

LAND USE  
BOARD OF APPEALS

SEP 11 2 52 PM '86

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

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UNION STATION BUSINESS )  
COMMUNITY ASSOCIATION, )  
 )  
Petitioner, )  
 )  
vs. )  
 )  
CITY OF PORTLAND, )  
 )  
Respondent. )

LUBA No. 86-011  
FINAL OPINION  
AND ORDER

Appeal from City of Portland.

Joseph H. Voboril and Jeffrey H. Keeney, Portland, filed the petition for review and argued on behalf of petitioners.

Jeannette M. Launer, Ruth Spetter, and Margaret D. Kirkpatrick, Portland, filed a joint response brief and argued on behalf of Respondent City of Portland and Participants Portland Development Commission and Central City Concern.

Kressel, Referee; DuBay, Chief Referee; Bagg, Referee, participated in the decision.

REMANDED 09/11/86

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

1 Opinion by Kressel.

2 NATURE OF DECISION

3 This appeal concerns an ordinance amending Portland's Downtown  
4 Waterfront Urban Renewal Plan (DWURP). The amendment was proposed  
5 by the Portland Development Commission, the city's urban renewal  
6 agency, and approved by the city council.

7 FACTS

8 The amendment adds two properties to the list of those that may  
9 be acquired in connection with the renewal program for the downtown  
10 waterfront area. The amendment adds the following text to the  
11 DWURP:

12 "Parcels 17 and 18 1) Block P Lots 2 & 3 Couch's  
13 Addition (designated as the 17th property acquisition)  
14 housing, social service and commercial uses. 2)  
15 Block 18 Lot 2 & 3. Couch's addition (designated as  
16 the 18th property acquisition) housing, social service  
17 and commercial uses." Record at 375.

18 Each property is occupied by a dilapidated hotel. A report  
19 accompanying the amendment indicates that one of the hotels  
20 (the Beaver Hotel) is to be redeveloped as a social service  
21 center for low income persons. The other (the Estate Hotel)  
22 will be renovated to provide low income housing. According to  
23 the report, both structures are to be owned and managed by a  
24 private, non-profit agency, Central City Concern.

25 The Portland Development Commission and the city planning  
26 commission approved the amendment in November, 1985. The city  
council adopted the amendment by ordinance in January, 1986.

FIRST AND SECOND ASSIGNMENTS OF ERROR

1           Petitioner contends that the amendment violates several  
2 provisions of the state urban renewal law (ORS Chapter 457)  
3 because it authorizes direct acquisition of the two properties  
4 by a private entity, Central City Concern. Petitioner  
5 interprets the urban renewal law to authorize acquisition and  
6 disposal of property only by an urban renewal agency.

7           The amendment is a reviewable "land use decision" because it  
8 concerns application of the city's comprehensive plan. See ORS  
9 457.095(3) (urban renewal plan must comply with comprehensive  
10 plan); ORS 197.015(10). See also, Billington v. Polk County, 299  
11 Or 471, 703 P2d 232 (1985); Tides Unit Owners Assoc. v. Seaside, 11  
12 Or LUBA 84 (1984). We assume that our jurisdiction over the  
13 decision includes the authority to rule on petitioner's claims that  
14 it violates portions of the urban renewal statute, ORS Chapter  
15 457. See ORS 197.835(8)(a)(D) (LUBA shall reverse or remand a land  
16 use decision if the local decisionmakers improperly construed the  
17 applicable law).

18           The statutes relied on in these assignments of error are ORS  
19 457.170 and ORS 457.230(1).<sup>1</sup> As explained below, however, we  
20 conclude that the challenged amendment does not authorize direct  
21 acquisition of the properties by a private entity. Accordingly, we  
22 need not consider whether the cited statutes permit that practice.

23           The record indicates that the city's urban renewal agency has  
24 acquired options to purchase the properties. The agency's report  
25 on the proposed amendment to the DWURP shows that the options may  
26 be transferred to Central City Concern, enabling that entity to

1 purchase the properties directly from the owners.<sup>2</sup> The report  
2 states:

3 "Sources of funds will be a combination of City Bureau  
4 of Community Development funds, Tax Increment bond  
5 proceeds, Private Financing, Foundation grants, State  
6 of Oregon Housing Division Bond funds and any other  
sources which can be secured. Assistance will be in  
the form of a loan or grant to Central City Concern to  
enable them to purchase and rehablilate the buildings.

7 "Purchase options may only be exercized by Central  
8 City Concern, if at all, only when all funds for  
9 acquisition, rehabilitation and soft costs are  
identified and funding commitments secured and the  
social service plan is completed." Record at 406.

10 Although the report on the amendment foreshadows  
11 acquisition of the properties by Central City Concern, the  
12 amendment itself does not endorse or authorize this approach.  
13 A proposed version of the amendment would have modified the  
14 DWURP to authorize "acquisition and rehabilitation of  
15 properties by private parties, with or without the financial  
16 assistance of the commission," Record at 484, but this language  
17 was not included in the amendment adopted by the city council.  
18 See Record at 374. As adopted, the amendment merely adds the  
19 two properties to the list of those "...which may be acquired  
20 by the agency for clearance and redevelopment." Record at  
21 374-5 (emphasis added).

22 Our jurisdiction is limited to the review of "land use  
23 decisions." ORS 197.825(1). The land use decision at issue in  
24 this appeal is the amendment to the DWURP, not the report<sup>3</sup> or  
25 other materials accompanying the amendment during the city's  
26 proceedings. Petitioner alleges that "the sole purpose of the

1 Amendment was to have the Council approve PDC's assignment of  
2 the options to Central City Concern," Petition at 6, but the  
3 allegation is not borne out by the city's decision. The  
4 challenged amendment does not authorize any particular means of  
5 acquiring the two properties. The amendment leaves intact the  
6 provisions of the DWURP that concern property acquisition.  
7 Those provisions contemplate acquisition by the urban renewal  
8 agency. Record at 373-4. Thus, whether the urban renewal  
9 statutes would permit the city to transfer the options to  
10 Central City Concern, setting the stage for direct acquisition  
11 of the properties by that entity, is not at issue here.

12 Based on the foregoing, the first two assignments of error  
13 are denied.

14 THIRD ASSIGNMENT OF ERROR

15 ORS 457.095 lists findings that must be included in an  
16 ordinance adopting an urban renewal plan. Similar findings  
17 must accompany a substantial amendment to such a plan. ORS  
18 457.220(2). The parties agree that the challenged ordinance  
19 adopts a substantial amendment to the DWURP. See DWURP,  
20 Section H, April 21, 1983.

21 ORS 457.095(6) requires a finding that

22 "Adoption and carrying out of the urban renewal plan  
23 is economically sound and feasible."

24 The city council made the required finding but added a  
25 qualification. The finding reads:

26 "Adoption and carrying out the Ninth Amendment is  
economically sound and feasible or the acquisitions

1 will not be pursued." Record at 362. (Emphasis  
2 added.)

3 Petitioner claims that the finding is at odds with ORS  
4 457.095(6) because it "...committed the PDC to nothing, other  
5 than perhaps more study regarding the issue of economic  
6 feasibility." Petition at 12. Respondents answer that the  
7 underlined portion of the finding is "redundant surplusage,  
8 which merely recognizes the fact that if circumstances change  
9 prior to acquisition, PDC will not proceed." Respondents'  
10 brief at 10-11.

11 Petitioner's criticism of the finding is well taken. ORS  
12 457.095(6) requires an unqualified determination that the  
13 amendment is economically sound and feasible. The challenged  
14 finding is not such a determination. Fairly read, it says that  
15 acquisition of the two structures may prove to be economically  
16 sound and feasible; if it is not, the project will not be  
17 undertaken. We reject respondents' attempt to characterize the  
18 qualification in the finding as mere surplusage.

19 The third assignment of error is sustained. ORS 457.095  
20 does not permit a municipality to hedge its findings as the  
21 city has in this case. Cf Federation of Seafood Harvesters v.  
22 Fish and Wildlife Comm., 291 Or 452, 459-60, 632 P2d 777  
23 (1981). The decision is remanded for entry of the unqualified  
24 finding required by ORS 457.095(6).

25 FOURTH ASSIGNMENT OF ERROR

26 The city's urban renewal agency was required to submit a

1 report to the governing body concerning the proposed  
2 amendment. ORS 457.085(5). The contents of the report are  
3 prescribed by ORS 457.085(3). In this assignment of error  
4 petitioner contends the report submitted to the city council  
5 did not adequately address all of the prescribed elements.

6 1. Impacts

7 ORS 457.085(3)(a) requires a report by the urban renewal  
8 agency to contain:

9 "A description of physical, social and economic  
10 conditions in the urban renewal areas of the plan and  
11 the expected impact, including the fiscal impact, of  
the plan in light of added service or increased  
population."

12 ORS 457.085(3)(c) requires a report to address:

13 The relationship between each project to be undertaken  
14 under the plan and the existing conditions in the  
urban renewal area."

15 Petitioner first argues that the report accompanying the  
16 challenged plan amendment does not address the "social impact"  
17 of providing services to indigents at the Beaver Hotel.

18 However, we have some difficulty responding to this claim  
19 because petitioner does not explain what it means by "social  
20 impact." We assume petitioner is concerned about anti-social  
21 behavior sometimes associated with groups of indigents who  
22 congregate in Portland's Old Town area. If that is the  
23 concern, we note that it has been amply addressed by a report  
24 in the record entitled "Estate and Beaver Hotel Analysis."<sup>4</sup>

25 The report lists the types of undesirable activity common in  
26 the area (e.g., public drunkenness, panhandling) and explains

1 the ways the proposed program will discourage those  
2 activities. See Record at 528-535.

3 Petitioner offers two more specific criticisms of the  
4 city's urban renewal report under ORS 457.085(3)(a) and (c).  
5 One is that the report does not back up the conclusion that the  
6 infrastructure in the project area is adequate. Petitioner  
7 insists that more detailed findings must accompany this  
8 conclusion.

9 The portion of the report in question states:

10 "The existing public and private infrastructure  
11 (water, sewer, storm drainage, power and telephone  
12 systems) are adequate to serve planned development  
13 without additional costs or creation of other fiscal  
14 impacts. Likewise, police and fire protection are  
15 adequate and should not be expanded because of this  
16 project. Record at 402.

17 The statute relied on by petitioner requires the report to  
18 describe "... the expected impact, including the fiscal impact,  
19 of the plan in light of the added services or increased  
20 population." ORS 457.085(3)(a). Although the scope of the  
21 requirement is broad, we do not read it to require discussion  
22 of each possible impact in great detail, particularly when no  
23 impact is found. Here, the report specifies the types of  
24 infrastructure services that could be affected by the project  
25 and concludes that no impact on these services is expected.  
26 Petitioner cites nothing in the record which undermines the  
conclusion or requires more detailed analysis. Under these  
circumstances, we find the discussion in the report to be  
adequate.



1           Petitioner's remaining charge under ORS 457.085(3)(a) and  
2 (c) is that the city's report "... makes no effort whatsoever  
3 to address the impact on local businesses from the  
4 Amendment..." Petition at 13. The charge is ill-founded. The  
5 "Estate and Beaver Hotel Analysis" referred to earlier covers  
6 the business impact issue. The analysis states that the  
7 project will improve conditions in the area by upgrading  
8 housing stock and offering needed social services. The impacts  
9 on retail trade are addressed in connection with each of the  
10 buildings to be renovated. Petitioner's broad allegation that  
11 the report wholly disregards the impact on business must be  
12 rejected.

13           2. Estimated Cost

14           ORS 457.085(3)(d) requires that the report on the amendment  
15 contain:

16           "The estimated total cost of each project and the  
17 sources of monies to pay such costs."

18           The city's report breaks the project down into estimated costs  
19 for acquisition, rehabilitation, legal fees and  
20 administration. The summary of total project costs is followed  
21 by:

22           "Sources of funds will be a combination of City Bureau  
23 of Community Development funds, Tax Increment bond  
24 proceeds, Private Financing, Foundation grants, State  
25 of Oregon Housing Division Bond funds and any other  
26 sources which can be secured. Assistance will be in  
the form of a loan or grant to Central City Concern to  
enable them to purchase and rehabilitate the  
buildings." Record at 406.

26           Petitioner aims two criticisms at the report's discussion

1 of project costs under ORS 457.085(3)(d). First, petitioner  
2 says that the estimated acquisition cost of one of the hotels  
3 is based on "misinformation". In support of this charge,  
4 petitioner cites a conflict in the evidence provided by the  
5 city's urban renewal agency about the date the hotel was  
6 appraised. An official of the agency informed the city council  
7 that the appraisal post-dated a fire in the hotel. Record at  
8 94. However, an earlier report by the agency indicates that  
9 the appraisal pre-dated the fire. Record at 534.

10 We assume for argument's sake that the cost estimate  
11 required by ORS 457.085(3)(d) must be supported by substantial  
12 evidence, even though the report is not technically part of the  
13 city's decision. See ORS 197.835(8)(a)(C). We also assume  
14 that petitioner's theory is that the conflict in the evidence  
15 deprives the decision of the necessary support.<sup>5</sup> That being  
16 the case, we reject the claim.

17 First, the city council was entitled to rely on the  
18 testimony of an official of the agency in charge of the  
19 project. His testimony was that the appraisal, which was  
20 considered in determining project cost, was made after the  
21 fire.

22 Second, the report that petitioner says casts doubt on the  
23 appraisal date indicates the appraisal was "adjusted for fire  
24 damage remaining to be repaired, as well as those repairs  
25 already completed." Record at 534. Since the report indicates  
26 that the estimates of project cost took the fire into account

1 after the appraisal, it constitutes substantial evidence for  
2 the city's estimate under ORS 457.085 (3) (d). Braidwood v.  
3 City of Portland, 24 Or App 477, 546 P2d 777 (1976).

4 We conclude that the city's estimate of project cost is  
5 based on substantial evidence, regardless of the discrepancy  
6 about the date of the appraisal.

7 Petitioner's other criticism of the report under ORS  
8 457.085(3) (d) is that

9 "It is unclear from the Report exactly what sources of  
10 funding are going to be used, the amounts from the  
11 various sources, and the level of commitment to  
12 provide the funds. This is not the kind of detailed  
13 identification of committed funding sources which the  
14 statute requires." Petition at 15.

15 We cannot accept petitioner's characterization of ORS  
16 457.085(3) (d) as a requirement for "detailed identification of  
17 committed funding." The statute requires only an estimate of  
18 total project costs and "the sources of monies to pay such  
19 costs." We do not read it to require a breakdown of costs or  
20 of sources to finance those costs beyond the sources listed in  
21 the city's finding (quoted earlier in this opinion).

22 3. Financial Analysis

23 Petitioner's attack on the city's cost estimates is  
24 considerably stronger in the context of ORS 457.085(3) (g).  
25 This subsection of the statute requires the urban renewal  
26 report to contain:

A financial analysis of the plan with sufficient  
information to determine feasibility."

We read the requirement to relate to the portion of the law,

1 discussed earlier in this opinion, requiring the city council  
2 to determine whether the plan amendment is "economically sound  
3 and feasible." ORS 457.095(5). The city's report provides  
4 general information on possible funding sources for the  
5 project, but the information is not sufficient to demonstrate  
6 feasibility. In pertinent part, the report states:

7 "Chapter VII- A FINANCIAL ANALYSIS OF THE PLAN WITH  
8 SUFFICIENT INFORMATION TO DETERMINE FEASIBILITY

9 The HCD and Tax Increment funds have been identified  
10 and are available without new bonding indebtedness.  
11 Options may only be exercised if at all, only (sic)  
12 when other funds sufficient to complete the projects  
13 are identified. The possibility of acquiring one  
14 parcel without acquiring the other parcel may be  
15 evaluated. Either or both projects may be excluded  
16 from the acquisition dependent on the outcome of the  
17 work program being completed by the Central City  
18 Concern and the Portland Development Commission."  
19 Record at 407.

20 The word "feasible" means "capable of being done, executed or  
21 effected; possible of realization." Webster's Third  
22 International Dictionary, Unabridged (1966). The report in  
23 question does not contain a financial analysis demonstrating  
24 that the project, or any part of the project, is capable of  
25 being executed. Rather, the quoted financial analysis is  
26 qualified. Like the council's finding under ORS 457.095(5),  
see p. 5-6, supra, the report shows that the project may be  
feasible. We do not read the statute to authorize approval of  
an urban renewal plan or substantial plan amendment under these  
circumstances.

We conclude that the report is insufficient under ORS

1 457.085(3)(g). Accordingly, we uphold the fourth assignment of  
2 error in part.

3 FIFTH ASSIGNMENT OF ERROR

4 The final assignment of error reiterates claims we  
5 addressed earlier in this appeal. The first is that the Mayor  
6 of Portland failed to publically disclose the substance of  
7 certain ex parte communications concerning the amendment. The  
8 record shows that in response to a warning by petitioner's  
9 counsel, the Mayor distributed a list of contacts he had  
10 concerning the amendment at a hearing on January 23, 1986. The  
11 list did not set forth the substance of the discussions, but  
12 the Mayor offered to provide those details upon request. No  
13 such request was made.

14 We hold that disclosure was not required because the  
15 amendment was legislative in nature.<sup>6</sup>

16 The Supreme Court has identified two principal elements of  
17 adjudicatory action:

18 Generally, to characterize a process as an  
19 adjudication presupposes that the process is bound to  
20 result in a decision and that the decision is bound to  
21 apply preexisting criteria to concrete facts.  
Strawberry Hill 4-Wheelers v. Benton County, 287 Or  
22 591, 602, 601 P2d 769 (1979).

23 The urban renewal statutes, ORS Chapter 457, governed the  
24 city's proceeding. The statutes require presentation of an  
25 urban renewal plan or substantial plan amendment to the  
26 governing body, ORS 457.085(5) and ORS 457.220(2), and require  
the governing body to conduct a public hearing if it wishes to

1 adopt the amendment. ORS 457.095. However, the statutes do  
2 not require action once a plan or plan amendment is presented.  
3 As we read them, the statutes allow the governing body to  
4 shelve or indefinitely postpone consideration of a plan or plan  
5 amendment. The discretion to either act or set the matter  
6 aside indicates the proceeding is legislative. Strawberry Hill  
7 4-Wheelers v. Benton County, supra.

8 We conclude that disclosure of ex parte contacts was not  
9 required. See Neuberger v. City of Portland, 288 Or 585, 590,  
10 607 P2d 722 (1979).

11 Petitioner's last contention is that Respondent's Mayor was  
12 biased as a result of having ex parte contacts concerning the  
13 plan amendment. In support, petitioner offers the following  
14 statement by the Mayor:

15 "Obviously, I had to vote for this. It was my plan to  
16 begin with and I feel that it is extremely--although  
17 the purchase of the hotels have long predated my  
18 getting into this--but I think it is necessary."  
19 Record at 282.

20 Assuming that an elected official acting in a legislative  
21 capacity can be disqualified for bias, the Mayor's statement  
22 does not reveal disqualifying bias. Rather, it reveals a  
23 committment to a particular program he believes would serve the  
24 public. Although judges are expected to be detached and  
25 nonpolitical, elected officials are

26 "... expected to be intensely involved in the affairs  
of the community He is elected because of his  
political predisposition, not despite it...."  
Eastgate Theatre v. Board of Comm. of Washington  
County, 37 Or. App 745, 752, 588 P2d 640 (1978).

1           Based on the foregoing, the fifth assignment of error is  
2 denied.

3           The city's decision is remanded.  
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FOOTNOTES

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ORS 457.170(3) and ORS 457.170(8) state:

4 "An urban renewal agency may plan or undertake any  
5 urban renewal project to carry out an approved urban  
6 renewal plan. In planning or undertaking an urban  
renewal project, the urban renewal agency has the power:

7 \* \* \*

8 "(3) To acquire real property, by condemnation if  
9 necessary, when needed to carry out the plan.

10 \* \* \*

11 "(8) To dispose of, including by sale or lease, any  
12 property or part thereof acquired in the urban renewal  
area in accordance with the approved urban renewal  
plan."

13 In addition, ORS 457.230(1) states:

14 "(1) The urban renewal agency shall, in accordance with  
15 the approved urban renewal plan, make land in an urban  
16 renewal project available for use by private enterprise  
17 or public agencies. Such land shall be made available  
18 at a value determined by the urban renewal agency to be  
19 its fair reuse value, which represents the value,  
whether expressed in terms of rental or capital price,  
at which the urban renewal agency in its discretion  
determines such land should be made available in order  
that it may be developed, redeveloped, cleared,  
conserved or rehabilitated for the purpose specified in  
such plan."

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22 According to a planning commission report, the idea is to  
23 avoid municipal liability associated with temporary ownership  
of the two properties.

24 3

25 Under ORS 457.085, the city's urban renewal agency was  
26 required to submit a report on the proposed plan amendment to  
the city council. The statute does not make the report part of  
the amendment, however, and does not require the council to



1 adopt the report.

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4 The analysis was prepared during the city's review of the  
5 proposed amendment in response to questions raised during the  
6 proceedings. It was submitted by the renewal agency to the  
7 city council in conjunction with the proposed plan amendment on  
8 December 31, 1985. We consider the analysis to be a supplement  
9 to the urban renewal report.

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12 The decision, as noted earlier, amends the DWURP to add two  
13 properties to the list of those that may be acquired and  
14 upgraded. The report must accompany the plan amendment, but it  
15 need not be adopted by the governing body. ORS 457.095. This  
16 fact casts some doubt on whether it is legally necessary for  
17 the report to be supported by substantial evidence in the  
18 record. However, we note that, wholly apart from the report  
19 requirement, the statute requires the governing body to find  
20 that implementation of the amendment is "economically sound and  
21 feasible." ORS 457.095(6). That finding must be supported by  
22 substantial evidence pursuant to ORS 197.835(8)(a)(C). Since  
23 the finding could not be made without consideration of the cost  
24 of acquiring the hotels, petitioner's claims about the conflict  
25 in the evidence concerning the appraisal dates merits our  
26 consideration.

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29 In our Order Denying Motion to Take Depositions and Motion  
30 for Special Evidentiary Hearing (June 19, 1986), we held also  
31 that petitioner waived its objection to the Mayor's failure to  
32 disclose the substance of ex parte contacts because petitioner,  
33 which was represented by counsel, did not respond to the  
34 Mayor's invitation to ask about specific items on the  
35 disclosure list.

1 CERTIFICATE OF MAILING

2 I hereby certify that I served the foregoing Final Opinion  
3 and Order for LUBA No. 86-011, on September 11, 1986, by  
4 mailing to said parties or their attorney a true copy thereof  
5 contained in a sealed envelope with postage prepaid addressed  
6 to said parties or their attorney as follows:


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17 Dated this 11th day of September, 1986.

19   
20 Elizabeth E. Sheridan  
21 Management Assistant  
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