

BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

Nov 3 3 01 PM '89

1000 FRIENDS OF OREGON,)
)
 Petitioner,)
)
 vs.)
)
 METROPOLITAN SERVICE DISTRICT,)
)
 Respondent,)
)
 and)
)
 CITY OF FOREST GROVE, GLENN)
 ZURCHER, THEODORE ZURCHER, and)
 AVA ZURCHER,)
)
 Intervenors-Respondent.)

LUBA No. 89-036

FINAL OPINION
AND ORDER

Appeal from Metropolitan Service District.

F. Blair Batson, Portland, filed the petition for review and argued on behalf of petitioners.

Daniel B. Cooper and Lawrence S. Shaw, Portland, filed the response brief. Lawrence S. Shaw argued on behalf of respondent.

David G. Frost, Hillsboro, represented intervenors-respondent.

HOLSTUN, Referee; SHERTON, Chief Referee; KELLINGTON, Referee, participated in the decision.

REMANDED

11/03/89

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

1 Opinion by Holstun.

2 NATURE OF THE DECISION

3 Petitioners appeal Metropolitan Service District (Metro)
4 Ordinance 89-084, which amends the Metro Urban Growth Boundary
5 (UGB) to include 38 acres of land located in the City of Forest
6 Grove.

7 MOTION TO INTERVENE

8 The City of Forest Grove and Glenn, Theodore and Ava
9 Zurcher move to intervene on the side of respondent in this
10 proceeding. There is no opposition to the motion, and it is
11 allowed.

12 MOTION TO ALLOW ADDITIONAL EVIDENCE

13 On October 2, 1989, petitioner submitted a stipulated
14 motion and order to allow additional evidence. On October 6,
15 1989, respondent objected that the evidence offered went beyond
16 what the parties had agreed should be added to the record. On
17 October 16, 1989, LUBA received another copy of the October 2,
18 1989 stipulation with portions of that document deleted.

19 The evidence the parties ask that we allow as part of the
20 record in this proceeding includes a newspaper article and an
21 affidavit signed by petitioner's attorney. The newspaper
22 article reports that a parcel owned by intervenors-respondent
23 Zurcher located within the UGB was sold and apparently will be
24 developed as a mixed use industrial park.¹ The affidavit states

25
26 ¹Petitioner argues that the respondent, in the decision challenging this proceeding, accepted the applicant's argument that "the approximately 70

1 that petitioner's attorney first learned of the sale on
2 September 28, 1989, after the oral argument in this proceeding
3 held on August 25, 1989.

4 Except in situations described in ORS 197.830(11)(c), our
5 review of Metro's decision is "confined to the record."²
6 ORS 197.830(11)(a). As we have explained on numerous occasions,
7 the record before the governing body consists of that evidence
8 actually placed before the decision making body. Panner v.
9 Deschutes County, 14 Or LUBA 512 (1985). The September 29, 1989
10 newspaper article and the October 2, 1989 affidavit could not
11 have been placed before the decision making body prior to the
12 decision which it reached over six months earlier, on March 28,
13 1989. Accordingly, we deny the motion.³

14
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16 _____
17 acre parcel * * * within the urban growth boundary 'by itself, is not large
18 enough to economically support the capital investment that would be
19 required to make it useable.'" Stipulated Motion and Order to Allow
20 Additional Evidence 2.

21 ²ORS 197.830(11)(c) provides:

22 "In the case of disputed allegations of unconstitutionality of
23 the decision, standing, ex parte contacts or other procedural
24 irregularities not shown in the record which, if proved, would
25 warrant reversal or remand, the board may take evidence and
26 make findings of fact on those allegations. The board shall be
bound by any finding of fact of the local government, special
district or state agency for which there is substantial
evidence in the whole record."

The parties do not argue the evidence they offer may be accepted by the board pursuant to ORS 197.830(11)(c).

³Even if we could consider the offered evidence, it has no bearing upon the adequacy of the evidentiary record to support Metro's decision, when that decision was adopted.

1 FACTS

2 The 38 acres included within the UGB by Metro's decision
3 consist of Class II soils and are zoned for exclusive farm use.
4 The property is currently in farm use, and is part of a 560 acre
5 farm owned by intervenors-respondent Zurcher. Approximately 51
6 developable acres of intervenors-respondent Zurchers' property
7 were already within the UGB prior to Metro's action to include
8 the additional 38 acres.

9 The 38 acres are not presently served by water, sewer,
10 storm drainage facilities, utilities or adequate transportation
11 facilities for an industrial site. Within the City of Forest
12 Grove there are 447 acres of vacant industrial land.

13 INTRODUCTION

14 Establishment or change of a UGB must be based on the
15 following factors specified in Goal 14:

- 16 "(1) Demonstrated need to accommodate long-range
17 urban population growth requirements consistent
 with LCDC goals;
- 18 "(2) Need for housing, employment opportunities, and
 livability;
- 19 "(3) Orderly and economic provision for public
20 facilities and services;
- 21 "(4) Maximum efficiency of land uses within and on
 the fringe of the existing urban area;
- 22 "(5) Environmental, energy, economic and social
23 consequences;
- 24 "(6) Retention of agricultural land as defined, with
25 Class I being the highest priority for retention
 and Class VI the lowest priority; and,
- 26 "(7) Compatibility of the proposed urban uses with

1 nearby agricultural activities."

2 In addition to the above seven factors, change of an
3 acknowledged UGB must satisfy the requirements for a goal
4 exception. ORS 197.732(1) provides in part:

5 "A local government may adopt an exception to a goal
6 when:

7 "* * * * *

8 "(c) The following standards are met:

9 "(A) Reasons justify why the state policy
10 embodied in the applicable goals should not
11 apply;

12 "(B) Areas which do not require a new exception
13 cannot reasonably accommodate the use;

14 "(C) The long term environmental, economic,
15 social and energy consequences resulting
16 from the use at the proposed site with
17 measures designed to reduce adverse impacts
18 are not significantly more adverse than
19 would typically result from the same
20 proposal being located in areas requiring a
21 goal exception other than the proposed
22 site; and

23 "(D) The proposed uses are compatible with other
24 adjacent uses or will be so rendered
25 through measures designed to reduce adverse
26 impacts."⁴

27 In its first assignment of error, petitioner argues Goal 14
28 factors 1 and 2 are violated by Metro's decision. In its second
29 assignment of error, petitioner contends Goal 14 factors 3-7 are
30 violated. In its final assignment of error, petitioner argues

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⁴Nearly identical exception standards are stated at Goal II, Part II (c) and OAR 660-04-010(1)(c)(B). OAR 660-04-010(1)(c)(B)(i) provides the "reasons" criterion, see ORS 197.732(1)(c)(A) supra, is satisfied by demonstrating compliance with the seven factors of Goal 14.

1 Metro failed to demonstrate compliance with the exception
2 standards established by statute, goal and rule.

3 FIRST ASSIGNMENT OF ERROR

4 "Respondent misconstrued the applicable law, failed to
5 make adequate findings and made a decision not
6 supported by substantial evidence in the whole record
in determining that the UGB amendment satisfied the
requirements of Goal 14."

7 Goal 14 factors 1 and 2 are referred to as the "need"
8 factors. Metro's finding that the amendment meets the need
9 factors of Goal 14 is based on a need to improve "livability," a
10 need factor Metro contends is explicitly recognized in Goal 14
11 factor 2 and implicitly recognized in factor 1.

12 The City of Forest Grove's assessed property value per
13 capita is low compared to other Portland Metropolitan area
14 cities.⁵ Because assessed value per capita is low, Forest
15 Grove's property tax rate must be higher than that of its
16 wealthier neighbors in order to raise the same property tax
17 revenue. At the same time, Forest Grove's per capita income was
18 the second lowest of cities in the metropolitan area, according
19 to 1985 data. Metro found:

20 "Due to the low assessed value, Forest Grove's
21 property tax rates must be high in order to pay the
22 cost of city government and schools. Of the 31 Oregon
school districts of an average daily attendance of

23
24 ⁵According to 1984-85 data, Forest Grove ranked third from the bottom in
25 assessed value per capita among the 21 Portland metropolitan area cities.
Based on 1987-88 data, Forest Grove was fourth from the bottom in assessed
26 value per capita among the 11 Washington County cities. Record 21-22.

1 3,000 or more students, Forest Grove has the highest
2 property tax rate of all. Yet, due to the low
3 assessed values, the expenditures per student are only
in the middle range (16th) of the 31 school districts.
Forest Grove also has a high combined school and city
government property tax rate." Record 22.

4 Metro determined that property tax rates and school
5 expenditures are elements of livability. Metro reasoned that
6 the comparatively high tax rates needed to raise mid-range
7 school revenues detracted from livability in Forest Grove.
8 Metro further reasoned that an expansion of Forest Grove's
9 industrial land base would raise assessed value per capita,
10 allowing a reduction of the city's tax rate and producing
11 improved livability. Metro also found that expected new jobs
12 associated with industrial development in Forest Grove might
13 boost retail business and increase the assessed value of the
14 city's existing commercial properties, allowing further
15 reductions of property tax rates and improved livability. Metro
16 found:

17 "Although it is impossible to quantify the extent of
18 reductions in the residential property tax burden that
19 can be achieved due to increases in industrial
20 property assessed values and secondary increases in
21 commercial property assessed values, it is clear that
22 Forest Grove needs to accomplish these reductions as
quickly as possible in order to meet the livability
needs of its residents. Thus, there is a demonstrated
need for the immediate availability of developable
industrial land in Forest Grove. Whether land
presently within the UGB is sufficient is addressed
[elsewhere in Metro's decision]." Record 24.

23 Petitioner presents several challenges to Metro's "need"
24 rationale. We discuss petitioner's challenges separately below.
25
26

1 A. Improper Reliance on Goal 14 Factor 2

2 Petitioner contends the Court of Appeals determined in
3 Benjfran Development v. Metro Service Dist., 95 Or App 22, 767
4 P2d 467 (1989) that establishment of "need" under Goal 14
5 requires satisfaction of both factors 1 and 2. Petitioner
6 contends that because Metro conceded in its decision that the
7 UGB amendment could not be justified based on an increase in
8 population projections, factor 1 was not satisfied and Metro's
9 reliance on factor 2 alone to demonstrate Goal 14 "need" was
10 error.

11 We disagree both with petitioner's characterization of
12 Metro's need findings and its interpretation of what is required
13 under Benjfran Development v. Metro Service Dist., supra, to
14 properly address need under Goal 14.

15 First, Metro's Goal 14 factor 1 findings include the
16 following:

17 "* * * Petitioners are not attempting to assert that
18 an increase in population growth projections has
19 created a need for a UGB expansion. Instead,
20 petitioners assert that the UGB does not have within
 it sufficient industrial land to accommodate the needs
 of the present population. This will be discussed in
 the next section." Record 19.

21 We do not understand Metro to have found that Goal 14 factor 1
22 was not met. Rather, Metro found the existing land within the
23 UGB insufficient to accommodate the needs of the existing
24 population.⁶ In Benjfran Development v. Metro Service Dist.,

25
26 ⁶In our opinion in Benjfran Development Inc. v. Metropolitan Service

1 supra, the Court of Appeals specifically rejected petitioner's
2 argument that Goal 14 factors 1 and 2 are discrete, totally
3 separate criteria:

4 "Petitioner's argument also treats factor (2) as
5 existing in a vacuum and as providing a basis for a
6 finding of need, without reference to the first Goal
7 14 factor. As LUBA correctly noted, in response to an
8 argument of another party to this case:

9 "We add, 1000 Friends of Oregon's view of
10 population projections and its narrow
11 application of Goal 14, Factor 1 ignore the
12 final enjoinder in Factor 1 that the UGB
13 include land needed to accommodate the
14 population 'consistent with LCDC goals.'
15 The goals expressly include goals for
16 housing (Goal 10), and economic development
17 and employment opportunities (Goal 9).
18 Further, most goals address liveability,
19 whether directly or indirectly. In our
20 view, rigid separation of Factors 1 and 2
21 into independent mandatory criteria
22 ignores the obvious overlaps between the
23 two factors.'" (Emphasis added.) 95 Or
24 App at 27.

25 We believe our decision and the Court of Appeals' decision in
26 Benjfran Development v. Metro Service Dist., supra, permit the
27 need factors in Goal 14 to be satisfied if, after consideration
28 of these factors, Metro determines that the proposed use is
29 needed to improve livability. If Metro properly construed and
30 applied the livability standard, then the need factors of Goal
31 14 are satisfied.

32 This subassignment of error is denied.

33 Dist., ___ Or LUBA ___ (LUBA No. 88-039, September 30, 1988), slip op 13,
34 we specifically recognized that Goal 14 factor 1 could be satisfied by
35 increasing population projections or by demonstrating changes in the
36 assumptions used to justify the establishment of the UGB.

1 B. Misconstruction of the Livability Standard

2 Petitioner contends Metro's narrow interpretation of the
3 livability standard in this case improperly applies Goal 14
4 factors 1 and 2. Petitioner argues Metro may not look solely at
5 tax rates and school expenditures without considering the effect
6 of the amendment on other aspects of livability.⁷ Petitioners
7 argue there is no evidence that the residents consider their
8 city unlivable due to the high tax rate. Petitioner contends
9 the residents' approval of a school levy in 1987 suggests the
10 citizens do not object to the current property tax burden for
11 schools.

12 Respondent argues the record demonstrates, and Metro
13 properly found, the city has a "structural livability problem,"
14 because it has a very high tax rate combined with a low ability
15 to pay. Respondent's Brief 13. Respondent also contends this
16 structural livability problem, combined with a "lack of
17 immediately available large industrial parcels, creates a Goal
18 14 'need' for additional land within the UGB." Respondent's
19 Brief 14. Respondent further contends there is no reason why
20 particular livability problems may not justify a UGB amendment,
21 and a requirement that a UGB amendment based on livability
22 consider all factors relating to livability would render the
23 livability criterion impossible to satisfy.

24 _____
25 ⁷Other livability factors cited by petitioner include (1) loss of
26 agricultural land, open space and wildlife habitat, (2) increased traffic,
noise, and human activity, and (3) change in character of the area.

1 Although we agree with respondent that it need not examine
2 all conceivable aspects of livability that might be associated
3 with a particular UGB amendment, we also agree with petitioner
4 that Metro's application of the livability criterion in this
5 case was improperly narrow. The livability factor in Goal 14
6 may not be satisfied simply by identifying a discrete negative
7 livability factor, such as a high tax rate being required for
8 moderate levels of school revenue, and then showing that the
9 negative livability factor might be alleviated by the proposed
10 UGB amendment. If the livability consideration could be
11 satisfied so easily, it would be a meaningless limitation on
12 establishment and expansion of the UGB. Rather, a correct
13 application of the livability criterion requires, in addition to
14 identification of a significant livability problem, an
15 evaluation of probable positive and negative livability impacts
16 that may occur if the UGB is amended to solve the identified
17 livability problem. Once the probable positive and negative
18 livability impacts are identified, Metro would be in a position
19 to explain why the probable livability benefits of the UGB
20 amendment outweigh any negative impacts on livability that could
21 be expected if the amendment is approved.⁸

22
23 ⁸We do not mean to imply Metro's duty to consider additional aspects of
24 livability is as extensive and comprehensive as petitioner suggested during
25 local proceedings. However, once the issue of potential negative
26 livability impacts due to the proposed UGB amendment is raised, Metro is
obligated to consider whether any probable negative livability impacts are
such that the expected net livability gain does not support a finding of
Goal 14 "need." See City of Wood Village v. Portland Metro Area LGBC, 48

1 This subassignment of error is sustained.⁹

2 C. Lack of Substantial Evidence That Tax Rate Detracts
3 from Livability

4 Petitioner argues Forest Grove's comparatively higher tax
5 rate is simply one factor in determining the property tax burden
6 imposed upon the residents of Forest Grove. Petitioner contends
7 more meaningful information would be the actual taxes paid by
8 the city's residents as compared to the residents of other
9 cities. However, according to petitioner, this comparative
10 information is not included in the record. Petitioner further
11 contends that lower living expenses in Forest Grove, together
12 with other positive livability factors may offset the higher tax
13 rate, or higher level of taxes paid, so that the latter do not
14 constitute a negative livability factor justifying a UGB
15 amendment.

16 Respondent emphasizes that the livability impact is the
17 combination of the high tax rate with the comparatively low
18 ability of the residents of Forest Grove to pay.

19 Although we agree with respondent in principle that low
20 assessed valuation with resulting higher tax rates and a higher
21 per capita tax burden could constitute a negative livability

22
23 Or App 79, 88, 616 P2d 528 (1980); Grovers Beaver Electric Plumbing &
Supply v. Klamath Falls, 12 Or LUBA 61, 66 (1984).

24 ⁹Because we determine respondent did not adequately explain why the
25 city's property tax rate constitutes a livability detriment supporting a
26 finding of "need" under Goal 14 factors 1 and 2, the first assignment of
error must be sustained in part. We address petitioner's remaining
subassignments of error to provide guidance on remand. ORS 197.835(10)(a).

1 impact that might justify a finding of need under Goal 14, we
2 agree with petitioner that the record does not support Metro's
3 conclusion that such is the case in Forest Grove. It is
4 reasonable to infer that a higher tax rate together with lower
5 assessed valuation per capita and lower income per capita
6 results in a comparatively more significant property tax burden
7 for the average citizen of Forest Grove, particularly in view of
8 the apparent support in the city to fund its schools at a level
9 comparable to cities with higher per capita assessed valuation.
10 However, as petitioner correctly notes, the degree of disparity
11 between property taxes paid in Forest Grove and other cities is
12 not included in the record.

13 More importantly, as noted in the previous section of this
14 opinion, livability becomes a meaningless standard if it is
15 applied with too narrow a focus. For example, the cities noted
16 in Metro's decision which have higher per capita assessed
17 valuation, may experience negative livability factors not
18 existing in Forest Grove or may lack positive livability factors
19 which are present in Forest Grove. Again, while we do not
20 believe Metro must conduct an exhaustive livability analysis,
21 neither may it accept as a given that the existence of a high
22 property tax rate, generating only moderate property tax
23 revenue, is a negative impact on livability sufficient to
24 constitute a Goal 14 "need" to amend the UGB. Some evidence
25 concerning the impact of the higher tax rate or tax burden on
26 livability in Forest Grove beyond evidence merely of the

1 existence of a tax rate disparity is required to show "need"
2 under Goal 14 factors 1 and 2.

3 This subassignment of error is sustained.

4 D. Lack of Substantial Evidence that the UGB Amendment
5 Would Lower Property Tax Rates

6 Petitioner contends that even if Forest Grove's high
7 property tax rate does affect livability, there is no evidence
8 in the record demonstrating the proposed UGB amendment will
9 correct the problem. Petitioner argues the hoped for secondary
10 effects on commercial property values are conjecture,
11 unsupported by any evidence in the record. Petitioner contends
12 there is no evidence in the record identifying or connecting the
13 anticipated property value and economic benefits of the proposed
14 UGB amendment to school expenditures or to the property tax
15 rate.

16 Respondent contends the precision petitioner suggests is
17 needed is not required where there is a clear tax structural
18 livability problem. According to respondent, the record shows
19 the proposed UGB amendment would create the only immediately
20 available large industrial site in the city, allowing the city
21 to attempt to attract a large industrial developer. Whether or
22 not an industrial development is attracted immediately,
23 respondent contends its action will increase the assessed value
24 of the affected property and the adjoining vacant industrial
25 parcel already inside the UGB. Next, respondent disputes
26 petitioner's suggestion that the amendment must correct the high

1 tax rate livability problem. Respondent contends it is
2 sufficient that its action address the identified need, and
3 according to respondent the record shows immediate action is
4 required.

5 It is obvious that if the disputed property is developed
6 for industrial uses, alone or in conjunction with the adjoining
7 parcel already within the UGB, some positive effect on the
8 assessed value of that property is likely. It is also perhaps
9 obvious that, all other things remaining equal, some increase in
10 the total assessed value of property in Forest Grove could also
11 be expected.¹⁰ However, although we agree with Metro that the
12 proposed UGB amendment's precise numerical impact on the tax
13 rate is neither possible to determine nor required by Goal 14
14 factors 1 and 2 to be determined at this stage, some evidence
15 that there will be a beneficial impact is required.

16 Substantial evidence is evidence a reasonable person would
17 rely on to reach a conclusion. See Younger v. City of Portland.
18 305 Or 346, 360, 752 P2d 262 (1988). The stated need for the
19 UGB amendment approved by Metro's decision is a need to reduce
20 the city's property tax rate. Based on the record, it is not
21 possible for a reasonable person to determine whether the likely

22
23 ¹⁰We cannot tell from the record whether industrial development of the
24 property would have secondary impacts on the property values of nearby
25 properties, further increasing citywide assessed value per capita, or
26 whether some of those impacts would be negative, partially offsetting the
increase in property value of the subject property. Similarly, we are
cited nothing in the record identifying possible costs associated with
developing the property industrially that may offset benefits associated
with gains in property value.

1 impacts of the UGB amendment will produce any appreciable effect
2 on the tax rate.¹¹

3 This subassignment of error is sustained.

4 E. Subregional Need

5 Citing our opinion in Hombuilders Ass'n v. Metro, 2 Or LUBA
6 25 (1980), aff'd 54 Or App 60 (1981), petitioner contends Metro
7 committed legal error by approving the UGB amendment based on
8 subregional, as opposed to regional, need. Petitioner contends
9 the Metro UGB is a regional UGB based on regional need and "may
10 not be expanded on the purported needs [of] one city or county
11 within the region." Petition for Review 17.

12 Respondent answers that Metro is currently examining the
13 issue of subregional need as part of its periodic review
14 process. Respondent contends, however, that no rule, goal or
15 statutory change "is needed for Metro to consider Goal 14 need
16 on a subregional basis in an appropriate case." Respondent's
17 Brief 17. Respondent argues that LUBA's decision in
18 Homebuilders Ass'n v. Metro, supra, does not hold it is improper
19 to consider a UGB amendment based on subregional need.

20 In Homebuilders Ass'n v. Metro we explained:

21 "The urban growth boundary adopted by Metro is a
22 regional urban growth boundary including lands in
several counties. As a regional urban growth

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24 ¹¹We also note that although respondent contends the record shows a need
25 for immediate action to address the livability problems created by the high
26 property tax rate, it cites no evidence supporting that position. We do
not know what the nature of the claimed emergency is or whether the tax
rate disparity has existed historically.

1 boundary, Metro's boundary looks to growth trends on a
2 regional basis and is designed to accommodate regional
3 growth. Changes within jurisdictions served by Metro
4 may be necessary to accommodate that regional growth,
5 but the Board does not agree with the petitioner that
6 only the growth in Clackamas County is relevant in
7 deciding whether the urban growth boundary in
8 Clackamas County needs to be amended. Without a
9 showing by petitioner as to how the Clackamas County
10 urban growth boundary is critical to the regional
11 urban growth boundary in some manner requiring it to
12 be viewed by itself, we believe we would be doing more
13 harm than good by accepting petitioner's proposition."
14 2 Or LUBA at 30.

15 Respondent is correct that we did not hold in Hombuilders
16 Ass'n v. Metro that Metro could not consider Goal 14 need on
17 less than a regional basis. Rather, we rejected the
18 petitioner's argument in that case that Metro must base its Goal
19 14 need analysis on subregional need. As respondent correctly
20 notes, we specifically left open the possibility that within the
21 Metro UGB a subregional need could also constitute a regional
22 need for purposes of Goal 14 factors 1 and 2. Although we find
23 in this case that Metro has failed to demonstrate either
24 subregional or regional need, we reject petitioner's contention
25 that, as a matter of law, a subregional need could never provide
26 a basis for amending Metro's regional UGB.

27 This subassignment of error is denied.

28 The first assignment of error is sustained in part.

29 SECOND ASSIGNMENT OF ERROR

30 "The respondent misconstrued the applicable law,
31 failed to make adequate findings, and made a decision
32 not supported by substantial evidence in the whole
33 record in determining that the UGB amendment satisfied
34 Goal 14 factors 3-7."

35 As petitioner correctly notes, because Metro failed to

1 demonstrate the need factors of Goal 14 are satisfied, even if
2 Goal 14 factors 3-7 or the exception standards challenged in the
3 third assignment of error are satisfied, Metro's decision must
4 be remanded. We consider the arguments raised in the second and
5 third assignments of error to provide guidance on remand.
6 ORS 197.835(10) (a).

7 A. Goal 14 Factor 3: Orderly and Economic Provision for
8 Public Facilities and Services

9 Petitioner's complaint under this subassignment of error is
10 not that public facilities and services cannot be provided to
11 the 38 acre parcel included in the UGB. Rather, petitioner
12 argues respondent did not adopt adequate findings demonstrating
13 that orderly and economic provision of public facilities and
14 services to vacant industrial zoned land already within the UGB
15 will not be adversely affected.

16 Petitioner contends including new areas within the UGB for
17 industrial development before existing industrial areas are
18 developed and provided with public facilities and services
19 frustrates rather than furthers orderly and economic provision
20 of public facilities and services, as required under Goal 14
21 factor 3. Petitioner complains there is no evidence in the
22 record comparing the costs of providing needed services to the
23 38 acre parcel with the costs of providing such services to
24 vacant industrial parcels already within the UGB. Finally,
25 petitioner argues that rather than adopting findings supported
26 by substantial evidence which show that providing needed

1 services to existing vacant industrial parcels would not be
2 adversely affected, respondent found there was no evidence
3 showing there would be such adverse effects. Petitioner claims
4 that Metro effectively, and improperly, shifted the burden of
5 proof to petitioner.

6 We agree with petitioner that respondent's findings fail to
7 show that providing public facilities and services to the 38
8 acre parcel will not adversely affect the ability to provide
9 those services to existing vacant industrial land in an orderly
10 and efficient manner. The findings explicitly recognize that
11 the amendment may mean provision of transportation and sewerage
12 facilities to existing sites will not occur.¹² Metro's findings
13 are insufficient to demonstrate that inclusion of the 38 acre
14 parcel within the UGB will not have precisely the effect Goal 14
15 factor 3 is intended to avoid. We also agree that the findings
16 improperly attempt to shift the burden to petitioners to
17 demonstrate that provision of services and facilities to
18 existing industrial properties will be adversely affected.¹³

19
20 ¹²The findings suggest that the existing properties that will not
21 receive transportation or sewerage facilities are marginal sites. This
22 suggestion, like the suggestions elsewhere in the decision that some of the
23 existing industrial property probably should not have been designated for
24 industrial development due to various constraints, may provide a basis for
25 replanning and rezoning such property for other uses and designating for
26 industrial development other properties within the UGB planned and zoned
for other uses. It does not, however, provide a basis for avoiding the
requirement of Goal 14 factor 3 that the UGB not be amended to include
additional property if that will make provision of the facilities and
services needed to develop the property within the UGB for the purposes it
is planned and zoned for more difficult.

¹³Respondent suggests comparison of the relative costs of providing

1 Billington v. Polk County, 13 Or LUBA 125, 131 (1985).

2 This subassignment of error is sustained.

3 B. Goal 14 Factor 4: Maximum Efficiency of Land Uses
4 Within and on the Fringe of Existing Urban Areas

5 Petitioner argues there is no evidence to support Metro's
6 conclusion that nearby agricultural land would not be affected.
7 In addition, petitioner argues that Metro acknowledges that
8 existing vacant industrial land within the UGB will not be
9 developed if the 38 acres are developed for industrial use.
10 Petitioner complains Metro simply concludes the land that will
11 not be developed is marginal, but does not explain what it means
12 by "marginal."

13 Respondent notes the proposed addition to the UGB was
14 originally 44 acres, but was reduced to 38 acres to assure
15 sufficient nonfloodplain land for the adjoining farming
16 operation. Respondent points out that the findings state that
17 200 of the 447 acres of available industrial zoned land within
18 the city are marginal for industrial development.

19 Respondent cites us to no evidence to support the finding
20 that adjoining agricultural land will not be affected by the
21 proposed UGB amendment. In addition, the findings that existing
22 vacant industrial properties (which will not be developed by
23 virtue of the amendment) are marginal do not explain why leaving

24 public facilities and services to existing vacant industrial parcels is
25 properly deferred to periodic review. We disagree. If the UGB is to be
26 amended to include additional land for industrial development, at least
some examination of the comparative costs of providing services to the
existing vacant lands is necessary to comply with Goal 14 factor 3.

1 vacant industrially planned and zoned property undeveloped in
2 favor of adding additional agricultural land for industrial
3 development satisfies Goal 14 factor 4's requirement for maximum
4 efficiency of land uses.

5 This subassignment of error is sustained.

6 C. Goal 14 Factor 5: Environmental, Energy, Economic and
7 Social Consequences

8 Petitioner argues respondent simply concluded that the
9 amendment was consistent with Goal 14 factor 5.

10 As respondent correctly notes, although petitioner
11 challenges respondent's ultimate conclusion that factor 5 is
12 satisfied, petitioner does not challenge the findings that
13 discuss the four subfactors of factor 5 or argue that those
14 findings are not supported by substantial evidence.

15 This subassignment of error is denied.

16 D. Goal 14 Factor 6: Retention of Agricultural Land as
17 Defined, With Class I Being The Highest Priority For
Retention and Class IV the Lowest Priority

18 Petitioner argues respondent recognized that 38 acres of
19 Class II farm land would be lost, but rationalized that loss by
20 concluding this was the only negative impact of the proposed UGB
21 amendment. Petitioner argues this finding regarding removal of
22 38 acres of Class II agricultural land from a 500 acre farm
23 operation is not sufficient to adequately address the
24 significance of that loss.¹⁴

25 ¹⁴Petitioner points out that, aside from the 38 acres, only 8 acres of
26 the 500 acre farm are outside the floodplain and capable of growing certain

1 Respondent suggests the loss of agricultural land was
2 appropriately balanced against the need to address livability
3 concerns, but does not identify findings that explain the
4 rationale or basis for that balancing. In addition, the
5 findings make no attempt to address whether properties with
6 Class III or higher soils may be available elsewhere to
7 accommodate expansion of the UGB for the proposed industrial
8 use.

9 This subassignment of error is sustained.

10 E. Goal 14 Factor 7: Compatibility of The Proposed
11 Urban Uses With Nearby Agricultural Activities

12 The respondent's finding on this criterion is as follows:

13 "If the 2 acre outbuilding area is excluded from the
14 Site, so that it can continue to serve the remainder
15 of the Zurcher farm, there should be no adverse
16 impacts from proposed industrial development on nearby
17 agricultural activities." Record 36.

18 Petitioner contends the above finding is inadequate to
19 demonstrate compliance with Goal 14 factor 7 and is, in any
20 event, unsupported by substantial evidence.

21 Respondent points out that eight, rather than two, acres
22 have been protected for continued use in conjunction with the
23 existing 500 acre farm. Although the finding suggests property
24 not within the floodplain needed by the existing farming
25 operation may continue to be available, it does not adequately
26 address the Goal 14 factor 7 requirement for compatibility of
the proposed industrial development with existing agricultural
crops.

1 uses.

2 This subassignment of error is sustained.

3 The second assignment of error is sustained in part.

4 THIRD ASSIGNMENT OF ERROR

5 "The respondent misconstrued the applicable law,
6 failed to make adequate findings, and made a decision
7 not supported by the whole record in determining that
8 the UGB amendment satisfied the requirements of
9 Goal 2."

8 A. Alternative Areas Not Requiring a Goal Exception

9 To approve a UGB amendment, the goal exception standard of
10 ORS 197.732(1)(c)(B) and Goal 2 Part II(c)(2) requires that
11 "[a]reas which do not require a new exception cannot reasonably
12 accommodate the use * * *."

13 Petitioner notes that respondent found 152 acres of the
14 available, vacant industrially planned and zoned land within the
15 UGB could not be economically assembled into large enough
16 parcels to develop economically. However, petitioner contends
17 Metro nowhere explains what the costs of assembling an
18 appropriate parcel would be or how large the parcel must be to
19 develop economically, and why.

20 Petitioner also faults respondent for dismissing a number
21 of sites on the basis of various constraints and infrastructure
22 costs without explaining why those costs or constraints make
23 development infeasible. Petitioner particularly contests
24 respondent's findings that developing only the 51 acre portion
25 of the Zurcher property already within the UGB would not justify
26 necessary infrastructure and services costs, but combining the

1 51 acre parcel with the 38 acre parcel proposed to be added to
2 the UGB would make necessary services economically feasible.
3 Petitioner contends there is no explanation of how large a site
4 must be to justify necessary supporting services and facilities,
5 and there is no comparison of the costs of providing needed
6 services to the proposed site rather than to existing sites.

7 Petitioner contends that the record at most establishes a
8 preference for the 38 acre site. Petitioner contends a
9 preference to develop the 38 acres is not sufficient to show
10 that other industrially planned and zoned lands already within
11 the UGB cannot reasonably accommodate the proposed use. See
12 Benjfran Dev. v. Metro Service Dist., 15 Or LUBA 319, 323
13 (1987). Petitioner argues the short term immediate need
14 respondent claims to exist is not a sufficient basis for
15 amending the UGB. Petitioner contends the city has ample vacant
16 industrial land, it simply must make the effort to provide
17 required services and consolidate properties into marketable
18 parcels.

19 Respondent answers that the record shows more than a
20 preference for the 38 acre parcel. According to respondent, the
21 record shows there is a short term need for industrially
22 developable property that cannot be satisfied by the existing
23 inventory of industrially zoned land, and this short term need
24 is created by the livability problem discussed earlier in this
25 opinion.

26 Our primary disagreement with respondent is based on the

1 absence of evidence in the record that the alleged livability
2 problem is one that requires a quick, short term solution.
3 Absent evidence of such an emergency, we agree with petitioner
4 that the record does not contain substantial evidence to support
5 respondent's conclusion that industrially zoned land already
6 within the UGB cannot reasonably accommodate the proposed use or
7 that lands already within the UGB zoned for other purposes could
8 not be rezoned for industrial use.

9 In this case the problem is not so much that the
10 alternative areas examined were improperly limited,¹⁵ but rather
11 that the respondent does not adequately explain or cite evidence
12 supporting its findings that the problems it notes with regard
13 to existing vacant industrial areas make them unreasonable
14 alternatives. We conclude the findings are inadequate to
15 demonstrate compliance with this alternative sites standard. In
16 addition, the findings respondent did adopt concerning the need
17 to combine the 38 acre parcel with the existing 51 acre parcel
18 to justify capital costs of needed services are not supported by
19 any evidence in the record.

20
21 ¹⁵As we explained in Benjfran Development v. Metro Service Dist., *supra*,
22 in accepting Metro's argument in that case that the alternative sites
analysis must not be artificially restricted:

23 "Metro replies that petitioner incorrectly restricted its
24 analysis of alternative sites by looking to only those held in
25 one ownership, zoned industrial and presently available on the
real estate market. Metro found the search too narrow. Slip
op at 21.

1 This subassignment of error is sustained.

2 B. Alternative Areas Requiring a Goal Exception

3 Petitioner contends respondent's findings are inadequate to
4 address the requirement in ORS 197.732(1)(c)(C) and Goal 2
5 Part II(c)(3) that

6 "The long term environmental, economic, social and
7 energy consequences resulting from the use at the
8 proposed site with measures designed to reduce adverse
9 impacts are not significantly more adverse than would
typically result from the same proposal being located
in areas requiring a goal exception other than the
proposed site * * *"

10 The findings concerning this criterion simply cite and rely
11 on the findings adopted to address Goal 14 factor 5. Petitioner
12 contends that for the same reasons those findings are inadequate
13 to address Goal 14 factor 5, they are inadequate to demonstrate
14 compliance with ORS 197.732(1)(c)(C) and Goal 2 Part II(c)(3).

15 We rejected petitioner's challenge to respondent's findings
16 concerning Goal 14 factor 5. As petitioner offers no additional
17 argument under this subassignment of error, we reject this
18 subassignment of error for the same reasons.

19 C. Compatibility With Other Adjacent Uses

20 Petitioner argues respondent's findings concerning the
21 requirement in ORS 197.732(1)(c)(D) and Goal 2 Part II(c)(4)
22 that "[t]he proposed use [be] compatible with other adjacent
23 uses or * * * so rendered thorough measures designed to reduce
24 adverse impacts" are simply conclusions.

25 The findings state:

26 "The proposed industrial use of the Site would be

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compatible with the industrial use of the Zurcher land already designated for industrial development, to the north, and with the agricultural use of land to the south, east, and west." Record 43.

We agree with petitioner that the findings are simply conclusions. They do not explain the basis for the conclusion of compatibility and, therefore, are inadequate. McNulty v. City of Lake Oswego, 14 Or LUBA 366, 373 (1986).

This subassignment of error is sustained.

The third assignment of error is sustained in part.

The decision is remanded.

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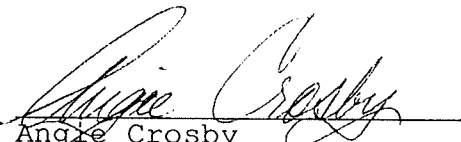
I hereby certify that I served the foregoing Final Opinion and Order for LUBA No. 89-036, on November 3, 1989, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

F. Blair Batson
Attorney at Law
300 Willamette Bldg.
534 SW Third Avenue
Portland, OR 97204

Lawrence Shaw
Legal Counsel
MSD
2000 SW First Avenue
Portland, OR 97201

David G. Frost
Frost and Kohl
P.O. Box 586
Hillsboro, OR 97123

Dated this 3rd day of November, 1989.


Angie Crosby
Administrative Assistant