  
13 petitioner's other allegations of error.

14 The county's decision is affirmed.