BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

ROBERT McGOWAN and COETA McGOWAN, Petitioners, vs. CITY OF EUGENE, Respondent, and CUDDEBACK INVESTMENTS, Intervenor-Respondent.	LUBA No. 89-078 FINAL OPINION AND ORDER

Appeal from City of Eugene.

Michael E. Farthing, Eugene, filed the petition for review and argued on behalf of petitioner. With him on the brief was Gleaves, Swearingen, Larsen and Potter.

Timothy J. Sercombe, Eugene, filed a response brief and argued on behalf of respondent. With him on the brief was Harrang, Long, Watkinson, Arnold and Laird, P.C.

Bill Kloos, Eugene, filed a response brief and argued on behalf of intervenor-respondent. With him on the brief was Johnson and Kloos.

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

AFFIRMED 11/02/89

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioners appeal an order of the Eugene Planning Commission approving a zone change from Lane County Agricultural/Urbanizable Land (AG/UL) to City of Eugene (city) Low-Density Residential (R-1) for 29 acres.

MOTION TO INTERVENE

Cuddeback Investments moves to intervene in this proceeding on the side of respondent. There is no opposition to the motion, and it is allowed.

FACTS

The subject property consists of two tax lots and a portion of a third. Intervenor-respondent Cuddeback Investments owns two of the tax lots, and the Eugene Water & Electric Board (EWEB) owns the third. The property is vacant, except for a water tower on the EWEB parcel. The property was annexed to the city in January, 1989. Areas to the north and east of the subject property are developed with single family residences. To the south and west of the subject property is vacant land, most of which is outside the city's Urban Growth Boundary (UGB).

The zone change proceeding was initiated by the city. After a public hearing, the city hearings official issued an order approving the zone change. Petitioners appealed the hearings official's decision to the planning commission. After a public hearing, the planning commission issued an order denying the appeal and upholding the hearings official's

approval of the zone change. This appeal followed.

FIRST ASSIGNMENT OF ERROR

> "The City of Eugene erred in interpreting Section 9.678(2)(a) of the Eugene Code and further erred in not having substantial evidence in the record to support its finding that the Subject Property can be served in an orderly and efficient manner with the key urban facilities and services prescribed in the Metropolitan Area General Plan."

Under this assignment of error, petitioners argue that the city misinterpreted Eugene Code (EC) 9.678(2)(a) and that the city's determination of compliance with EC 9.678(2)(a) is not supported by substantial evidence in the record. We address each of these issues separately below.

A. Interpretation of EC 9.678(2)(a)

EC 9.678(2) establishes approval criteria for zone changes. EC 9.678(2)(a) provides in relevant part:

> "The uses and density that will be allowed in the location of the proposed [zone] change * * * can be served through the orderly and efficient extension of key urban facilities and services prescribed in the Metropolitan Area General Plan * * *"

Petitioners argue that the city's decision fails to address all of the "key urban facilities and services prescribed in the Metropolitan Area General Plan" (Metro Plan).[1] According to petitioners, these key urban facilities and services are identified in the following Metro Plan "Growth Management and the Urban Service Area" (Growth Management) policies:

---

[1]The Metro Plan is the comprehensive plan for the area within the combined UGB for the cities of Eugene and Springfield.

"7. Land within the urban growth boundary may be converted from urbanizable to urban only through annexation to a city when it is found that:

"a. A minimum level of key urban facilities and services can be provided to the area in an orderly and efficient manner. They consist of sanitary sewers, solid waste management, water service, fire and emergency medical services, police protection, parks and recreation programs, electric service, land use controls, communication facilities, and public schools on a district-wide basis * * *.

"b. There will be a logical area and time within which to deliver urban services and facilities. Conversion of urbanizable land to urban shall also be consistent with the Metropolitan Plan.

"8. A full range of key urban facilities and services shall be provided to urban areas according to demonstrated need and budgetary priorities. They include, in addition to the minimum level of key urban facilities and services, urban public transit, natural gas, storm drainage facilities, street lighting, libraries, local parks, local recreation facilities and services, and health services."

Petitioners argue that Growth Management Policy 7 describes "a minimum level of key urban facilities and services" as consisting of the ten services listed in subsection "a" of the policy. Petitioners further argue that Growth Management Policy 8 describes "a full range of key urban facilities and services" as consisting of the key facilities and services identified in Growth Management Policy 7 plus the eight additional services listed in Policy 8.

Petitioners argue that the city's decision improperly fails to consider or address provision of the eight key urban

facilities and services listed in Growth Management Policy 8. Petitioners also argue the city's decision fails to address the provision of three of the ten key urban facilities and services listed in Growth Management Policy 7 - solid waste management, water and electricity.

Petitioners maintain that EC 9.678(2)(a) requires consideration of the provision of all "key urban facilities and services" identified in Growth Management Policies 7 and 8. According to petitioners, there is nothing in the EC or Metro Plan which allows the city to limit its determination of compliance with EC 9.678(2)(a) to only the ten key urban facilities and services identified in Growth Management Policy 7. Petitioners contend that, if the city had intended to refer only to the facilities and services identified in Growth Management Policy 7, it could easily have used the phrase "minimum level of key urban facilities and services" in EC 9.678(2)(a). Petitioners argue the city cannot now rewrite its code through interpretation.

The city and intervenor (respondents) argue that EC 9.678(2)(a) and the relevant Metro Plan policies must be interpreted together to give meaning to the city's overall policy and all of its parts. Respondents argue that neither Growth Management Policy 7 nor 8 "prescribe" or require particular key urban facilities and services be available for approval of a zone change. The city contends that Growth Management Policy 7 requires a determination of service

availability in annexation proceedings. According to the city, Growth Management Policy 8 merely discusses eventual provision of all key urban facilities and services "according to demonstrated need and budgetary priorities."

Respondents point to other Metro Plan provisions which they argue do "prescribe" the level of service availability required for approval of a zone change for low density residential development. The introduction to the Public Utilities, Services and Facilities (Services and Facilities) Element of the Metro Plan states:

> "* * * It is intended that development in the metropolitan area will require at least the minimum level of key urban service at the time development is completed. It is further intended that concerted efforts will be made to ultimately provide the full range of key urban service to these areas.* This element is also intended to provide the public and private sectors with policies for developmental and program decision making regarding urban services. * * *
>
> "* * * * *
>
> "*See Policies 7 and 8 on Page II-B-4." (Emphasis added.) Metro Plan III-G-1.

Respondents also point to Services and Facilities Policy 6, which provides:

> "In addition to physical, economic, energy, and social considerations, timing and location of urban development within the metropolitan area shall be based upon the current or imminent availability of a minimum level of key urban services." (Emphasis added.)

Based on these Metro Plan provisions, respondents argue that under EC 9.678(2)(a), the "key urban facilities and

services prescribed in the [Metro] Plan" for approval of a zone change to the R-1 district are the "minimum level of key urban [facilities and] services" referred to in the introduction to the Facilities and Services element and Facilities and Services Policy 6, and listed in Growth Management Policy 7.

In addition to the Metro Plan provisions quoted above, we note that Facilities and Services Objective 6 states:

> "Provide at least the minimum level of key urban services to all urban development within the metropolitan area." (Emphasis added.)

We agree with respondents that the correct interpretation of these plan provisions is that the key urban facilities and services which the Metro Plan "prescribes," or requires to be available, at the time of approval of a zone change to an urban zone (as well as at the time of approval of annexation or actual urban development) is the "minimum level of key urban facilities and services" identified in Growth Management Policy 7. The city's decision, therefore, did not misinterpret EC 9.678(2)(a) and did not violate EC 9.678(2)(a) by failing to address the additional key urban facilities and services identified in Growth Management Policy 8.

We also disagree with petitioners' claim that the city failed to address in its decision water, electricity and solid waste management, three of the key urban facilities and services identified in Growth Management Policy 7. The planning commission findings quote from a staff report which includes a statement that "all the key urban services specified in the

[Metro] Plan are available to the property," and then states as follows:

> "This [staff report] is based upon responses from the providers of all the above mentioned services to a referral sent out at the time the annexation of this property was proposed. The fact that the actual referral responses are not included in the record and that [a letter in the record] does not specifically mention water and electric service or solid waste management services does not invalidate the above summary as evidence that all the key urban services can be provided in an orderly and efficient manner.
>
> "* * * * *
>
> "* * * Therefore, the Hearings Official is correct in his finding * * * that 'it is established that the key urban facilities and services are available, [and] furthermore, that they can be extended to the site.'" Record 4-5.

The findings quoted above show that the planning commission specifically considered whether the record was adequate to support a determination that water, electricity and solid waste management services could be provided to the subject property, and concluded that those services could be provided in an orderly and efficient manner.[2]

This subassignment of error is denied.

B. Evidentiary Support

Petitioners argue that the city's determination that the Growth Management Policy 7 key urban services can be extended to the subject property in an orderly and efficient manner is not

---

[2]Petitioners' challenge to the evidentiary support for the city's determination that key urban facilities and services can be provided to the subject property in an orderly and efficient manner is addressed in the following subassignment of error.

supported by substantial evidence in the record. Petitioners contend that the only evidence in the record addressing this issue is the city's own staff report (Record 148-153) and a letter from a city staff member (staff letter, Record 142-143) summarizing responses from some of the service providers. Petitioners point out that in this case the city is both the applicant and the decision maker.

Citing Portland Audubon Society v. Clackamas County, 12 Or LUBA 269, 274 (1984), petitioners argue that the relevant statements in both the staff report and staff letter are conclusory in nature and, therefore, cannot be considered adequate to support the city's conclusion. Petitioners also contend the both the staff letter and staff report are not reliable evidence in support of a determination of compliance with EC 9.678(2)(a) because they do not discuss "the uses and densities that will be allowed in the location of the proposed zone change." Petitioners assert that without identification of the "uses and densities" allowed on the property, it is not possible to conclude that any urban services can be extended to the property in an orderly and efficient manner.

Petitioners further argue that the staff letter cannot be considered substantial evidence because it merely summarizes responses solicited from service providers during the annexation process in December of 1988. Petitioners argue that without the responses themselves being in the record, there is no way to verify the information contained in the staff letter.

Petitioners specifically argue that there is not substantial evidence in the record to support a determination on the availability of water, electricity and telephone service to the property. Petitioners contend the staff letter does not mention water or electricity and, with regard to telephone service, states only "U.S. West stated [it has] no objections to this annexation proposal." Record 143. Petitioners further maintain the staff report contains only a conclusory statement that "[m]unicipal water, electricity * * * and telephone service are all available to the subject property." Record 149. Petitioners argue that "staff conclusions without some type of verification or acknowledgment by the service provider are not 'substantial evidence.'" Petition for Review 17.

The city argues that what constitutes substantial evidence to support a decision depends on the context of that decision. The city admits that a greater quantity of evidence may be needed to support a conclusion if there is conflicting evidence in the record on the issue. The city contends, however, that in this case there is no evidence in the record that any key urban service or facility cannot be extended to the property. The city also recognizes that the quantity of evidence required to support a conclusion may be affected by the degree of change from the status quo which the decision allows. However, the city argues that in this case the degree of change is relatively minor, as the appealed zone change is from AG/UL to R-1, one of the lowest intensity urban zoning districts.

The city further points out that under Growth Management Policy 7, the January 1989 annexation of the subject property itself required a demonstration that the property can be served with a minimum level of key urban facilities and services. The city concludes that where the subject property is within the UGB, within city limits, adjacent to developed and serviced property, proposed to be zoned for non-intensive uses, and there is no conflicting evidence in the record, evidence directly from each service provider is not necessary to constitute substantial evidence in support of a conclusion that urban services can be provided to the subject property.

Intervenor agrees with the city's arguments and adds that this Board has repeatedly recognized that staff reports can constitute substantial evidence, citing Randall v. Washington County, ___ Or LUBA ___ (LUBA No. 89-019, July 21, 1989), slip op 21-22; McConnell v. City of West Linn, ___ Or LUBA ___ (LUBA No. 88-111, March 13, 1989), slip op 14; Scott v. City of Portland, ___ Or LUBA ___ (LUBA No. 88-063, December 2, 1986), slip op 7. Intervenor further argues that there is no reason why the testimony of city staff should be be given less weight when the city is the applicant. Intervenor also argues that the fact that the staff report and staff letter do not specifically discuss the uses and densities that will be allowed on the subject property does not detract from their evidentiary value because the allowable uses and densities are obvious from the city's R-1 code provisions.

As intervenor points out, we have frequently found that staff reports constitute substantial evidence in support of a challenged decision. Randall v. Washington County, supra; McConnell v. City of West Linn, supra; Scott v. City of Portland, supra. We see no reason, in this case, why the staff report and staff letter summarizing the responses of service providers cannot constitute substantial evidence in support of the city's determination of compliance with EC 9.678(2)(a) simply because the city itself is the applicant or the service providers' responses themselves are not in the record to verify the contents of the staff documents.

Contrary to petitioners' assertion that neither the staff report nor the staff letter identified the "uses and densities that will be allowed" on the subject property by the proposed zone change, we note that the staff report does state that "[a]pproval of this zone change request will allow development of the area with single family residences." Record 149. In any case, we also agree with respondents that the "uses and densities that will be allowed" on the subject property by the proposed zone change do not need to be specified in the staff documents because they are established as a matter of law by the EC provisions controlling the proposed R-1 zoning district.

We next address petitioners' specific charge that the staff report and letter do not constitute substantial evidence in support of the city's determination that water, electric and telephone services can be provided to the subject property.

Substantial evidence is evidence a reasonable person would rely on to reach a conclusion. Williams v. Wasco County, ___ Or LUBA ___ (LUBA No. 89-057, September 11, 1989), slip op 13; see Younger v. City of Portland, 305 Or 346, 360, 752 P2d 262 (1988). We agree with petitioners that the fact that U.S. West has no objections to an annexation is not the equivalent of a statement that it can extend telephone services to the subject property in an orderly and efficient manner and, therefore, does not support the city's decision. However, we believe that in this particular situation, where the subject property is 29 acres in size, within the UGB and city limits, adjacent to a developed and serviced residential area, the proposed zoning is low density residential and there is no conflicting evidence in the record, a reasonable person would rely on the statement in the staff report that "[m]unicipal water, electricity * * * and telephone service are all available to the subject property" to reach the conclusion that water, electricity and telephone services can be extended to the property as required by EC 9.678(2)(a).[3]

---

[3]In the case cited by petitioners, Portland Audubon Society v. Clackamas County, supra, we stated that "while staff reports and testimony of county personnel may be relied upon to provide information in some circumstances, * * * conclusional statements of the type in question cannot be considered evidence supporting the ultimate determination." (Emphasis added.) The staff statements in question in that case were very different in nature than those at issue here. Portland Audubon Society v. Clackamas County concerned the identification of the boundaries of a wetland, where the code standards were technically complex and there was much conflicting evidence in the record. In those circumstances, we found that a staff statement that the boundary of a wetland was identified after on-site staff examination, without an explanation of how the boundary was determined

This subassignment of error is denied.

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

> "The City of Eugene erred in interpreting Section 9.678(2)(c) of the Eugene Code and further erred in not having substantial evidence to support its findings that the subject zone change was consistent with the South Hills Study, a refinement plan applicable to the Subject property."

Petitioners point out that EC 9.678(2)(c) requires proposed zone changes to be "consistent with applicable adopted neighborhood refinement plans, special area studies, and functional plans * * *." Petitioners assert that the subject property is subject to the South Hills Study (study), an adopted special area study. Petitioners allege that the city's decision fails to comply with the study in two respects.

A. Application of PD Zoning Suffix

The study contains "specific recommendations" which include the following:

> "That all vacant property above an elevation of 901' be preserved from an intensive level of development, subject to the following exceptions:
>
> "1. Development of individual residences on existing lots; and
>
> "2. Development under planned unit development procedures when it can be demonstrated that a proposed development is consistent with the purposes of this section." Petition for Review App-9.

Petitioners point out that most of the subject property is

---

based on the evidence and the standard, was not evidence a reasonable person would rely on.

above the 901 foot elevation. Petitioners argue that the above-quoted policy requires that the city apply its planned unit development (PD) zoning suffix to the subject property as part of the approved zone change, and adopt findings demonstrating the consistency of development of the subject property with the purposes of that study section before the zone change is approved.

Respondents agree that the study applies to the subject property. However, respondents argue that the above specific recommendation does not require that all development of the subject property be carried out through planned unit development procedures. Non-intense development and residences on individual lots can occur without following planned unit development procedures. On the other hand, according to respondents, the PD zoning suffix requires that planned unit development procedures be followed prior to any development of property so designated. EC 9.268(c). The city argues that application of the PD zoning suffix at the time of approving a zone change would, therefore, be inconsistent with the study's recommendation.

Respondents argue the above-quoted recommendation is correctly interpreted as requiring the PD suffix to be applied, and planned unit development procedures followed, when approval of more than a minimal density development is requested. According to respondents, it is also at that time that a demonstration of consistency with the purposes of the study will

have to be made.

We agree with respondents that the study's "specific recommendation" quoted above does not require that the PD zoning suffix be applied to the subject property, and consistency with the purposes of the study demonstrated, at the time a zone change to R-1 is approved. Rather it requires that these things be done when approval of a specific development proposal, other than non-intensive development, is sought. Thus, the city did not err by failing to apply the PD zoning suffix and demonstrate consistency with the study's purposes.

This subassignment of error is denied.

B. Previous Maintenance of the Property

The study also contains the following "specific recommendation:"

> "That future annexation requests within the potential urban service area be evaluated upon the following bases:
>
> "* * * * *
>
> "2. The previous maintenance of the property as a desirable residential environment (Note: if the city adopts an ordinance governing vegetation removal, the standards set forth in that ordinance could provide the basis for evaluating previous maintenance of the property)." Petition for Review App-12.

Petitioners argue that "[s]ince this property was annexed without notice to neighbors or an opportunity to comment provided, this policy should have been addressed with the zone change." Petition for Review 24. Petitioners claim the city improperly ignored this issue in their findings, even though

there was testimony about past logging activities on the property.

Intervenor argues that the above-quoted recommendation is applicable to annexation proceedings, not zone change proceedings. Intervenor further argues that petitioners cannot make a collateral attack on the January, 1989 annexation decision in this appeal proceeding.

The above specific recommendation of the study applies only to proposed annexations, not to zone changes after annexation has occurred. It is not an applicable standard for the city decision appealed in this proceeding.

This subassignment of error is denied.

The second assignment of error is denied.

The city's decision is affirmed.