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

CITY OF WILSONVILLE,)
MUNICIPAL CORPORATION, and)
EARL MAY,)
Petitioners,)
vs.)
METROPOLITAN SERVICE DISTRICT,)
Respondent.)

LUBA No. 86-037

FINAL OPINION
AND ORDER

Appeal from Metropolitan Service District.

Michael E. Kohloff, Wilsonville, filed the petition for review and argued on behalf of Petitioner, City of Wilsonville.

Eleanor Baxendale, Portland, filed a response brief and argued on behalf of Respondent, Metropolitan Service District.

KRESSEL, Referee; BAGG, Referee; DuBAY, Chief Referee; participated in the decision.

AFFIRMED

10/09/86

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 Respondent denied a petition to amend the urban growth
4 boundary (UGB) for the Portland metropolitan area. The
5 amendment, termed a "locational adjustment" under Metro's code,
6 would add a 46 acre tract to the UGB.

7 FACTS

8 The property is in unincorporated Washington County and lays
9 just outside the metropolitan area UGB. Its western and
10 southern boundaries adjoin commercial development inside the
11 Wilsonville city limits. East of the property is agricultural
12 land. Small forested tracts, including a parcel used as a
13 water storage reservoir, are to the north.

14 The property is in two ownerships. A one-acre parcel on
15 the northern end is owned by Petitioner City of Wilsonville.
16 The property is forested. The city plans to construct a water
17 storage facility there, and to serve residents of the city via
18 transmission lines that would traverse the land to the south.

19 The remainder of the property is owned by Petitioner May.
20 The property is designated AF-10 (agricultural and forestry
21 use) and is undeveloped. Elligsen Road, an arterial, runs
22 along the property's southern boundary. Two local streets
23 serve the property to the west and could be extended to serve
24 the May property.

25 Petitioners applied for a "locational adjustment" to bring
26 the 46 acres within the UGB. The Metro code states:

1 "'Locational Adjustment' means an amendment to the
2 District UGB which includes an addition or deletion of
3 50 acres or less or a combination of an addition and
4 deletion resulting in a net change of 10 acres of
5 vacant land or less, and which is otherwise consistent
6 with the standards indicated in Section 3.01.040."

7 The code, which has been acknowledged by LCDC, sets forth a
8 series of factors to be considered when an area of less than 50
9 acres is proposed to be added to the UGB. An applicant for a
10 locational adjustment is not required to demonstrate a need to
11 expand the UGB to accommodate unexpected growth. Instead, the
12 applicant must show that adjusting the UGB to include the
13 property in question will contribute to an efficient land
14 development pattern. In pertinent part, Section 3.01.040 of
15 the code provides:

16 "(a) As required by subsections (b) through (d) of this
17 section, locational adjustments shall be consistent with
18 the following factors:

19 "(1) Orderly and economic provision of public
20 facilities and services. A locational adjustment
21 shall result in a net improvement in the efficiency
22 of public facilities and services, including but
23 not limited to, water, sewerage, storm drainage,
24 transportation, fire protection and schools in the
25 adjoining areas within the UGB; and any areas to be
26 added must be capable of being served in an orderly
27 and economical fashion.

28 "(2) Maximum efficiency of land uses. Considera-
29 tions shall include existing development densities
30 on the area included within the amendment, and
31 whether the amendment would facilitate needed
32 development on adjacent existing urban land.

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

1 "(4) Retention of agricultural land. When a
2 petition includes land with Class I-IV soils that
3 is not irrevocably committed to non-farm use, the
4 petition shall not be approved unless it is
5 factually demonstrated that:

6 "- Retention of the agricultural land would
7 preclude urbanization of an adjacent area
8 already inside the UGB, or

9 "- Retention of the agricultural land would
10 prevent the efficient and economical provision
11 of urban services to an adjacent area inside
12 the UGB.

13 "(5) Compatibility of proposed urban uses with
14 nearby agricultural activities. When a proposed
15 adjustment would allow an urban use in proximity to
16 existing agricultural activities, the justification
17 in terms of factors (1) through (4) of this
18 subsection must clearly outweigh the adverse impact
19 of any incompatibility.

20 Under the code, a proposal to add more than two acres to the
21 UGB must "be superior to the UGB as presently located based on
22 the factors set forth in Section 3.01.040(a)." Section
23 3.01.040(d)(2). The code also provides:

24 "Additions shall not add more than 50 acres of
25 land to the UGB and generally should not add more
26 than 10 acres of vacant land to the UGB. Except
27 as provided in subsection (4) of this subsection,
28 the larger the proposed addition, the greater the
29 differences shall be between the suitability of
30 the proposed UGB and suitability of the existing
31 UGB, based upon consideration of the factors in
32 subsection (a) of this section." Section
33 3.01.040(d)(3), Metro Code.

34 After evaluating petitioner's application under the
35 above-quoted code provisions, a hearings officer recommended
36 denial. The hearings officer's conclusions were later adopted
37 by the Metro council. They can be summarized as follows:

1 (1) The application complies with section
2 3.01.040(a)(1) (improvement in efficiency of public
3 facilities and services serving adjoining areas inside
4 UGB). The 46 acres can readily be served by existing
5 services, such as sewer, water, and storm drainage.
6 Adding the land to the UGB would increase the
7 efficiency of these services.

8 (2) More difficult questions arise under section
9 3.01.040(a)(2) (maximum efficiency of land uses). The
10 standard requires consideration of the extent of
11 development on the 46-acre parcel as well as whether
12 the proposal would facilitate development on adjacent
13 land. With respect to the former question, the 46
14 acres is almost completely undeveloped; it therefore
15 does not presently require municipal services. With
16 respect to the latter question, the critical fact is
17 that adjacent land within the UGB is already developed
18 or being developed. Since most of the necessary
19 services are already available to the adjacent
20 property, expanding the UGB to include the 46 acres
21 would not facilitate adjacent development. However,
22 urbanization of the 46 acres would probably include
23 the widening of Elligsen Road on the southern
24 boundary. This would stimulate development of the
25 land to the south "to some degree." Record at I-8.

26 Based on the above rationale, and taking into account the
"heightened burden of proof" required under Section
3.01.040(d)(3) the report concludes that the proposal does not
comply with section 3.01.040(a)(2). The report states:

"...though some facilitation of development might
occur as a result of this amendment proposal, there is
no evidence that such facilitation would meet the
heightened burden of proof required by paragraph (d)
of the standard. In addition, development of
principally vacant land does not in this case create
any notable efficiency of land use which might
otherwise exist were the parcel partially developed."
Record at I-8.

(3) Code Section 3.01.040(a)(3) (environmental,
energy, economic and social consequences) is not
applicable. Under the code any impact on transit
corridor development must be positive and "limitations
imposed by the presence of hazard (sic) or resource
lands must be addressed." The record contains no

1 evidence that the application would have impact on
2 existing transit corridors; further, no hazard or
resource lands were identified.

3 (4) Section 3.01.040(a)(4) (retention of agricultural
4 land unless conversion to urban use would result in
5 more efficient use of adjacent land inside the UGB) is
6 not met. First, the city-owned parcel is zoned for
7 exclusive farm use. The land can be developed for the
8 intended use (municipal water storage facility) under
9 EFU zoning. Therefore, although establishment of the
water storage system might facilitate development in
Wilsonville, an amendment of the UGB is not necessary
to achieve that result. Second, retention of the
entire 46 acres in agricultural use will not preclude
urban development on adjacent land within the UGB
because the adjacent land is already developed.

10 (5) Section 3.01.040(a)(5) (compatibility of urban
11 uses with nearby agricultural activities) is
12 satisfied. The record contains uncontroverted
evidence that development of the 46 acres will not
adversely affect nearby agricultural activity.

13 The hearings officer's report and petitioners' exceptions
14 to it were taken up by the Metro council at a hearing on May
15 15, 1986. At the conclusion of the hearing, the council
16 adopted the report and an order denying the application.

17 FIRST ASSIGNMENT OF ERROR

18 Under Metro's code, the council may limit its review of a
19 hearings officer's recommendation to the record established
20 before the hearings officer or it may hear additional
21 evidence. The code provides:

22 "(c) a party may, in addition to filing written
23 exceptions, file a written request to submit evidence
24 that was not available or offered at the hearing
25 provided for in Code Section 2.05.025. A written
26 request to submit additional evidence must explain why
the information was not provided at the hearing, and
must demonstrate that such evidence meets the
standards of Section 2.05.030 and would likely result
in a different decision. Upon receipt of a written

1 request to submit additional evidence, the council
2 shall within a reasonable time:

- 3 "(1) refuse the request; or
4 (2) remand the proceeding to the hearings officer
5 for the limited purpose of receiving the new
6 evidence and oral argument and rebuttal argument
7 by the parties on the new evidence; or
8 (3) If the nature of the new evidence to be submitted
9 is such that remand would serve no useful
10 purpose, proceed to hear and consider the
11 evidence and argument and rebuttal from the
12 parties on the evidence." Section 2.05.035 Metro
13 Code.

14 Petitioners asked the council to allow them to present new
15 evidence in their appeal. The evidence consisted of a
16 developer's plan to build an outdoor performing arts center on
17 the privately owned portion of the property. Petitioners
18 contended that the proposed evidence was admissible under the
19 Metro Code because it was (1) not available at the time the
20 hearings officer considered the proposed UGB amendment and (2)
21 relevant to whether the application satisfied several criteria
22 for approval. In a divided vote, however, a majority of the
23 council concluded that the new evidence should not be heard.¹

24 Petitioners assign error to the council's evidentiary
25 ruling. They contend that the evidence of the proposed
26 development satisfied the standards for new evidence in Metro's
code and therefore should have been admitted.

We reject this assignment of error for two reasons. First,
the Metro Council is not legally required by its code to hear
new evidence in reviewing a hearings officer's recommendation,

1 even if the proposed new evidence qualifies for admission under
2 Section 2.05.035. The code authorizes but does not require the
3 council to expand the factual record established by the
4 hearings officer. The council could thus limit its review to
5 the established record, requiring the applicant to present new
6 evidence to the hearings officer in a reapplication proceeding.

7 Apart from the above, we believe the council could refuse
8 to hear the new evidence on the ground that it was irrelevant
9 to approval of the locational adjustment of the UGB. As
10 Metro's brief explains:

11 "...the locational adjustment process is an
12 alternative process to strict Goal 14 compliance for
13 adding small parcels of land to the UGB. The process
14 assumes it will generally be impossible to demonstrate
15 an isolated need for 50 acres or less of urban land in
16 a boundary which includes 230,000 acres. As its name
17 implies, the locational adjustment process is designed
18 to correct small defects in the boundary where
19 inefficiencies to urbanization may have been created.
20 Therefore, the specific use for a parcel is not
21 particularly relevant, unlike a traditional Goal 14
22 amendment based on need. Additionally, it is
23 impractical for the council to ensure that any
24 particular proposed use will in fact occur. For these
25 reasons, the council does not rely on specific uses in
26 locational adjustments." Metro Brief at 3-4.

19 Metro's rationale is consistent with findings that serve as
20 background material to the code provisions governing UGB
21 amendments. Those findings state, in pertinent part:

22 "In general, it is assumed that land added to the UGB
23 will be developed and, all else being equal, some
24 property of comparable size already in the UGB which
25 would otherwise be needed for urban use will remain
26 undeveloped by the year 2000 in consequence."
Findings in Support of Ordinance 81-105, establishing
procedures for locational adjustments to Metro's urban
growth boundary, March 5, 1981.

1 Metro's interpretation of the code provisions governing UGB
2 amendments is reasonable and we accept it. See Gordon v.
3 Clackamas County, 73 Or App 16, 20-21 698 P2d 49 (1985). Under
4 that interpretation, the council could refuse to hear the new
5 evidence on relevancy grounds.²

6 The first assignment of error is denied.

7 SECOND ASSIGNMENT OF ERROR

8 Section 3.01.040(d)(3) of the Metro Code provides:

9 "(3) Additions shall not add more than 50 acres of
10 land to the UGB and generally should not add more than
11 10 acres of vacant land to the UGB. Except as
12 provided in subsection (4) of this subsection, the
13 larger the proposed addition, the greater the
differences shall be between the suitability of the
proposed UGB and suitability of the existing UGB,
based upon consideration of the factors in subsection
(a) of this section."

14 As noted previously, Metro held that because the requested
15 amendment involved nearly the maximum number of acres eligible
16 for a locational adjustment, it was subject to a "heightened
17 burden of proof" under the code. The final order concludes
18 that although the proposal meets the criteria for approval of a
19 boundary adjustment in some ways, the balance of factors
20 warrants denial. In this assignment of error, petitioners
21 contend that Metro could not employ a "heightened burden of
22 proof" to deny the amendment because such a variable, undefined
23 standard is unconstitutionally vague. Referring to section
24 3.01.040(d)(3), the petition states:

25 "This section fails to make clear to an applicant what
26 degree of evidence of greater differences there shall
be between a 46.25-acre application and a 10-acre

1 application. It fails to indicate how much greater
2 the differences must be. It fails to provide whether
3 the difference is greater qualitatively or
4 quantitatively. Basic, due process fairness not only,
5 at a minimum, requires that one be given notice and
6 opportunity to be heard at a meaningful time, but in a
7 meaningful manner. Vanelli v. Reynolds School
8 District Number 7, 667F 2d 773 (CA Or 1982)."
9 Petition at 12.

10 Petitioners' constitutional attack on the Metro code
11 provision must be rejected. Although a variable burden of
12 proof is necessarily imprecise, imprecision characterizes many
13 aspects of land use decisionmaking. See Anderson v. Peden, 284
14 Or 313, 587 P2d 59 (1978). For example, local decisionmakers
15 are often called on to balance divergent plan policies in
16 acting on permit and similar requests. See Green v. Hayward,
17 275 Or 693, 704, 552 P2d 815 (1976) (findings must explain why
18 proposal that satisfies some plan policies but not others
19 complies with the plan as a whole). The fact that the
20 decisionmakers who undertake this balancing do not announce the
21 precise weight to be given to particular policies in advance
22 does not make their decision unconstitutional.

23 The practice of subjecting large-scale land use changes to
24 greater scrutiny than smaller changes was sanctioned by the
25 state Supreme Court in Fasano v. Washington County, 264 Or 574,
26 507 P2d 23 (1973). In that case the Court stated:

"Because the action of the commission in this instance
is an exercise of judicial authority, the burden of
proof should be placed as is usual in judicial
proceedings, upon the one seeking the change. The
more drastic the change, the greater will be the
burden of showing it is in conformance with the
comprehensive plan as implemented by the ordinance..."

1 As the degree of change increases, the burden of
2 showing that the potential impact on the area in
question was carefully considered and weighed will
also increase." 264 Or at 586.

3 Petitioners cite no authority that undermines or
4 contradicts the court's statement in Fasano. Based on the
5 foregoing, the second assignment of error is denied.

6 THIRD ASSIGNMENT OF ERROR

7 In their exceptions to of the hearings officer's decision,
8 petitioners asked the Council to order a verbatim transcript of
9 the previous hearings. The Council turned down the request at
10 the hearing on May 15, 1986. However, copies of the pertinent
11 tape recordings were made available to petitioners prior to the
12 May 15 hearing.³

13 Petitioners assign error to the procedure followed by the
14 Council. They argue that a transcript would have disclosed
15 information supporting their application and that this
16 information was either misrepresented or disregarded in the
17 hearings officer's report. In particular, they claim the report
18 did not cite the reasons given by Petitioner Wilsonville for
19 wanting to annex the one-acre portion of the property.
20 Petitioners add that the hearings officer also misstated the
21 city's position when he found that "The city contends that the
22 reservoir can be constructed only if the property is annexed to
23 the City..." Record at I-4.

24 The legal foundation for petitioners' objection is
25 unclear. Their argument seems to be that a fair appeal hearing
26

1 could not be held without a verbatim transcript of the
2 proceedings below. However, petitioners do not cite legal
3 authority for the right they claim.

4 Petitioners do not contend they were prevented from either
5 making a factual record before the hearings officer or
6 subsequently directing the Council's attention to evidence in
7 the record supporting their application. As noted above,
8 petitioners had access to the tape recordings of the prior
9 hearings and could have transcribed relevant portions for the
10 benefit of the Council. Evidently they chose not to do so.⁴
11 The fact that a verbatim transcript, prepared at Respondent's
12 expense, might have been of assistance to petitioners in making
13 their case is not a reason for remanding or reversing the
14 Council's decision. See West v. City of Astoria, 18 Or App
15 212, 221-22, 524 P2d 1216 (1974).

16 The third assignment of error is denied.

17 FOURTH ASSIGNMENT OF ERROR

18 Petitioners' last assignment of error is that Metro failed
19 to give sufficient weight to the evidence and argument
20 petitioners offered in support of their application. They
21 direct our attention to this evidence and the conclusions they
22 believe should be drawn from the evidence.⁵ Their contention
23 seems to be that Metro did not fully appreciate the strength of
24 their case, and that the application should have been approved
25 because they supported it with substantial evidence.

1 We are not authorized to reweigh the evidence submitted to
2 local decisionmakers. If a land use decision is supported by
3 substantial evidence in the whole record, the fact that a
4 contrary decision might also be supported by the record is
5 irrelevant in this forum. Homebuilders Assoc. of Metropolitan
6 Portland v. Metropolitan Service District, 54 Or App 60, 62-63,
7 633 P2d 1320 (1981). The legislature has delegated the task of
8 weighing the evidence to local officials, not LUBA.

9 We note that Petitioners do not attack particular portions
10 of Metro's decision for lack of evidentiary support.⁶
11 Rather, they say they demonstrated satisfaction of all approval
12 criteria by substantial evidence, and that Metro erred in
13 concluding that some criteria were not satisfied. As already
14 noted, however, we may not undertake the analysis requested by
15 petitioners. The task of weighing the evidence in light of the
16 criteria for approval of a UGB amendment is Metro's to perform.

17 The fourth assignemnt of error is denied.

18 The challenged land use decision is affirmed.

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FOOTNOTES

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4 Metro's final order does not include a ruling on the
5 request to present new evidence. However, the minutes of the
6 council's hearing of May 15, 1986 show that a motion was passed
7 denying the request. The motion was made by Counselor Kafoury,
8 who argued that evidence of a proposed land use is irrelevant
9 to a request for a minor locational adjustment of the UGB.

7

2
8 Although the council voted to deny petitioners' request to
9 introduce evidence of the proposed arts center, the record
10 shows that petitioners' attorney was nonetheless permitted to
11 describe the project to the council in some detail. Thus it
12 might be more correct to describe the council's action as a
13 refusal to give any weight to the proposal, rather than a
14 refusal to hear evidence about it. In either case, we hold
15 that the council did not err.

13

3
14 See affidavit of Gwen Ware Barrett, Metro Intergovernmental
15 Resource Center secretary. Metro offered the affidavit as
16 supplemental evidence in response to petitioner's third
17 assignment of error. At oral argument, counsel for petitioners
18 waived objection to inclusion of the affidavit in the record.

17

4
18 At oral argument, counsel for petitioners suggested that
19 the tapes were given to petitioners too late for the
20 preparation of a transcript. However, the record of the
21 council hearing of May 15 indicates that petitioners' counsel
22 did not make this point or ask for a continuance so that a
23 transcript could be prepared.

21

5
22 Petitioners direct our attention to the following points
23 they say are shown by the record: (1) their application will
24 improve an arterial serving the area and will extend certain
25 streets to serve a nearby business park that currently has
26 inadequate access, (2) the proposal will bring a "looped water
system" to the area and will generally stimulate economic
development by improving water services in the area and (3)
urbanization of the parcel will improve land use efficiency

1 because the parcel is near interstate highway and adjoins
2 developed land.

3 The challenged order takes all these points into account
4 but denies the application on grounds that on balance. The
5 proposal will not facilitate efficient urbanization. We cannot
6 say that the evidence relied on by petitioners prevents
7 respondent from making that determination.

6

7 Petitioners would confront formidable difficulties in
8 challenging this decision on substantial evidence grounds. The
9 courts have instructed that a denial of a quasi-judicial land
10 use application is supported by substantial evidence unless the
11 reviewing tribunal can say, as a matter of law, that the
12 applicant is entitled to approval. Jurgensen v. Union Co.
13 Court, 42 Or App 505, 600 P2d 1241 (1979); Utah International,
14 Inc. v. Wallowa Co., 7 Or LUBA 77 (1982).

1 CERTIFICATE OF MAILING

2 I hereby certify that I served the foregoing Final Opinion
3 and Order for LUBA No. 86-037, on October 9, 1986, by mailing
4 to said parties or their attorney a true copy thereof contained
in a sealed envelope with postage prepaid addressed to said
parties or their attorney as follows:

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14 Portland, OR 97201

15 Dated this 9th day of October, 1986.

16 
17 Elizabeth E. Sheridan
18 Management Assistant
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