

BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

Nov 10 4 34 PM '83

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2
3 BRIAN ALLEN and SOUTH BANKS)
PROPERTIES,)
4)
Petitioners,)
5)
6 v.)
7 CITY OF BANKS, ROBERT)
McCRACKEN, and JIM WARD,)
8 Respondents.)

LUBA NO. 83-054

FINAL OPINION
AND ORDER

9 Appeal from City of Banks.

10 Steven L. Pfeiffer, Portland, filed a petition for review
11 and argued the cause for petitioners. With him on the brief
were O'Donnell, Sullivan & Ramis.

12 Jeffrey J. Bennett, Portland, filed a brief and argued the
13 cause for Participants McCracken and Ward.

14 The City of Banks did not appear.

15 REMANDED 11/10/83

16
17 You are entitled to judicial review of this Order.
18 Judicial review is governed by the provisions of Oregon Laws
19 1983, ch 827.
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1 BAGG, Board Member.

2 NATURE OF THE PROCEEDING

3 Petitioners appeal an ordinance of the City of Banks
4 amending the city's comprehensive plan and zoning map. The
5 amendment extends

6 "* * * the City's Immediate Growth Area to Change the
7 Designation of the Herinckx Property from Future Urban
8 to Urban Immediate, to Amend the plan's Land Use and
9 Urbanization Inventory Relating to Commercial and
10 Industrial Lands Needs, to Amend the Plan Map to
11 Designate the Herinckx Property as Commercial and
Industrial, to Amend the City's Zoning Map to Zone the
Property as General Commercial (C-3) and Light
Industrial (M-3), and to Amend the Comprehensive Plan
Text to Revise and Delete Certain Urbanization
Policies." Record S2.

12 Petitioners ask the Board to reverse and remand the decision to
13 the City of Banks.

14 FACTS

15 The property subject to this plan and zone amendment is a
16 9.2 acre parcel outside the city limits but within the city's
17 acknowledged urban growth boundary. The site is presently
18 zoned GFU-38 on the Washington County zoning map and is in
19 agriculture use. The applicant's plan for the property
20 includes a new grocery store.

21 The property is located at the southern edge of the city's
22 corporate limits and is bordered by Highway 6 to the south,
23 State Highway 47 on the west and land owned by Petitioner South
24 Banks Properties on the north and east. A single-family
25 residence and related out buildings exist on the property.

26 Participants Jim Ward and Robert McCracken asked the City

1 of Banks to amend its comprehensive plan and zoning map to
2 change certain policies about urbanizable lands and the
3 conversion of urbanizable lands for urban use. Along with the
4 request, participants asked to change the designation of the
5 subject property from "Future Urban" to "Immediate Urban."
6 Further, they asked to designate the subject property for
7 commercial use under the city's comprehensive plan. The
8 property would be rezoned from the county's designation of
9 GFU-38 to a C-3 or general commercial designation under the
10 city's ordinance.

11 Along with this request, the participants asked the city to
12 initiate annexation proceedings with the Portland Metropolitan
13 Area Local Government Boundary Commission. The city did
14 request annexation, and continued with the plan and zone
15 change. On May 10, 1983, the city council approved the request
16 with modifications and conditions. The city amended the plan
17 map designation for the entire 9.2 acre parcel to immediate
18 urban and designated 6 acres as commercial. The remaining 3.2
19 acres was designated industrial. The city amended its plan to
20 reflect this conversion. Included in the action was a
21 condition that the city's plan and zone changes were contingent
22 upon annexation of the property by action of the boundary
23 commission. No time limit was placed on this potential
24 annexation. The Board understands the boundary commission
25 denied the first request for annexation and the same annexation
26 request is again pending before the boundary commission.

1 FIRST ASSIGNMENT OF ERROR

2 "THE CITY ERRED IN FINDING THAT THE DECISION COMPLIED
3 WITH APPLICABLE COMPREHENSIVE PLAN POLICIES AND OTHER
4 CONTROLLING CRITERIA.

5 "A. City Erred in Failing to Demonstrate a Need for
6 Additional Immediate Urban Land Prior to the Next
7 Scheduled Periodic Review."

8 Petitioners begin by quoting a portion of the city's
9 comprehensive plan as follows:

10 "Conversion areas from Future Urban to Immediate Urban
11 will be considered only during the periodic city plan
12 review process, and shall be based on a determination
13 that a need will exist for addition immediate urban
14 land prior to the next scheduled periodic review."
15 City of Banks' Comprehensive Plan, p. 22.

16 "Areas in this land use category are to maintain a
17 rural or agricultural character until such land is
18 required for urban use and has been redesignated.
19 'Immediate Urban'." Id.

20 Petitioners argue these provisions require the city to show the
21 subject parcel to be necessary for urban use prior to 1985, the
22 next scheduled review, not at some unspecified time.¹

23 Petitioners go on to say the need standard is subjective,
24 and because this standard is not susceptible to objective
25 proof, the city bears a heavy burden to show conformity with
26 the policy. Petitioners criticize the city's findings on need
because the findings point to a possible need for additional
urban land before the year 2000, and there is no finding the
existing vacant urban parcels can not accommodate the city's
needs over the next few years. Petitioners argue the city must
show there is no other property already designated "Immediate
Urban" available to meet an identified, not simply a possible,

1 need. The petitioners urge a mere preference for a particular
2 location is not need, especially where, as here, the city
3 concedes in its findings there is a parcel bearing the
4 appropriate land use designation just north of the subject
5 property.

6 Petitioners add the 3.2 acres given an industrial
7 designation is defective because the city provided only a
8 conclusional reference to the need standard. The finding says
9 the land is needed to "achieve the plan's economic policies and
10 assure market choice and site size, neighboring land uses and
11 in locational factors such as access." Finding 34(k). There
12 is no explanation of how the city arrived at this conclusion,
13 according to petitioners.

14 Participants argue the city properly found the need
15 standard simply means the council must find a need exists prior
16 to or at the time a review is conducted. Finding 28. In this
17 case, the city found a need exists now for additional immediate
18 urban land. The city also found such a need existed at the
19 time of plan adoption in 1980. Finding 34 (e-j). The Board
20 understands the city to say it underestimated the need for
21 urban land at the time it passed its comprehensive plan.

22 Participants go on to argue the city is entitled to
23 interpret its plan (and what "need" means) as long as the
24 interpretation is not contrary to the expressed terms of the
25 ordinance. Bienz v. City of Dayton, 29 Or App 761, 566 P2d 904
26 (1977). The city interpreted need to mean:

1 "Not only quantitative demand for a certain number
2 [sic] of commercial and industrial land over time but
3 also to mean a need for (a) sites which exhibit the
4 required size, configuration, and accessibility, and
5 (b) a sufficient number of sites to insure choices in
6 the market place. The Council finds that a 'need' for
7 a commercial or industrial land can be based on any
8 one of the above factors." Finding 28.

9 In sum, participants argue the findings developed by the
10 city demonstrate a need for an "Immediate Urban" designation on
11 the site and for commercial and industrial zoning.

12 The city's findings show it considered the changes on
13 review here as part of its periodic review. The review was
14 called because the city found a need to respond to a proposed
15 78 acre area development within the city limits. Finding 5
16 under "Citizen Involvement." The Board does not agree with
17 petitioners' view that the city had no power to hold a periodic
18 review outside the five year interval mentioned in the plan.
19 See Footnote 1. The Board finds the plan does not prohibit
20 review. Indeed, the plan policy calling for periodic review
21 appears to set a minimum interval. Comprehensive Plan, pp. 6,
22 7. There is nothing to suggest the city can not initiate
23 reviews of its plan when it pleases.²

24 The city's findings (Nos. 28-35) about need begin by
25 accepting testimony presented by the applicant. The testimony
26 shows a supermarket of some 18,000 square feet can be supported
in the city along with associated other (unspecified)
commercial development of some 30,000 square feet. This later
development would come in two later phases. The whole project

1 would require some six acres, and the city recognizes existence
2 of a site large enough to accommodate the development just
3 north of the subject property. The findings go on, however, to
4 say that some \$330,000 is to be spent on and off site to
5 improve this property and these particular applicants have
6 shown the subject property is the only site in the city which
7 warrants such an investment. The findings reference a letter
8 from United Grocers, Inc., which says "deficiencies" exist at
9 the South Banks property, the one properly zoned parcel in the
10 city. The deficiencies mentioned include less highway frontage
11 and insufficient depth from the store front parking area to the
12 back of the truck lane behind the store. This shorter depth
13 "creates friction between delivery trucks and customers."
14 Letter of United Grocers of February 11, 1983, Exhibit H.
15 There is no discussion, however, of whether the store might be
16 rearranged. The Board understands the letter to assume a
17 particular site placement for both proposed locations. "The
18 most positive advantage" of the site chosen was "visual
19 exposure to State Highway 6." Id.

20 The council's findings also say the comprehensive plan,
21 when adopted, did not consider the effect of off-street parking
22 on the available commercial land inventory. That is, the ratio
23 of commercial land to population failed to account for the fact
24 that more space would be required for commercial uses because
25 of new parking requirements. The city concludes it needs about
26 7.9 acres of land beyond that already allocated for commercial

1 use, in part, as a result of this error. Finding 34 (f-h).³

2 The council justifies the rezoning of part of the property
3 for industrial land use as necessary

4 "to achieve the plan's economics policies and assure
5 market choice and site size, neighboring land uses and
6 in locational factors such as access." Finding 34(k).

6 In this case, at least with respect to commercial land, the
7 city's analysis of need included inquiry into the quantity of
8 land required to meet an existing plan formula, an analysis of
9 the kind of site needed for a particular development and a
10 conclusion there should be alternative properties to insure a
11 choice in the marketplace. The city applied all three elements
12 in reaching its conclusion that additional property was
13 required for designation as commercial land. The analysis most
14 in keeping with the plan as a whole is the city's analysis of
15 its plan formula and the comparison of the amount of available
16 commercial land with that called for in the plan formula. With
17 this analysis, the city's incorporation of more commercial land
18 is simply an updating of the plan. That is, the city revised
19 its agricultural land and commercial land inventory in order to
20 comply with the plan. This criterion provides a reasonable
21 basis for the city's conclusion more land should be designated
22 "Immediate Urban," and zoned for commercial use.

23 The other two criteria advanced as separate and
24 independently sufficient determiners of need are different. If
25 need means more than a desire, the need for the use must be
26 balanced against other plan policies to see if the facts

1 showing need comply or do violence to the rest of the plan.
2 See "need" Websters 3d International Dictionary (1961).
3 Because the subject site is zoned for and is in agricultural
4 use, the agricultural goal is applicable.

5 The agricultural lands goal exists "[t]o preserve and
6 maintain agricultural lands." Land is to be considered
7 suitable for agricultural uses

8 "[i]f it is not built upon and exists in a large
9 enough parcel as to be productively farmed." Plan,
page 9.

10 There is no hint of what is meant by "productively farmed," or
11 what the city believes is a large enough parcel to be
12 "productively farmed." The city findings do not explain how it
13 is this property is not productive or is too small to be
14 productive. There is a statement from the owner (the applicant
15 herein) that the land is not productive, but the Board is cited
16 to no facts to support this view. Therefore, the city has not
17 shown the land is not suitable for agricultural use. As a
18 consequence, if it is to be taken from agricultural use, there
19 must be a showing of need for some other use that overrides
20 preserving the land for agricultural use.

21 When deciding whether the need for the proposed use is
22 sufficient to take land from agricultural use, the urbanization
23 goal must be considered. Under the urbanization goal, lands
24 may be designated Immediate Urban when they are "required for
25 urban use."⁴ Plan, p. 22 (emphasis added). Urbanization is
26 to take place on lands suitable for agricultural use "only

1 after all other available, adequate, and usable sites are
2 utilized." Plan, p. 9. This language does not suggest market
3 demand is enough to justify urbanization of agricultural land.
4 See Still v. Bd. of Co. Comm'rs., 42 Or App 115, 600 P2d 433
5 (1979). The Board does not find these plan policies allow land
6 to be taken from an agricultural land inventory simply because
7 it makes a good site for some particular use. Ruef v. Stayton,
8 7 Or LUBA 219 (1983).

9 In this case, the conclusion this property is needed
10 because it provides a superior site for a particular
11 development is suggestive of market preference, not need.
12 Still v. Bd. of Co. Comm'rs., supra. While there has been a
13 showing the city can support a commercial enterprise like that
14 of the applicants', there has not been a showing the enterprise
15 is itself needed in the city (to fulfill a plan goal or
16 policy). Therefore, the need for this site as the most
17 suitable for the project is not more than a market preference.
18 Where the use is needed and the site is the best site to
19 facilitate the use, then it may be argued the site is needed
20 for urban purposes. See, for example, Friends of Linn County
21 v. Lebanon, 1 Or LUBA 50 (1980).

22 The third criterion, the call for alternative properties to
23 insure a choice in the marketplace, maybe an independent source
24 of a need to make changes in land use designations when it can
25 be shown that existing choices are not sufficient. Presumably,
26 the adoption of the City of Banks comprehensive plan resulted

1 in a document with all goals in balance. That is, agricultural
2 land inventories were balanced against needs for other uses
3 including commercial uses, industrial uses and residential
4 uses. A change in that balance is possible, but the plan
5 requires a showing of need. That showing, if it is not to do
6 violence to the other portions of the plan, must be more than a
7 simple desire on the part of the person asking for the change.
8 Otherwise, the plan may be turned into a document which no
9 longer "interrelates all functional and natural systems and
10 activities relating to the use of lands * * * *" ORS
11 197.015(5).⁵

12 As discussed above, the city appears to have maintained
13 this balance in its analysis of the need for additional
14 commercial property. The same can not be said for the claim of
15 need for additional industrial land. With the industrial lands
16 analysis, the city made only a conclusion that more
17 industrially zoned land was needed. There is no discussion of
18 why the original choice of acreage for this use was wrong or
19 incomplete as with the analysis of the commercial acreage. It
20 is not apparent what the city meant when it said more land was
21 needed to "achieve the plan's economic policies." The city's
22 conclusion on the industrial lands issue includes only one
23 factor, choice in the marketplace. As discussed above, a more
24 detailed explanation of how the existing industrial land is not
25 adequate is required. All the city has recited is that it
26 wants more industrial land so there is more to buy with no

1 showing the industrial land which exists is unsuitable. In
2 other words, there has been no explanation of how more
3 industrial land is "required" under the urbanization goal to be
4 taken from the agricultural land inventory.⁶

5 This subassignment of error is sustained insofar as it
6 alleges no need has been shown to zone more land for industrial
7 use.

8 "B. The City's Finding of Need for Additional Urban
9 Land Prior to 1985 is Not Supported by
10 Substantial Evidence in the Whole Record."

11 Petitioners urge the city's decision to incorporate an
12 additional 9.2 acres of immediate urban land is not supported
13 by evidence in the record. Petitioners advise that before this
14 decision, the city's urban growth boundary contained 10.4 acres
15 of vacant commercial land and a projected need of only 4.3
16 acres of land by the year 2000. Petitioners also say the
17 record shows the vacant commercial land within the city limits
18 and immediately north of the subject site is and has been
19 available for use by the applicant or any other prospective
20 developer. Further, there is evidence in the record, showing
21 the city's market area will never generate a need for
22 additional commercial land. See minutes of April 12 and May
23 10, 1983 city council meeting and Record S154. Petitioners
24 argue references in the findings to "the plan's economic
25 policies" and "market choice in site size, neighboring land
26 uses and in locational factors such as access" are simply
generalizations. See Finding 34(k).

1 Participants argue the city's findings justify its
2 conclusion that additional large sites for industrial and
3 commercial uses are needed. There is at present only one site
4 zoned for commercial use, and the single site is insufficient
5 to provide any choice in the marketplace. Participants point
6 to the record at S134 in which the need for choices in the
7 marketplace is justified by reference to similar language in
8 LCDC Goal 9.⁷ Participants also point to the figures quoted
9 herein at Footnote 3, as substantial evidence for the need for
10 additional commercial acreage.

11 The city's conclusion it needs additional land for
12 commercial purposes is adequately supported under the city's
13 premise that additional land is needed now (1) to maintain the
14 established ratio of population to commercial land and (2) to
15 assure choice in the marketplace through the year 2000. See
16 Finding 34.⁸

17 The matter of support for the additional industrial acreage
18 is different. There are no facts or figures supporting the
19 need for more industrial land. The statement that more such
20 land is needed to insure a choice in the marketplace does not
21 explain how that need is unmet by the present acreage available
22 for industrial uses. There is no analysis of the industrial
23 land versus population similar to that used to show a
24 deficiency of commercial land. Also, there are no facts
25 showing why the market requires greater choice than that
26 available now within the city. As discussed earlier, the Board

1 believes the sole reference to market choices is not enough to
2 justify a change. If market choice were the sole criterion,
3 the city would be free to rezone the whole UGB for whatever use
4 it pleased with no evidence the existing choices are
5 inadequate. See Sills v. Marion County, supra.

6 This subassignment of error is sustained insofar as it
7 alleges a lack of substantial evidence to support the change to
8 industrial zoning.

9 "C. The City Erred in Deferring Conformance with
10 Applicable Urban Facilities and Services Policies
Until the Issuance of a 'Development Permit.'"

11 Under this subsassignment of error, petitioners say the
12 comprehensive plan requires assurances of adequate utilities
13 prior to rendering land available for immediate development.
14 Petitioners quote the following plan policies.

15 "New development should occur in areas where public
16 utilities are available before reaching out in areas
that are not served."

17 "* * * *

18 "The City will require the following preconditions to
development:

19 "Surface water runoff can be handled on site, or
20 adequate provisions can be made for runoff which
21 will not adversely affect water quality in
adjacent streams, ponds, lakes or other drainage
22 on adjoining lands, nor will such runoff
adversely affect the use of adjoining properties.

23 "Adequate water will be present for firefighting.

24 "* * *

25 "The city will require equitable sharing of those
26 public facility costs between new development and
the community through a systems development

1 charge, Local Improvement District, or other
2 possible means." Comprehensive Plan, City of
Banks, page 16-17.

3 Petitioners argue the designation of the subject site as
4 Immediate Urban and the zoning of the property for commercial
5 and industrial use will result in the city having to issue
6 permits for proposed uses where there has been no showing of
7 the availability of utility services. Petitioners point to the
8 city's own findings which concede water and sewer connections
9 are not now available. Finding 39 and Conclusion #6.

10 Petitioners add the city has impermissibly relegated to a
11 condition a requirement of its comprehensive plan. Without
12 further public hearings which would reveal compliance with
13 applicable standards, the city may not approve this
14 development. See Turner v Washington County, __ Or LUBA ____
15 (LUBA No. 83-014, 1983). Gustafson v. City of Grants Pass, 3
16 Or LUBA 189 (1981).

17 Petitioners add the finding for construction of needed
18 services is uncertain, and this fact also shows the Urban
19 Facilities and Services Goal to remain unmet. Participants say
20 the plan requires the city to find services are available and
21 may reasonably be extended to specific properties if private
22 commitments are made to insure such extension. Participants
23 say the city did so. It first made findings that public
24 facilities and services could reasonably be extended to the
25 property, and after so finding, that extensions could be made
26 and financed through the imposition of conditions. Findings

1 40-44 and Conditions at Record S18.⁹

2 The city's "Urban Facilities and Services" goal is

3 "[t]o coordinate and arrange for the provision of
4 public facilities and services in an efficient,
orderly and timely manner." Plan, p. 16.

5 The city's interpretation of the policies is as follows:

6 "The Council interprets the terms 'available' and
7 'arrange for' as used in the Public Facilities and
Services goal section of the plan to mean that general
8 system capacity is available and can be reasonably
extended to the specific property if private
9 commitments are made to assure extension of such
services. The Council also interprets the goal
10 statement regarding provisions of facilities in an
efficient, orderly and timely manner to mean that
11 planning for public facilities should be conducted for
an entire service area rather than exclude any small
parcels such as the subject property.

12 "With regard to the policies for this section of the
13 plan it is the City Council's interpretation of these
policies that they apply to an actual request for a
14 development permit, i.e. a building permit and that it
has the authority to proceed with general plan
15 amendments prior to the actual availability of a
specific service to a specific property." Finding 39.

16 While the words "coordinate" and "arrange for" suggest the
17 goal is to guide provision of public facilities and services
18 within the city generally, the policies supporting the goal do
19 not appear to require a showing of the existence of sewer,
20 water and other utilities prior to making new comprehensive
21 plan and zoning designations. The city's policies under this
22 goal are listed as "preconditions to development," not as
23 directives about when or how to designate land for growth.

24 The Board cautions, however, that part of the city's
25 interpretation is not reasonable. The goal requires a
26

1 demonstration of availability of services prior to
2 development. A building permit is permission to build. The
3 permit may not be issued until all provisions of the plan and
4 code have been met. City of Banks Zoning Ordinance, Art 9,
5 §9.010. To issue a building permit on a mere showing of the
6 reasonable possibility of extending services is to make the
7 building permit into some sort of initial design approval
8 instead of the final permission to proceed that it is. The
9 showing of service availability at the building permit stage
10 must be firm, not one of mere feasibility. See Margulis v City
11 of Portland, 4 Or LUBA 89 (1981); Meyer v Portland, 7 Or LUBA
12 184 (1983).

13 As to the matter of the adequacy of funding, the Board
14 finds the city's plan is not specific in its description of
15 what kind of funding must be available for public
16 facilities.¹⁰ In this case, the city found the applicant had
17 committed itself to a sharing and development cost. It does
18 not appear that the plan requires any more at this stage. It
19 may be imprudent for the city to approve a development with
20 only the commitment of an applicant to participate in some sort
21 of "equitable sharing and development costs," but it does not
22 appear to be illegal under the city's plan.

23 This subassignment of error is denied.

24 "D. "The City Erred by Failing to Provide Finding and
25 Conclusions Supported by Substantial Evidence in
26 the Record Which Demonstrate Conformance with
Urbanization Policy No. 1."

1 Under this subassignment of error, petitioners quote the
2 following urbanization policy:

3 "The city has established an urban growth boundary;
4 growth and development will be directed and encouraged
5 within this area on developable lands (as shown and
6 defined in the plan element section). Development
7 will be consistent with the capacity and capability of
8 public services." City of Banks Comprehensive Plan at
9 21.

10 Petitioners argue the city did not even address this policy.
11 At the same time, petitioners point to the city's findings at
12 Finding 51 acknowledging this policy to be applicable. The
13 Board understands petitioners to say the city has made no
14 assessment of how, when and at what level utility services can
15 be provided. Petitioners point to the city's "Conclusions of
16 Law" No. 6 wherein the city notes "that water and sewer
17 connections are not available today for the subject property."
18 Petitioners argue there must be a finding at this stage of the
19 proceeding showing such services are available.

20 Participants argue the city's plan simply requires a
21 showing that services can be extended to the site. In this
22 case, the city found the South Banks Local Improvement District
23 would provide sewer service, and the Local Improvement District
24 was proceeding through an engineering design phase. The Local
25 Improvement District's improvements will have sufficient
26 capacity to serve the project, according to participants.
27 Participants also point to city Finding #42 explaining the
28 property is already served with a three-quarter inch city water
29 line, and installation of a ten inch water line will enable the

1 applicant to supply water for fire and meet daily water needs.
2 Finding #44.

3 Some guidance as to what the urbanization policies require
4 is provided by the urbanization policy on annexation.
5 Annexation is allowed when it is shown to be consistent with
6 the comprehensive plan and "within the capabilities of the
7 city's services and facilities." Plan, p. 21. This plan
8 element suggests guidance to the city council when it
9 designates property for development. That is, lands within the
10 urban growth boundary may be zoned (and thereby made available)
11 for development as long as they are within the "capacity and
12 capability of public services." Other lands may be annexed to
13 the city and thereby be made available for development when
14 they are "within the capabilities of the city's services and
15 facilities." These policies are different from the Urban
16 Facilities and Services policies which appear to be directed
17 more at specific development requests. It is important to
18 remember in this case that the land is now outside of the
19 city's limits, and therefore the Board believes that in zoning
20 this property in anticipation of annexation, the city is
21 obliged to abide by policies controlling what land it will
22 annex.

23 Therefore, while the city's interpretation of the term
24 "available" as it is used in the Public Facilities and Services
25 element of its plan is reasonable, such is not to say that the
26 city may zone property for development without a showing of

1 feasibility and capacity to serve the property with the city's
2 services under its Urbanization Goal.¹¹

3 The city's findings do not show feasibility of providing
4 sewer and water services. The findings show ongoing studies.
5 See Finding 41-44 and Condition of Approval No. 2 at S18. The
6 city is still undertaking studies to determine whether water
7 and sewer is available and how these services will be
8 provided.¹² Id. The condition requiring a determination of
9 water and sewer service is simply a postponement of a finding
10 to this effect. Id. The Board believes the urbanization
11 policy, unlike the urban facilities and services policy,
12 requires a finding of consistency with the capacity and
13 capability of public services. To make such a finding, the
14 city must have facts showing the feasibility of providing
15 service to an area before the area may be designated for urban
16 commercial and industrial uses.

17 This subassignment of error is sustained.

18 "E. The City Erred in Failing to Provide Adequate
19 Findings Supported by Substantial Evidence which
20 Demonstrate Conformance with the Plan and Zone
Amendment Standards Set Forth at Page 60 of the
Comprehensive Plan."

21 Petitioners argue the city's plan requires it to
22 demonstrate:

23 "The change is in conformance with the comprehensive
24 plan.

25 "There is a public need for the requested change.

26 "The public need will be best served by changing the
classification of the particular piece of property in

1 question, as compared with other available property.

2 "Proof of change in a neighborhood or error in the
3 original comprehensive plan or ordinance are
4 additional relevant factors to consider.

5 "The potential impact upon the area resulting from the
6 change must be considered; the greater the impact, the
7 greater the degree of justification.

8 "If other areas have been previously zoned the
9 classification which is sought, the proponent must
10 show why it is necessary to introduce that zone into
11 an area not previously contemplated." Plan, p. 60-61.

12 Petitioners argue the city's findings showing compliance with
13 these criteria simply conclude the criteria have been met.

14 Petitioners argue the city is under an obligation to support
15 conclusions of compliance with something more than a mere
16 reference to the previous pages of findings which address
17 different standards.

18 Petitioners add the criteria were made the subject of
19 specific testimony. See Record S75-76, 83-86. There is no
20 response to petitioners' concerns, and the city was under a
21 duty to make such response. See Novell v. Portland
22 Metropolitan Area Local Government Boundary Comm'n, 43 Or App
23 849, 604 P2d 896 (1979).

24 Respondents agree the policies are applicable.

25 Participants state, however, the findings made showing
26 compliance with the criteria are not comprehensive because the
27 criteria are nearly identical to other standards found within
28 the plan. For example, the standard calling for a public need
29 for the requested change was discussed when the city justified

1 the inclusion of more commercial land. See Assignment of Error
2 I(A). Therefore, according to participants, the city
3 considered the public need criterion existing in the
4 comprehensive plan at page 60 to be the equivalent of the need
5 criterion in the urbanization policy.¹³

6 Participants argue the matter of alternative sites was
7 discussed when the city compared the need for incorporation of
8 the subject property into its industrial and commercial lands
9 inventory with the lands already available for these uses.

10 Participants say all applicable plan policies were
11 considered at some point in the findings.

12 The Board agrees with the participants. The city explained
13 what it meant by public need, and it is not necessary for the
14 city to explain the same matter twice. But see discussion
15 under Assignment of Error I(A), supra. The city's extensive
16 findings explain why it undertook the changes, and the findings
17 taken as a whole cover each of the criteria found at page 60 of
18 the plan. The Board does not believe it is necessary for the
19 city to repeat discussions already made showing compliance with
20 apparently identical criteria.¹⁴

21 This subassignment of error is denied.

22 The first assignment of error is sustained, in part, as
23 discussed above.

24 SECOND ASSIGNMENT OF ERROR

25 "THE CITY ERRED IN FAILING TO ADDRESS CONFLICTING
26 EVIDENCE WHICH UNDERMINES ITS ULTIMATE FINDINGS AND
CONCLUSIONS."

1 Under this assignment of error, petitioners argue the city
2 was given substantial conflicting evidence on the matter of
3 need for additional commercial land, the choice of this
4 particular site, the city's commercial land needs calculations
5 and its finding regarding the need for industrial land.
6 Petitioners' claim the city was obliged to discuss this
7 conflicting evidence and explain why it chose not to believe
8 it. Clemens v Lane County, 4 Or LUBA 63 (1981). Also,
9 petitioners take issue with the city's finding on the need for
10 industrial property and on the suitability of the site for
11 agricultural purposes. There is a conclusion that the site is
12 "unsuitable for agricultural uses," but petitioners complain
13 the city did not address evidence showing the site to be
14 suitable for agricultural uses.

15 Participants argue the petitioners presented extensive
16 evidence about the suitability of its own site, the South Banks
17 site. The city did what it was required to do, according to
18 participants: it compared petitioners' property with that of
19 the subject property and concluded, with reasons, why the city
20 preferred participant's site over that of petitioners.
21 Participants argue whatever conflicting evidence was introduced
22 is not material to the city's decision.

23 With respect to the industrial lands finding, participants
24 repeat their earlier argument that more large lot industrial
25 and commercial properties were needed within the city to
26 provide a market choice.

1 As to petitioners' assertion the city did not address
2 evidence about the suitability of the property for agricultural
3 land, participants say the city properly found the site was not
4 suitable for continued agricultural uses. The findings
5 numbered 11 through 15 support the conclusion that the parcel
6 size, its location and its proximity to lands planned for
7 immediate commercial and residential use made it unsuitable for
8 agricultural use, according to participants.

9 With respect to agricultural uses, the Board agrees with
10 petitioners that the soil type and history of uses suggests the
11 property is suitable for agricultural use. However, the
12 comprehensive plan does not require continuation of
13 agricultural use when a need is shown for other more intensive
14 uses. See Plan, page 9 and discussion under Assignment of
15 Error I(A), supra. Therefore, the Board does not believe the
16 city needed to discuss conflicting evidence on the agricultural
17 value of this land when deciding whether to add it into a
18 commercial land inventory. The city made a valid determination
19 of need for some of the property for commercial purposes. The
20 Board believes the city's analysis of need is sufficient to
21 remove the property from agricultural land and add it to the
22 commercial lands inventory.

23 As noted earlier, there is no support for removal of
24 agricultural land for industrial uses. The record does not
25 show any facts supporting a need for more industrial land, even
26 if one accepts the view that more is needed to supply the

1 marketplace.¹⁵ However, while the Board finds the city has
2 not adequately explained its claim of need for more industrial
3 land, the evidence cited by petitioners about industrial land
4 is simply argument. Therefore, the Board does not find the
5 city to have erred in the manner alleged when it failed to
6 consider this "evidence" on industrial land needs.

7 This assignment of error is denied.

8 THIRD ASSIGNMENT OF ERROR

9 "SINCE THE SUBJECT PROPERTY IS YET TO BE ANNEXED TO
10 THE CITY OF BANKS, THE CITY'S ACTIONS CHALLENGED
11 HEREIN ARE VOID FOR WANT OF JURISDICTION."

12 Petitioners argue that because the property subject to this
13 rezoning lies outside the corporate limits of the City of
14 Banks, the city's action is ultra vires and must be declared
15 void. Petitioners say there is no power provided by the
16 legislature under which the city may zone land outside its
17 corporate limits. See State v. Port of Astoria, 79 Or 1, 154 P
18 39 (1916); 8 E. McQuillin, Municipal Corporations, §25.85 (3d
19 ed 1976), hereinafter McQuillin. Petitioners add the emergency
20 clause put in the ordinance, in an apparent effort to make the
21 ordinance effective immediately, makes the decision outside the
22 city's authority at the time it is declared to be effective.
23 The decision can not be brought to life by some independent
24 conferral of authority by the boundary commission, according to
25 petitioners.

26 Participants argue a city may enact an ordinance to go into
effect on a stated contingency. In this case, the stated

1 contingency is the action of the boundary commission. Further,
2 participants point to Willamette University v. LCDC, 45 Or App
3 355, 608 P2d 1179 (1980) in which the court recognized the
4 existence of the same facts that exist here. That is, in the
5 Willamette University case, an action of city annexing certain
6 property was made contingent upon an action of a boundary
7 commission. The court did not recite this set of circumstances
8 as part of a holding, but at least the court appeared to take
9 no offense at the existence of such facts.

10 ORS 227.720(2) provides:

11 "Notwithstanding any other provision of law, the
12 jurisdiction and application of government of cities
13 shall be coextensive with the external boundary of
14 such cities, regardless of county lines."

15 There are two clear apparent exceptions to this rule. In ORS
16 227.110, the city is given authority to review subdivision
17 plats and public dedications outside their corporate limits
18 (within six miles), and in ORS 215.170, a city is permitted to
19 rename thoroughfares until the city exercises its own authority
20 within an area. One other provision, however, tends to suggest
21 a recognition in unnamed circumstances of a city's authority to
22 take action in advance of its power to make that action
23 effective. Under this statute, county zoning applies to

24 "the area within the county also within the boundaries
25 of a city as a result of extending the boundaries of
26 the city or creating a new city unless, or until the
city has by ordinance or other provision provided
otherwise. * * * *" ORS 215.130(2)(a).

This language suggests a city may take action in advance of the

1 time property is annexed to a city. Use of the word "unless"
2 may be read as a legislative recognition there are
3 circumstances in which a city has planned and zoned an area
4 before the territory is incorporated into the city limits.
5 Petitioners posit the word "unless" simply refers to a
6 situation in which a municipality annexes and rezones land
7 simultaneously; however, it is equally possible the language
8 looks to a situation where the city has acted in advance of its
9 apparent authority to do so in anticipation of an annexation.

10 While not at all without doubt, the Board believes the
11 existence of the "unless or until" language in ORS
12 215.130(2)(a) is a recognition of authority of a city to plan
13 and zone for property outside its jurisdictional limits in
14 anticipation of annexation. It is a generally recognized
15 principal that municipalities may act subject to stated
16 contingencies, and the fact that the stated contingency is an
17 action by another governmental authority does not make the
18 city's action void. 5 McQuillin, §15.41. It is not a
19 delegation of legislative authority as, for example, delegation
20 of a discretionary power to some city staff member might be,
21 but is rather a means of controlling the time when the
22 ordinance has the power to change or direct the use of land.
23 See 2 McQuillin, §4.14.

24 The Board is not troubled by the existence of the emergency
25 clause. The emergency clause simply means, in these
26 circumstances, the ordinance is effective as an ordinance

1 immediately. Implementation of the ordinance is still
2 controlled by an additional provision, a stated condition that
3 the ordinance take effect only upon action of the boundary
4 commission. See Record S18 and the Minutes of the City Council
5 of May 10, 1983. The Board notes the condition includes no
6 time limit. It is also correct that the boundary commission
7 has considered this matter and denied the annexation. The
8 matter is up before the boundary commission again. With no
9 time limit, conceivably the ordinance can be in existence
10 forever waiting for an action of the boundary commission.
11 While a potential cause of confusion, the Board is aware of
12 nothing to make this set of circumstances illegal. Only if the
13 ordinance were to clearly state that it would become effective
14 when the boundary commission acted on a date certain would the
15 Board possibly construe the ordinance to have expired with the
16 boundary commission's failure to approve the annexation.

17 There exists one other source for the city's power to act
18 now. Section 2.060 of the city's development code provides:

19 "Zoning regulations applicable to an area prior to
20 annexation to the City shall continue to apply and
21 shall be enforced by the City until a zone change for
22 the area has been adopted by the City Council. The
23 City may, in an ordinance annexing property to the
24 City or ratifying annexation action of the Portland
25 Metropolitan Area Boundary Commission, conduct such
26 proceedings as may be necessary to conform the zoning
and land uses of the property to the requirements of
the City's Zoning Code and Comprehensive Plan.

"The Council may also by ordinance place the property
of any part thereof in a zoning classificaton
hereunder, provided the resolutions, ordinance and
notices required to be given in the annexation

1 proceedings include a declaration of the City's
2 intention to place the annexed property or such part
thereof in such zoning classification."

3 The first sentence in this section suggests the city is
4 reserving for itself the power to act prior to annexation. The
5 last paragraph of §2.060 similarly suggests the city may act on
6 zoning land prior to annexation as long as the annexation
7 proceedings recite the city has taken such action.

8 The Board concludes the decision to rezone outside city
9 limits in the manner done here was within the city's power.
10 The third assignment of error is denied.

11 The decisions of the City of Banks are remanded for further
12 proceedings not inconsistent with this opinion. At a minimum,
13 the city must review its designation of the subject property
14 for industrial use, and the city must determine, pursuant to
15 the urbanization policy of the comprehensive plan, whether it
16 is feasible to provide sewer and water services to the subject
17 site.

FOOTNOTES

1
2
3 1

The citizen involvement and land use policies of the city's comprehensive plan call for update and revision of the plan every five years. The City of Banks Comprehensive Plan, p. 6. The Board does not find any other control on when the plan may be revised and does not see these policies to limit the city's review.

7
8 2

It is doubtful the city could prohibit its own future legislative action, even if it wanted to do so. See 2 E McQuillin, Municipal Corporations, §10.38 (3d ed, 1979), hereinafter McQuillin and 4 McQuillin at §13.03.

10
11 3

The city's findings, in part, on this issue are as follows:

"g. The city adopted off-street parking and landscape development regulations for new commercial development in its zoning ordinance in January 1980 which was adopted to implement its new comprehensive plan. There is no evidence in the plan or any related documents that the projections of commercial land needs took into account the substantial reduction in building coverage caused by adoption of off-street parking regulations. On the contrary, both the plan (Exhibit D) and the LCDC Acknowledgment Order indicate this reduction was mistakenly not considered.

"h. There is quantitative need for approximately 7.9 net acres of land beyond the land area already allocated for commercial use within the city limits (Exhibit G, pages 25 through 27). As shown in the table below which is an excerpt from page 26 of Exhibit G, the comprehensive plan projection methodology will result in a significant reduction of new commercial square feet per person if the limited land area designated for commercial expansion is maintained." Finding, p. 9.

	"Before this Addition Projected Situation (1980)	With this Addition Projected Situation (6 Acres Commercial) (2000)	
Existing Situation (1980)	Addition Projected Situation (2000)	With this Addition Projected Situation (6 Acres Commercial) (2000)	

1	"Population*	490	1,050	1,050
2	"Commercial Land Area Used 6.1		14.1**	20.1
3	"Net Commercial Sq.Ft.	212,600	334,600**	382,600***
4	"Net Commercial Sq.Ft. Per Capita	433 s.f./ person	318 s.f./ person	364. s.f./ person

6 _____

7 "*" Source: Comprehensive Plan and 1980 Census.

8 "*** Excludes 9.2 acres being considered in this application.

9 "**** Derived by adding existing square footage plus approximately
10 122,000 sq.ft. which assumed a 35% coverage factor on the 8
11 acres of additional commercial land in South Banks Properties.

12 "***** 48,000 (approximately) planned for 6 acres (gross current
13 proposal).

14 "NOTE: 2.4 acres were zoned commercial but vacant in 1980. Also
15 assumed that 2.4 acres of total available commercial acres
16 will be vacant at year 2,000.

17 "i. The City Council finds that the city's original intent in
18 projecting commercial land needs in the comprehensive plan was
19 to maintain a constant ratio of net leasable square feet of
20 commercial building space per capita into the future and that
21 if this objective is to be attained, an additional
22 approximately 7.9 acres is needed to maintain the 1980 level of
23 approximately 430 square feet per capita. The city further
24 finds that if additional commercial lands are not provided
25 within the planning area that the Banks Comprehensive plan may
26 no longer be in compliance with LCDC statewide planning goal
27 9." Findings, p. 10.

28 _____

29 4

30 "Future Urbanizable Areas are lands between the Immediate
31 Growth Boundary and the Urban Growth Boundary. Future
32 Urbanizable Areas are intended to include areas defined by
33 the State LCDC as Urbanizable Land. Areas in this land use
34 category are to maintain their rural or agricultural
35 character until such land is required for urban use and has
36 been redesignated 'Immediate Urban'." Plan, p. 22.

1
5

2 ORS 197.015(5) defines comprehensive plan as

3 "a generalized, coordinated land use map and policy
4 statement of the governing body of a local government
5 that interrelates all functional and natural systems
6 and activities relating to the use of lands,
7 including, but not limited to, sewer and water
8 systems, transportation systems, educational
9 facilities, recreational facilities, and natural
10 resources and air and water quality management
11 programs. 'Comprehensive' means all-inclusive, both
12 in terms of the geographic area covered and functional
13 and natural activities and systems occurring in the
14 area covered by the plan. 'General nature' means a
15 summary of policies and proposals in broad categories
16 and does not necessarily indicate specific locations
17 of any area, activity or use. A plan is 'coordinated'
18 when the needs of all levels of governments,
19 semipublic and public agencies and the citizens of
20 Oregon have been considered and accommodated as much
21 as possible. 'Land' includes water, both surface and
22 subsurface, and the air."

14
6

15 The question of whether or not sufficient evidence exists
16 to support these changes is a separate issue.

16
7

17 Goal 9 states, in part:

18 "Plans shall be based on inventories of areas suitable
19 for increased economic growth and activity after
20 taking into consideration the health of the current
21 economic base; materials and energy availability;
22 labor market factors; transportation; current market
23 forces; availability of renewable and nonrenewable
24 resources; availability of land; and pollution control
25 requirements.

26 "Economic growth and activity in accordance with such
plans shall be encouraged in areas that have
underutilized human and natural resource capabilities
and want increased growth and activity. Alternative
sites suitable for economic growth and expansion shall
be designated in such plans.

"Diversity - refers to increasing the variety, type,

1 scale and location of business, industrial and
2 commercial activities.

3 "Improve the Economy of the State - refers to a
4 beneficial change in those business, industrial and
5 commercial activities which generate employment,
6 products and services consistent with the availability
7 of long term human and natural resources."
8

9 8
10 There does not appear to be a demonstration in the findings
11 or in the record of an immediate need for more commercially
12 zoned property in general.
13

14 9
15 Condition No. 2 at S18 is as follows:

16 "No building or occupancy permit shall issue allowing
17 development on the Hernickx property without a
18 demonstration that sufficient public water and sewer
19 facilities will be available on-site at the time of
20 occupancy to serve the level of development proposed in the
21 building for occupancy permit application."
22

23 10
24 For extention of services outside the city limits, the city
25 requires the applicant to pay all costs and dedicate the
26 improvements to the city. See plan at 17.

27 11
28 The Board views the plan to provide that the Urbanization
29 Goal controls how land is chosen to be available for urban
30 development and the Public Facilities and Services Goal
31 controls site specific development.
32

33 12
34 Conclusion No. 6 says

35 "necessary facilities and services can be provided
36 through combined efforts of private and public
37 investments in facilities."
38

39 However, the city is referring to financial feasibility, not
40 engineering feasibility.
41

1 _____
13

2 The policy is quoted supra at page 4.

3 _____
14

4 The Board hastens to add it is not holding the needs
5 analysis to be wholly correct.

6 _____
15

7 The Board notes the discussion of agricultural lands in the
8 findings does not adequately explain why this property is not
9 suitable for agricultural use. There is a finding that only
10 6.7 acres of this 9.2 acre site is available for possible
11 agricultural use, but there is no explanation as to why the
12 city has concluded that the property is not a sufficient size
13 to be productive. Indeed, as noted earlier, there is no
14 indication of what the city means by "productive." The
15 testimony of the owner, Mr. Herinckx, that the property "is of
16 insufficient size and productivity to constitute a productive,
17 viable farm unit" is not supported by any facts. Findings, p.
18 5.