BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

Tillamook Citizens for Responsible Development, Petitioner, vs. City of Tillamook, Respondent.	LUBA No. 80-041 FINAL OPINION AND ORDER

Appeal from City of Tillamook.

Elizabeth S. Merrill, Tillamook, filed a petition for review and argued the cause for Petitioner Tillamook Citizens for Responsible Development.

Lois Albright, Pacific City, filed a brief and argued the cause for Petitioner-Intervenor Tillamook Retail Merchants for Responsible Development.

Diane W. Spies, Portland, filed a brief and argued the cause for Respondent Harrington.

Douglas E. Kaufman, Tillamook, argued the cause for Respondent City of Tillamook.

Mark Greenfield, Portland, filed a brief and argued the cause for Amicus 1000 Friends of Oregon and Tillamook Soil and Water Conservation District.

Highway 101 North Sanitary District made no appearance.

Bagg, Referee; Reynolds, Chief Referee; Cox, Referee; participated in the decision.

Remanded. 9/18/80

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

NOTE: The attached LCDC Determination extensively amends portions of this Final Opinion. Please refer to the attached LCDC Determination for those changes. The LCDC changes control where a conflict is evident with the LUBA Opinion.

BAGG, Referee.

STATEMENT OF THE CASE

This case is about the annexation of a strip of land on either side of Oregon Coast Highway 101 from the present city limits of the City of Tillamook to a mile north of the City of Tillamook. Petitioners and intervenors seek to have the annexation declared invalid on several grounds.

MOTIONS OF THE PARTIES

Early in this proceeding Respondent City of Tillamook filed a motion to dismiss alleging, primarily, failure of Petitioner Tillamook Citizens for Responsible Development to abide by the Land Use Board of Appeals' rules and its enabling law, Oregon Laws 1979, ch 772. That motion was denied by this Board on the 23rd day of May, 1980, but the motion was preserved until the time set for hearing on the merits. It was the Board's order that respondents may:

> "[p]resent evidence of prejudice or actual failure to serve a necessary person under the law or rules of this Board. The motion to dismiss is otherwise denied and the case shall proceed in accordance with the Board's rules." Order on Motion to Dismiss, 23 May, 1980.

It was further ordered that two motions filed by petitioners, a motion to strike certain items from the record furnished by the City of Tillamook and a motion for summary judgment, would be heard at the time of the hearing on the merits.

At the hearing on the merits, the parties decided to rest on the briefs already on file. No further argument was

presented, except that Respondent City of Tillamook wished it made clear that their motion to dismiss was based on jurisdiction and, contrary to the LUBA order, no showing of prejudice or harm was necessary for a ruling in their favor. The motion to dismiss is denied for the reasons stated in the order of May 23, 1980.

The motion to strike filed by petitioners urges removal from the record of a transcript of a hearing on economic development funds held on January 4, 1980. The hearing was held for the purpose of deciding whether or not Tillamook County should support Robert Harrington's (the applicant in this matter) application for economic development bonds. The bonds were to help finance a motel complex cited within the annexed territory. Petitioner claims the January 4 hearing had nothing to do with the annexation at issue in this case and that, as a matter of fact, the hearing was advertised as "not being a land use hearing." Petitioner does not, however, allege that the matter of the January 4, 1980 economic development fund hearing was not before the City Council when that body considered the annexation.

The "record" that is reviewed by the Land Use Board of Appeals is similar to that reviewed in a writ of review proceeding. The record quite properly includes only those items that were, in fact, before the local governing body when it made its decision. Curran v. State, 53 Or 154, 99 P 420 (1909). The relevance of the material is not important as to

its inclusion in the record. The fact of its placement before the governing body is what determines inclusion or exclusion from the record. Without an allegation that these materials were not before the city council when it was considering the annexation, the motion to strike is insufficient. The motion will be denied.

With respect to the motion for summary judgment, petitioners assert that the City of Tillamook failed to follow the rules of the Land Use Board of Appeals and instruction by Referee John Bagg that it supply petitioner with a copy of the record.

Petitioner was able to file a petition which made reference to the record. Petitioner did not introduce as part of the motion allegations sufficient to show willful and persistent refusal by the respondent to furnish a copy of the record. The record was available in the City of Tillamook and within easy geographical access of petitioner's attorney, and the inconvenience occasioned by a failure to supply the record is not sufficient to grant petitioner summary judgment. Also, the telephone conference held on March 11, 1980, did not result in a clear order by Referee Bagg to furnish "the record" to an extent greater than the city had already provided petitioner's attorney. Rather, the matter was to be left to the cooperation of the parties. The motion for summary judgment is denied.

FACTS

In late 1979, the City of Tillamook received petitions for

annexation signed by landowners within the Highway 101 North Sanitary District. The petitions bore sufficient signatures to satisfy ORS 122.120, and the city council decided not to submit the annexation to a popular vote.

The City of Tillamook set January 10, 1980 as the time for a public hearing on the annexation. That hearing was cancelled on January 9, and the hearing was ordered continued until January 16. Notice of the cancellation was issued by posting and broadcasting. The city notified the persons it knew to be in opposition to the annexation by letter on January 11, 1980 and in that letter advised them of the new hearing date of January 16.

At the January 16 hearing, which lasted well into the morning of January 17, the city planning commission and city council deliberated and considered evidence on the annexation. The matter was continued until January 22 for receipt of certain agreed to written evidence.

The proposed findings of fact and conclusions of law were submitted on February 13, 1980. On March 3, the council held the first and second reading of the ordinance annexing the property. The third and final reading was held on the 17th of March, and the effective date of the annexation was May 21, 1980. See generally Findings 1-9, Record 5-7.

The total area to be annexed is not precisely clear, but we conclude it amounts to 150 acres. TR of January 16 Hearing, p. 123. Between 94-96 acres remain after exclusion of rights of

way, and the city included this total in its ordinance. According to respondent's calculation, just under 33 acres is presently developed and something over 6 1/2 acres are otherwise committed to other than farm or rural uses. Something over 46 acres is, therefore, available for farm use. See Footnote 5, Brief of Respondent Harrington.

The property is subject to flooding. Finding 77, Record 29. Of 15 major floods since 1916, ten have occurred since 1964. TR of January 16 hearing, p. 320. It is the city's view that the area along Highway 101 subject to the worst flood hazard has already been annexed to the city and the city has "resolved" that any development within the flood area must be on pilings. Finding 78, Record 29.

The land is agricultural land within the meaning of Statewide Goal 3. It is composed primarily of type II soils. Finding 23, Record 13. Agricultural activity in the area includes a farm of which 8.4 acres is in the area annexed. Finding 32, Record 15-16. According to the city's findings, there are "various farm parcels in the vicinity of the annexation," and apparently the spreading of liquid manure "about twice a week year-round is a routine agricultural practice in and around the annexation area." Findings 26-27, Record 14. The city adds in finding 27 that there have been no complaints about odors from farm activities. See TR of January 16 hearing, pp. 242-244.

Plans for use of the property conclude "the Harrington

project." That project is the construction of a Nendel's motel facility on approximately 2.5 acres. Finding 55-61, Record 25-26; TR of January 16 hearing, p. 49. Also listed as a use for the property is a grocery store and some small shops. Finding 51, Record 24. No particular acreage size is mentioned in conjunction with that combined commercial use. Finding 50, Record 24.

It is estimated that the Harrington project would directly employ about 100 people during a two-year construction period. That employment would generate 100 secondary jobs in the Tillamook community. When operating the motel would provide 100 jobs and again generate 100 secondary jobs. Finding 57, Record 25. At Finding 49, Record 24, the city found that Tillamook County had a 9.6 percent unemployment rate, and in October of 1979, there were between 500 and 600 unemployed persons in the county. There is no finding as to whether the unemployment figures take into account normal seasonal fluctuations of the timber and fishing industries. The city says that tourism has been the only growth industry in Tillamook County, and the city cites an increase from 16 to 28 percent between the years 1959 and 1977 in retail employment to support this view. Finding 48, Record 23. The city found there will be a need for 93 additional acres of commercial land by the year 2000. Finding 33, Record 16. That finding appears to be based on a report by Applied Economics, Inc. appearing as Item 2hh in the record.

The city found a need existed for a development that would help employment levels. That kind of development requires "municipal" services Provision of municipal services requires annexation. See findings 51-53, 119.

The city claims the proposed comprehensive plan "represents the best collective thinking of the City of Tillamook about its future land use." Finding 10, Record 7-8. The city has treated this proposed plan as a source of evidence in support of the annexation. That plan shows a population increase in the city of 6 persons from 1960 to 1977. The county's population declined during that period. Draft Plan at 6. Record Item 3b. The plan nevertheless projects an increase of 2,100 people by the year 2000.

ALLEGATIONS OF PROCEDURAL ERROR

Petitioner Tillamook Citizens for Responsible Development alleges that material in the record deals only with the Nendel motel development rather than the annexation itself and that the city's findings are inadequate, conclusory and not supported by substantial evidence. At the hearing on the merits, petitioner's attorney clarified the assignment of error and asserted that the findings were not properly adopted. She asserted there is nothing in the record to indicate that the city council ever considered the findings as written ,and the city's casual regard for the findings is witnessed by the failure of the city to note that the ordinance itself contains no language actually annexing the territory in question or

specifically adopting the findings.

It is correct that ordinance no. 968 in its title speaks to annexing 96 acres to the City of Tillamook, but the ordaining clause of the ordinance neglects to annex the property. The language that does appear after the ordaining clause simply describes the property but does nothing with it. The findings of fact and conclusions of law provided in Exhibit A are, however, made a part of the ordinance by unambiguous language appearing just before the ordaining clause.

The Board does not consider this error to be material. Petitioner's attorney noted that the failure to include language specifically annexing the property in the body of the ordinance was probably a scrivener's error and her complaint was directed more at a perceived failure to know what was precisely being adopted. A scrivener's error is not sufficient to render an ordinance void where the ordinance is otherwise clear. 2 McQuillin, Municipal Corporations 7.24 (1979); 5 McQuillin, Municipal Corporations 15.24 (1969).

Additionally, we do not find sufficient allegation of fact in petitioner's assertion of error to find as a matter of law that the city's governing body did not know what it was adopting and, therefore, could not be said to have adopted it. The facts show that the proposed findings were available to the city for some time prior to the actual passage of the ordinance, and without some factual basis to support petitioner's assertion that the city council members did not

consider the ordinance, we will not so find.

We will consider petitioner's assertion that the findings of fact are inadequate as part of our discussion on allegations regarding the statewide land use goals and the LCDC annexation rule, OAR 660-01-315.

ALLEGATIONS OF ERROR

A. Introduction

Petitioners and Intervenors allege that the city violated the annexation rule and statewide goals 1, 3, 6-7, 9-14 and 16. There is also an assertion that the annexation rule is invalid. We will first discuss the validity of the annexation rule as the commission's decision on the validity of the rule will determine the outcome of the case. We will then discuss the city's compliance with the rule and finally, the allegations of individual goal violation.rule, OAR 660-01-315.

B. Validity of the Annexation Rule.

The annexation of property is a political decision. See Homebuilders Assn. v. Corvallis, LUBA 79-002 (1980). In that case, the commission said that as long as the city had some means of complying with LCDC goals, the fact that annexations were submitted to the voters was not in itself violative of the goals. Also, that case stood for the proposition that an annexation had two parts: a quasi-judicial part and a legislative part. The quasi-judicial part was that portion of the annexation proceedings wherein appropriate LCDC goal were applied to the proposed annexation. The legislative part of

the decision was the actual annexation, the redrawing of city boundaries.

There is nothing in the annexing of property that necessarily "converts" the territory annexed from rural to urbanizable or urban land. In Willamette University v. LCDC, 45 Or App 355, ____P2d ____ (1980), the court made it clear that the simple fact that land was within city boundaries did not mean that it was no longer subject to the requirements of goal 3.

However, while there is no basis for concluding that an annexation itself constitutes a conversion of rural land to urbanizable or urban land, there is a basis for concluding that annexation does at least amount to a "presumption" that the governing body is "proposing to convert" that land to some urban use. Annexations relate to future and not necessarily present growth and development. Peterson v. Klamath Falls, 279 Or 249, ___ P2d ____ (1977); West Side Sanitary District v. LCDC, ____ Or ___, ___P2d ____ (1980). A city would not annex property for no purpose at all, and as a city's usual reason for existence is the supplying of services to a relatively dense population, we can at least conclude that the city is contemplating or proposing some urban use for that property. An exception might be where the city annexes property to protect a water shed (in which case one might have a forest within a city), or provide some buffer. Usually, however, the city will use the property in a manner most persons would

consider to be intense at least in comparison with a rural use of property.

If we are correct that in annexing property the governing body is at least "proposing to convert rural agricultural land to urbanizable land," then the governing body is required by the terms of goal 3 to "follow the procedures and requirements set forth in land use planning goal (2) for goal exceptions.

The annexation rule does not itself require that an exception be taken when rural agricultural land needed for development prior to acknowledgment is annexed to the city. To the degree that the annexation rule serves to provide such a "shortcut" through goal 3, it does not provide a level of compliance equal to that required by the terms of the goal itself. To the extent that the annexation rule excuses a governing body when it annexes property from taking an exception to goal 3, the rule is not valid. Support for this proposition is found in Willamette University v. LCDC, supra, wherein the court made it clear that the commission could not, by administrative rule, eliminate a goal requirement.[1]

Amicae 1000 Friends of Oregon and Tillamook Soil and Water Conservation District have also asserted that the annexation rule in order to be valid requires an exception to goal 14. Under the annexation rule as written, a city need not justify and the city need not consider a proposed urban growth boundary at the time of annexation. To fully comply with the goal is to adopt or amend the urban growth boundary to reflect the change

in corporate limits. Choosing not to take that step results in an exception to the goal. Amicae say this Goal 14 exception requirement raises the city's burden to one of showing "compelling reasons and facts" as to why it did not adopt or amend its urban growth boundary along with the annexation.

Although annexation without rezoning or other act approving development has no effect on the use of land, the Supreme Court has strongly intimated that Goal 14 does apply to annexations. Peterson, 279 Or 249 at 255. As goal 14 applies, a strict reading of the goal does lend considerable support to amicae position.[2]

If an act to adopt or amend an urban growth boundary is a requirement that must accompany each annexation, the commission may so state. We decline to adopt such a position here. We believe it is sufficient in order to comply with Goal 14 that the city base its decision on the seven factors listed in Goal 14.[3]

C. Compliance with the Annexation Rule.

Petitioners and Intervenors allege a violation of the LCDC Annexation Rule. The rule, OAR 660-01-315 provides in pertinent part:

> "Annexation of lands not subject to an acknowledged comprehensive plan.
>
> "(1) All appropriate goals must be applied during annexation by the city . . .
>
> "(2) For the annexation of land not subject to an acknowledged plan, the requirements of Goal #3 (Agricultural Lands) and Goal #14 (Urbanization),

OAR 660-15-000, shall be considered satisfied only if the city or local government . . . after notice to the county and an opportunity for it to comment, finds that adequate public facilities and services can be reasonably made available; and

"(a) The lands are physically developed for urban uses or are within an area physically developed for urban uses; or

"(b) The lands are clearly and demonstrably needed for an urban use prior to acknowledgment of the appropriate plan and circumstances exist which make it clear that the lands in question will be within an urban growth boundary when the boundary is adopted in accordance with the goals.

"(3) Lands for which findings in (2) above cannot be made shall not be annexed until acknowledgment of the urban growth boundary by Land Conservation and Development Commission as part of the appropriate comprehensive plan."

Subparagraph (2) of the rule requires that adequate public facilities and services "can be reasonably made available." The city addressed public facilities and services at Findings 106-120, Record 35-36, and concluded that such services could be made available. Conclusion 15-23, Record 51-54. A review of these findings shows them to be conclusory to the extent that the findings speak more to a belief that services would be made available than precisely how the services would be provided. An example is the discussion of aneeded storm drainage service. At one point, the city named on site storage for later release as a solution for the storm drainage problems. Finding 48. Later, however, the city found that storm drainage was best addressed through site plan review for a specific development within the annexation area. Finding

113, Record 36. At the hearing, respondents pointed to the testimony of engineers from the firm of CH 2M Hill as factual support in the record for the availability of engineering solutions to the flooding and drainage problem. The engineer named no specific solutions. His testimony was to the existence of engineering solutions generally. TR of January 16 hearing, pp. 320-325. The cost, however, might be "to the point you want to let it flood. Ibid. p. 232. The City Public Works Director said that no "detailed study" or drainage plan had been prepared. TR of January 16, Record 22-23.

Similarly, the city found highway access could be provided and asserted coordination with the State Highway Division. Finding 112, Record 31-32. But the citations the record noted in respondent's brief do not show coordination between the city and the Highway Division, only mention of a discussion at a meeting of widening Highway 101. Respondent's brief at 9-10, Hearing of January 4, pp. 48-56; Hearing of January 16, pp. 23-26.

There are, however, sufficient findings to show that water, police protection, fire protection, solid waste disposal and sewage facilities are now available or if not now available, have a capacity to serve the territory annexed. Finding 107-120. Record 35-37, Exhibit 2kk. These findings rest upon statements from the agencies in a position to provide those services, and it is our view that the city may rely on such assurances.

The city's finding do not amount to a plan for the provision of such services. However, the fact that the city at least addressed the matter of public facilities and services and found that they could reasonably be made available may be sufficient to satisfy that portion of the annexation rule. The fact that the solution to the drainage problem may be terribly expensive or difficult does not, in and of itself, mean that the public facilities and services necessary cannot "reasonably" be made available. The city may rely on the opinion of engineers and its Public Works Director at least, as here, when no other similarly qualified experts challenge their opinions.

As to Subparagraph (a) of the rule requiring that the lands be physically developed or within an area physically developed for urban uses, there is a dispute as to how much of the property is already developed. Respondent Harrington claims that 32.83 acres are presently developed while Intervenor Retail Merchants claims that only 26 acres are currently developed. Footnote 5 Respondent Harrington's Brief, Brief of Intervenor's, p. 11. We conclude that something under a third of the property is already developed. With a third of the property already developed, there remains something in excess of 60 acres (again excluding rights of way) not developed. The existence of that remaining property leads us to conclude that the entire area is not developed or within an area physically developed for urban uses under subparagraph (a) of the rule,

and we must look to subparagraph (b) of the rule. Subparagraph (b) of the rule requires the lands be clearly and demonstrably "needed for an urban use prior to acknowledgment of the appropriate plan" and requires additionally that the land clearly be part of an urban growth boundary when that boundary is adopted in accordance with the goals. The acreage requirement shown for the Respondent Harrington's development is only 2.5 acres. Record 49. There is an unknown acreage requirement for the shopping center project, also mentioned as planned for the area annexed. In sum, we find no finding or conclusion addressing the need for a particular amount of land. Respondent Harrington's brief addresses need in terms of the city's unemployment and tourism as the only "growth" industry in the Tillamook area. Respondent's Brief, pp. 14-16. Nowhere is that need translated into a requirement for a specific number of acres.

The commission's opinion in Friends of Linn County, Inc., et al v. City of Lebanon, LUBA 79-007, tells us that it is the city's need for the land that must be considered. In that case, Tektronix announced it would not develop in the Lebanon area without a commitment from the city of the full 245 acres of property annexed, even though the identified need was for 67 acres. At the hearing on the merits in this case, respondent's attorney announced that the same circumstance existed but made no reference to a place in the record where we might find such a statement of need. What was asserted, however, was that

placement of the Harrington (Nendel's) project dictated the annexation of the rest of the property. That is, the placement of the Nendel's development at the end of the strip of property to be annexed north of the city limits necessitated inclusion of the remaining strip south to the present city limits. Presumably, that contiguous city limit would make possible provision of city services without traversing properties outside city jurisdiction. Also, city services may be required for this development. Fire, police, sewer and other urban level services may well be necessary to facilitate this project and its return contribution to the community.

Perhaps the most significant justification of need cited by the city for inclusion of the whole property within city limits is stated at finding 116, wherein the city notes

> "[S]ubsurface sewage disposal systems in the annexation area are failing; there exists a health hazard in the North 101 Sanitary District due to inadequate sewage treatment."

There is reference in the record and in testimony to support this finding. It may well be, as the city found, that development and resulting provision of city services are the only feasible means to alleviate this hazard. Finding 53, 119, Record 24, 35.

The next issue in the Annexation Rule is the matter of inclusion within the urban growth boundary and the need to annex the property before acknowledgment. The city found that

it would be 12-18 months before their comprehensive plan is acknowledged. (Finding 105, Record 34.) Considering the deadline for submittal of the City of Tillamook's comprehensive plan was July 1, 1980, (Record at 33, Finding 102), that estimate does not seem unreasonable. The Harrington project would be started sometime in the summer of 1980, and a delay past the construction season might very well result in a significant and costly delay to the developer. The timing of his development, according to the city, is tied to the issue of revenue bonds to finance the project. Presently the bond market is favorable, but it could change for the worse late this year. (See Findings 61-67, Record 26-27.) Under the commission's decision in Friends of Linn County, Inc., the city's perception of the immediacy of that need is probably sufficient.

Also, we note again the health hazard mentioned by the city in its findings. The existence of the hazard certainly contributes to the immediacy of the need to annex, if by annexing the city can help alleviate the health hazard. We note in that regard that the city has plans and is apparently ready to build a sewage system in the area. (See Findings 117 to 120.)

As to economic need, we note this project will employ 100 people directly and provide an additional 100 secondary jobs. Finding 57, Record 25. As the city suffers from unemployment, the presence of a new employer may alleviate the unemployment

problem. Apparently, the city believed he report of Applied Economics, Inc. of Portland, entitled "Supplement to Economic Justification for the Proposed North Highway 101 Annexation to the City of Tillamook, (Record Item 2hh), when it concluded that this project would benefit the community and agreed with the developer as to the best place to put the project (although no reference to the report appears in the findings).

The City's need for employment opportunities, the health hazard in the area, the developers' need to have his particular development included at the northern end of the annexation area all together seems marginally to satisfy the need test in the annexation rule.

With the need for the project on the subject property established, and with the property already within the proposed urban growth boundary, the inclusion of the area in the city's eventual urban growth boundary appears to be a foregone conclusion. In summary, we conclude that the requirements in the annexation rule relating to public services and need for urban use have been met, although marginally, in this case.

D. Goal Violations Alleged by Petitioners and Intervenors

1. Goal Standard

The fact that the annexation rule is probably not available to make annexations easier, at least in terms of goal compliance, does not mean that the commission cannot consider the circumstances of the annexation in deciding how the goals must be applied. In the present case, the City of Tillamook

has simply annexed a portion of property along Highway 101. It has not, unlike Lebanon, coincidentally rezoned the property and made it ready for development. The city has repeatedly said that the time for specific application of particular goals including natural hazards and public facilities and services will come at the time actual development is to begin. All that is occurring now is a change in city limits. The commission is free to test this annexation against its stated purpose: to make land available for the proposed project. What specific parcels will serve the development and where roads and sewers will go is a matter for future consideration and future measure against goal standards appropriate to these "development" acts. The commission's job is to test these proposals generally against the goals, and that test is "prospective in nature." Friends of Linn County v. Lebanon, LUBA No.79-007 (1980). Dissenting, concurring opinion of Referee Cox. It is with this standard in mind that we review the allegations of goal violation.

2. Individual Goals

LCDC GOAL 1. Petitioner alleges a violation of the citizen involvement goal on the ground that the hearings held on this annexation were inadequate and that there was inadequate consideration of citizen's views. As to the latter allegation, petitioner complains that the city council rejected findings made in 1978 by the planning commission that further strip development along Highway 101 was ill advised. The planning

commission's findings were based in part on a citizen's advisory committee study. The Board believes that this concern is more one of substantial evidence than citizen involvement. The fact that the city rejected a study that was done in part through the efforts of a citizen involvement committee does not in and of itself mean a violation of the citizen involvement goal.

With respect to the first allegation, that the hearings held were insufficient, we note that there is a record of adequate notice in terms of the legal requirements imposed upon the city. See Findings 1-10, Record 5-8. Much of petitioner's discussion concerns the fact that the major hearing on this proposal held on the 16th of January began at 7:30 p.m. and ended on the 17th of January at about 4:30 a.m. It is petitioner's view that a hearing of that length should in and of itself equal a violation of citizen involvement.

The Board does not agree. Long hearings may not serve the participants or the governing body well, but they do not in and of themselves result in a violation of the citizen involvement goal. We note again that notice of the hearing was provided by mail to the persons known by the city to be in opposition to the proposal. There is no allegation that persons were not permitted to speak or that persons were not permitted to submit written testimony. At the hearing on the merits, it was stated that persons were permitted to speak out of turn so that they might leave the hearing at a reasonable hour. It is our view

that accommodation was made for citizen involvement and that no violation occurred.

Petitioner's concerns about Goal 2 compliance take the form of an assertion that the city council did not make use of a proper planning process. Petitioner asserts deficiencies in coordination with the Wilson River Water District, inadequate inventories, methods of retaining the existing agricultural enterprise in the area and inadequate notices to include the public in the exceptions process. Petitioner's concerns, therefore, go to not only the substantive requirements for an exception, but also quite simply the manner in which the city proceeded with the annexation.

Respondent says that the council substantially complied with the planning requirements of Goal 2. Respondent's Brief at 21. Respondent says the property has been zoned for commercial use by the county since 1971, and that it is in accord with a draft city comprehensive plan which, though not acknowledged, represents the city's current thinking regarding land use. Ibid. Respondent asserts that through that plan, adequate citizen involvement and the coordination requirements of Goal 2 have been addressed. Ibid. Respondent reminds us that goal 2 is "essentially procedural in nature." (Rivergate Residents Assoc. v. LCDC, 38 Or App 149, 590 P2d 1233 (1979).

The findings as a whole do address much of Goal 2's demands for plan development. However, the findings do not adequately consider "alternative courses of action" to problems that exist

in the annexation area. For example, drainage and flooding are cited as problems and the unnamed solutions are left to the future. The findings do not, then, meet the standard set by Goal 2 for plan development. It must be noted, however, that this appeal is about an annexation, not an element of a comprehensive plan. Full goal 2 compliance to the standard necessary for plan development does not seem warrented in such a case. We deny petitioner's assignment of error.

A violation of Goal 2 does exist, however, if the commission finds goal compliance is required fully at the time of annexation because the city did not incoporate in its plan an exception to goal 3 for the aricultural land in the area annexed. See Discussion of Goal 3, supra at 13.

LCDC GOAL 3.

Petitioners assert a violation of goal 3. If the annexation rule is allowed, no separate analysis of goal 3 is required. However, if goal 3 applies directly, then an exception to the goal is needed for the agricultural land annexed by the city.

An exception to goal 3 was taken by the city. However, the city failed to simultaneously take an exception to the comprehensive plan. Under the rule announced in Wright v. Marion Co., LUBA No. 80-010, the failure to take an exception to the comprehensive plan requires us to return the case to the city.

We do not, therefore, reach the merits of the partial

exception taken by the city. We note, however, that goal 2 requires careful factual detail to show the existence of "compelling reasons and facts" showing why goal 3 cannot be applied.

LCDC GOAL 6 AND 7. Petitioner alleges a violation of Goal 6 on the ground that the commercial uses may have an uncertain impact on the carrying capacity of the Wilson River. It is asserted that there will be an adverse impact on adjacent properties and the Wilson River from storm water runoff from business parking areas. For example, it was noted in the record that the runoff of lead contaminants from the parking lot would mix with the "manure" on the farmlands. Transcript of January 16 hearing, p. 324. In response, the city asserts that toxic contaminants resulting from runoff will be incidental. Finding 134, Record 40. Further, the city found in Conclusion 11, Record 49-50 that the annexation will improve water quality by speeding provision of municipal sewage treatment to the annexation area to replace presently failing septic tanks. The minor threat from such pollution is supported by testimony from an engineer, but the Board had to search the record to find it. Transcript of January 16 hearing, p. 324.

It is our view that Goal No. 6 and Goal 7 are closely related in this case and compliance with Goal 6 and 7 must be found, if at all, in the city's assertion that Goal 6 and 7 are adequately complied with through the engineering and planning

solutions that the city believes are available. Finding 79 and 81, Record 29; Finding 88, Record 30 and Findings 90-92, Record 31.

To begin with, the city says, in essence, that one need not look at the development as all inclusive when considering Goal 7 hazards. It is the city's proposition that Goal 7 does not prohibit development, but that development in known areas of natural hazards must be undertaken with adequate safeguards. Respondent's brief at 27. Respondent points to Norvell v. Portland Area Boundary Commission, 43 Or App 849, _____ P2d _____ (1979) for the proposition that one must only find that not all development is rendered unsafe by the existence of a hazard. It is the city's assertion that the particular location of development on the property is what counts in terms of Goal 7. Certainly, not all of the area annexed is unsafe and unfit for development.

To the extent that the city recognizes that it "has a separate and further responsibility to investigate and satisfy itself concerning the safety of any proposed development," we agree. Norvell, 43 Or App at 855. Our concern, however, is that the city has not adequately addressed or considered what steps must be taken before concluding that the property may be developed. For example, the city found

> "88. There are several common engineering solutions available to insure that storm water drainage from commercial development in the annexation area can be stored on-site and released at a rate not exceeding natural conditions.

". . . .

"92. The Port of Tillamook Bay is interested in taking leadership in seeking solutions to flooding generally, including flood hazard areas in the proposed annexation area. The Port is particularly interested in bay restoration and has the backing of the Port of Bay City and of the City and County of Tillamook. It needs the backing of the business community and residents in flood areas, particularly farmers. The Port is also interested in reviving the presently defunct drainage district in the North 101 area to help deal with flood problems."

It may well be that individual portions of that property may be developed and that solutions will be found for the flooding problems. Except the comments of an engineer that the unnamed solutions are available, the city has little before it from which to conclude that Goal 7 will be satisfied. Under the circumstances of this case we believe the city's position to be sufficient only if strict compliance with the goal is not required now but only at the time of development. That is, as this annexation does not rezone specific lands or issue building permits, but only shows a boundary within which such development may take place, then the city has adequately addressed goals 6 and 7.

LCDC GOAL 9. Petitioners and intervenors allege a violation of Goal 9 on the ground that no attempt was made to address the effect of the development on the economy of the State, on surrounding farmlands, on the Tillamook downtown core business, community, and on potential losses to individuals because of flood water damage. There is an assertion that the downtown core will suffer economically from this annexation,

and apparently the city council noted that possibility. Record 70-77. However, there is no analysis of the severity of the impact of that possibility.

We cannot say as a matter of law that the city council's consideration of the dairy industry, forest products and other industries in the area along with its consideration of unemployment is inadequate to satisfy Goal 9. See Findings 46-50, Record 21-24. The city found that the annexation area would comprise less than one-quarter of the one percent of the agricultural land in the county, Finding 29, Record 15, and that annexation of the property would not have an adverse effect on that portion of Tillamook's economy. Finding 41, Record 18. The city found there would be increased traffic flow and that, therefore, downtown merchants would benefit from the development, Finding 42-43, Record 19-20; Finding 48, Record 22-23; Findings 57-58, Record 25-26.

Goal 9 calls for diversity and improvement of the economy of the state, and we cannot say as a matter of law that the city's conclusion that it has complied with Goal 9 and that the proposal would not adversely impact the economy of the area is erroneous. Where conflicting evidence exists, the city is entitled to choose which evidence it believes. Christian Retreat Center v. Comm. For Washington Co., 28 Or App 673, 560 P2d 1100, rev den (1977). Indeed, as the city found the growth in retail trade to be attributable to increased tourism, this development will meet an apparent state need for tourist

facilities. See Finding 33, 48.

LCDC GOAL 10. Petitioner alleges a violation of Goal 10 on the ground that were the strip to be developed commercially, single-family residences may be driven out. Respondent argues that Goal 10 does not apply because the area has been designated for commercial uses since 1971. Additionally, jobs created should be filled by those presently living in the area and not place an increased burden on housing. See Findings 57-58, 94-101, Record 25-26, 32-33.

Again, we do not find that as a matter of law Goal 10 has been violated simply because of the annexation of property for a commercial purpose. There has been no allegation that there is insufficient land available in Tillamook or within Tillamook's suggested urban growth boundary to provide housing. The negative impact on housing is speculative.

LCDC GOAL 11. Petitioner alleges a violation of Goal 11, Public Facilities and Services. The allegation is based on a failure of the city to update its sewage facilities plan and the lack of a storm drainage plan.

Respondents assert that the commission's order in Olson v. Marion-Polk County Boundary Commission, LCDC 78-005 (1978) provides that Goal 14 as applied to preacknowledgment annexations properly incorporates and addresses Goal 11. Respondent says that its arguments on public facilities and services are contained in its discussion of the annexation rule, and points again to its proposition that the test for

public facilities and services is one of "reasonable availability." Respondent asserts that the evidence in the record and the findings do support the proposition that public facilities and services can "reasonably" be made available.

The city's findings on the availability of public facilities and services are mixed. Some matters such as police protection and sewers appear to be adequately addressed. Others, such as drainage are discussed more in terms of "availability of evidence" of possible solutions and not statements of the existence of solutions. See Norvell, 43 Or App at 855. We conclude that taken as a whole, public facilities and services can be provided to the property. We base that conclusion in part because the development will occur bit by bit. The goal test is, as in Lebanon, prospective and the record shows solutions to be available if considered prospectively.

LCDC GOAL 12. Petitioners and Intervenors assert a violation of Goal 12 in that the City of Tillamook has not developed a transportation plan.

The absence of a transportation plan in connection with a specific proposal to annex property does not in and of itself violate Goal 12. However, all the record shows the city to have done was identify the problem and conclude, without facts that solutions could be found. TR of January 16 hearing, Record 22-27. The city has no substantial evidence in the record to support its conclusion that adequate transportation

is available or can be provided. Absent a relaxed standard for annexation, we conclude goal 12 has not been satisfied. See also "availability of evidence" vs. "findings" discussion in Norvell, 43 Or App at 855.

LCDC GOAL 13. Petitioners assert a violation of Goal 13 on the ground that there has been no consideration of the energy consequences on the local area of this annexation. Petitioner says there is "no possibility of ever divorcing these businesses from the automobile."

However, it is the nature of a tourist commercial establishment that an automobile will be necessary for a good many of those persons served by the development. A motel or convention center is geared to travelers, and to accept petitioner's assertion would, it seems to us, be to accept the proposition that tourist establishments must be discouraged or forbidden. We are unwilling to accept that proposition at this point. Goal 13 requires a conservation of energy "based upon sound economic principles." To deny a commercial development simply because it is to be used by travelers does not appear to make use of sound economic principles.

LCDC GOAL 14.

Petitioners claim a violation of goal 14. Paramount among their concern is their claim that goal 14 is violated because no plan for needed facilities and services has been drawn by the city. We conclude that goal 14 must be read prospectively in this case and in any annexation case. Given a prospective

reading of the seven factors in goal 14, we find the city has adequately addressed the seven factors and complied with the goal.

Though it may not have shown a demonstrated need to annex the property based upon its urban population growth, it did show a need to annex the property to accommodate economic growth needs and an apparent need to provide urban services to alleviate health hazards. It considered other alternative sites and the land uses on those sites and concluded that the particular property annexed was best suited to satisfy the city's economic growth needs. The city considered the environmental, energy, economic and social consequences of the annexation and concluded that the annexation would benefit its community in those respects. The city also considered agricultural conditions and its inventory of agricutural lands and concluded, by balancing the goals, that the proposed use of the property would not seriously conflict with the county's agricultural needs. Our review of these findings shows them to lack detail but not to be unreasonable or unsupported. There is sufficient information in the draft plan (which the city took to be evidence of conditions in the county) to support the city's conclusions with respect to need, growth and alternative sites for commercial uses. Though there may be disagreement on specific points in the city's findings, taken as a whole we cannot say that there is insufficient demonstration of the seven factors listed in goal 14.

LCDC GOAL 16. Petitioners urge that a violation of Goal 16 has occurred because no consideration has been given by the city to the impact of this development on the estuary. Respondents counter that the council did make findings relative to the impact on the estuary contained at Findings 121-122 and 127. Record 37, 39. The city points to the draft policies in the Tillamook Bay estuary in the Tillamook Bay management plan and concludes that the commercial area proposed would be in conformance with the draft plan.

Petitioner has made no specific allegations showing why the draft plan is inadequate to protect the estuary, and the fact that the city has considered the proposal in light of its draft plan and found no violation of Goal 16 (or as a matter of fact 17) is sufficient for us to conclude that the requirements in Goal 16 have not been directly violated. At least the draft plan appears to have basis in fact. Further, a witness, "a professional planner" with "extensive experience in estuary and coastal planning," testified as to compatibility of the project with Goal 16, and her testimony was not challenged. TR of January 16 hearing, Record 94-97.

CONCLUSION

Unlike the Friends of Linn County v. City of Lebanon case decided earlier this year, the record does not include the detail showing availability of public facilities and services, economic necessity of the development as proposed, benefits to the economy of the state, benefits to the local economy, and

need for and suitability of the land in question. This case has forced us to go to the record to try to find some basic facts to support the very conclusory findings prepared by the city. There are few significant guide posts in the findings to point our way to the record to support the findings. These unfortunate facts made our review of this case difficult. Should we have missed facts in the record that support the findings, that regrettable possibility is a failure of the findings to show us the way. Absent exceptional circumstances, we need not search the record as a substitute for goal findings showing statewide goal compliance. Rivergate Residents Assoc. v. LCDC, 38 Or App 149, 590 P2d 1233 (1979).

FOOTNOTE

1

As we discuss at page 24, an exception was taken to goal 3 by the City of Tillamook. However, the city neglected to take an exception at the same time to its comprehensive plan. In the recent case of Wright v. Marion County, this Board proposed and the commission adopted a requirement that whenever an exception is taken by a local jurisdiction, the exception must also be taken to the local comprehensive plan. No such action was taken by the City of Tillamook, and for that reason alone, this case must be sent back to Tillamook for corrective action.

2

We say in our discussion of goal 3 that the act of annexing land does not automatically result in a "conversion" of that property from rural to urbanizable or urban property. The act of annexing land does not in and of itself mean goal 14 applies because annexation alone involves no change in land use. However, the Supreme Court's view of annexation and goal 14 in the Peterson case forces us to treat annexations as subject to goal 14.

3

As we discuss at page 39, the city did consider these seven factors. Moreover, the city did examine its proposed urban growth boundary and found it compatible with the new city limits. See finding 142 and 143. The findings say that the proposed urban growth boundary was drawn with the annexation area in mind as being within the city's urban growth boundary. These findings show the city considered the annexation in the context of goal 14 and in accord with its proposed urban growth boundary.

BEFORE THE
LAND CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF OREGON

TILLAMOOK CITIZENS FOR RESPONSIBLE DEVELOPMENT, Petitioner(s), v. CITY OF TILLAMOOK, Respondent.	LUBA 80-041 LCDC Determination

The Land Conservation and Development Commission hereby affirms the validity of the administrative rule on annexations, OAR 660-01-315, as to how the substantive requirements of Goals 3 and 14 are to be applied to annexations of lands not subject to an acknowledged comprehensive plan. The Commission further holds that the procedural requirements of all applicable goals, including the Goal 2 exceptions procedure, must be considered in the annexation of lands not subject to an acknowledged comprehensive plan. The procedures of Goal 2 specifically require that an exception be taken as part of the comprehensive plan adoption or amendment process, see Wright v. Marion County, _____ or LUBA _____ (1980). The Commission therefore specifically rejects those portions of the LUBA recommendation at pages 10 through 13, including lines 11-19 on page 12, which are inconsistent with this determination. The Commission continues to regard this administrative rule as valid.

The Commission further finds that the LUBA recommendation did not provide information sufficient to show that the City of Tillamook had made adequate findings that the land to be annexed was "clearly and demonstrably needed for an urban use prior to acknowledgment of the appropriate plan and ....." pursuant to OAR 660-01-315 (2)(b).

The Commission finds that the LUBA conclusions on pages 13 through 20 are not adequate to show compliance with the requirements of OAR 660-01-315 (2). The Commission stated that information necessary to satisfy the requirements of OAR 660-01-315(2) in this case, include, but is not limited to the following: findings as to the 'need' for the entire acreage of the land to be annexed; findings as to why the location of the Harrington project at the North end of the area necessitates the annexation of the entire area; and findings as to why a health hazard in the committed area justifies a 'need' for the undeveloped area. The Commission therefore specifically rejects those portions of the LUBA recommendation and conclusions on pages 13 through 20, including lines 8-12 and 17-19 on page 20, which are inconsistent with this determination.

The Commission also finds that the annexation of the area to the City of Tillamook violated the requirements of Goal 12 (transportation) for the reasons set forth at pages 30 and 31 of the LUBA recommendation. However, the Commission specifically

rejects the following language found at lines 1 and 2 on page 31 which states: "Absent a relaxed standard for annexation."

The Commission makes no determination on the other allegations of goal violations contained in the recommendation, and directs that any LUBA conclusion to these other goal allegations be deleted.

DATED THIS 17th DAY OF September, 1980.

W. J. Kvarsten, Director
For the Commission

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