

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

ALAN BURK,)
)
 Petitioner,)
)
 vs.)
) LUBA No. 90-037
 CITY OF UMATILLA,)
) FINAL OPINION
 Respondent,) AND ORDER
)
 and)
)
 PORT OF UMATILLA,)
)
 Intervenor-Respondent.)

Appeal from City of Umatilla.

Alan Burk, Umatilla, filed the petition for review and argued on his own behalf.

No appearance by respondent.

Douglas E. Hojem, Pendleton, filed the response brief and argued on behalf of intervenor-petitioner. With him on the brief was Corey, Byler, Rew, Lorenzen & Hojem.

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

REMANDED

09/25/90

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

Petitioner appeals a City of Umatilla ordinance which amends the City of Umatilla Comprehensive Plan (plan) map designation for a 270 foot wide strip of land east of Draper Road from Single Family Residential to Light Industrial.

MOTION TO INTERVENE

The Port of Umatilla moves to intervene in this appeal proceeding on the side of respondent. There is no objection to the motion, and it is allowed.

FACTS

On October 4, 1989, intervenor-respondent Port of Umatilla (intervenor) and Umatilla County (county) filed an application with respondent City of Umatilla (city) for a city plan map amendment from Single Family Residential to Light Industrial for a 42 acre area. This area is within the Umatilla Urban Growth Boundary (UGB), but is outside of Umatilla city limits. At the time the plan amendment application was filed, the county had adopted the city's residential plan map designation for this area, but had zoned the area Heavy Industrial (M-2).¹

¹There is no disagreement that under a joint management agreement adopted by the city and county, the county retains jurisdiction over and responsibility for land use decisions in the unincorporated area within the UGB, but is required to adopt the city comprehensive plan for the unincorporated area within the UGB as part of the county comprehensive plan. Record 18-19. Prior to the appealed decision, there was a conflict between the city/county plan map designation and the county zoning for the property that is the subject of the challenged plan map amendment. After

Draper Road extends from Highway 730 on the south, to a county road on the north, through this 42 acre area, dividing it into eastern and western subareas. The portion of the area west of Draper Road, approximately 25 acres in area, is owned by the county. It is bordered on the west by McNary Golf Course and a residential subdivision. The western subarea is part of the approved McNary Master Plan, a residential planned development, and was acquired by the county through tax lien foreclosure. The western subarea adjoins the eastern edge of the Umatilla city limits.

The portion of the 42 acre area east of Draper Road, a strip 270 feet in width and approximately 17 acres in area, is owned by intervenor. It is bordered on the east by other land owned by intervenor, designated and zoned for industrial use, which is part of McNary Industrial Park. The northern portion of the eastern subarea is used for log stacking. The remainder is unused.

On October 26, 1989, after a public hearing, the city planning commission adopted a recommendation that the western subarea retain its residential plan map designation, but that the application to change the plan map designation of the eastern subarea to Light Industrial be approved. On

the city adopted the appealed ordinance, the county adopted an ordinance which (1) amends the county plan to "co-adopt" the city plan map amendment, and (2) changes the zoning of the subject property from county M-2 to city M-1 (Light Industrial). Umatilla County Ordinance #90-05 (March 15, 1990). No party contends that the county's adoption of Ordinance #90-05 makes this appeal of the city's plan map amendment moot.

February 12, 1990, after a further public hearing, the city council adopted Ordinance No. 565, amending the plan map designation of the eastern subarea to Light Industrial. This appeal followed.

FIRST ASSIGNMENT OF ERROR²

Petitioner argues that the planning commission chairman had a conflict of interest when the planning commission held its hearing on the proposed plan amendment on October 26, 1989. According to petitioner, the chairman is a major shareholder in a corporation which operates an onion dehydration plant on property leased from intervenor, adjacent to the subject property.³ Petitioner argues that if the subject property were to remain designated for residential use, and industrial traffic were therefore not allowed to cross the subject property to reach Draper Road, the onion dehydration plant would be landlocked, causing a significant adverse financial impact to the chairman.

Petitioner contends the chairman failed to disclose this conflict of interest and to refrain from participating

²As intervenor points out, the petition for review does not set out specific assignments of error, as required by OAR 661-10-030(3)(d). Accordingly, we limit our review in this proceeding to those alleged errors which are presented in petitioner's argument with sufficient clarity to reasonably enable intervenor to respond in its response brief. Freels v. Wallowa County, ___ Or LUBA ___ (LUBA No. 88-046, November 14, 1988), slip op 5; Schoonover v. Klamath County, 16 Or LUBA 846, 853 n 4 (1988), Standard Insurance Co. v. Washington County, 16 Or LUBA 30 (1987).

³At oral argument, petitioner advised the Board that he learned of these facts after the city adopted the appealed decision.

in the proceeding, as required by ORS 227.035.⁴ Petitioner argues that his right to a fair hearing was prejudiced by the chairman's participation. Petitioner also argues that, had the chairman recused himself, the planning commission would have lacked a quorum and would not have been able to make a recommendation to the city council. According to petitioner, this would make the city council's action on the proposed plan amendment invalid.

Intervenor contends that there is no basis for finding that petitioner's right to a fair hearing was prejudiced because the planning commission was not the decision maker on the plan amendment application. Intervenor points out the planning commission's decision was only a recommendation to the city council, and the city council conducted a full, de novo evidentiary hearing on the proposed plan map amendment.

We agree with intervenor that even if the chairman's participation in the planning commission proceedings on the proposed plan amendment were improper, de novo review of the proposed plan amendment by the city council cured any such impropriety. Murphey v. City of Ashland, ___ Or LUBA ___

⁴ORS 227.035 provides in relevant part:

"A member of a planning commission shall not participate in any commission proceeding or action in which [the member] has a direct or substantial financial interest * * *. Any actual or potential interest shall be disclosed at the meeting of the commission where the action is being taken."

(LUBA No. 89-123, May 16, 1990), slip op 7; Slatter v. Wallowa County, 16 Or LUBA 611, 617 (1988); see also Fedde v. City of Portland, 8 Or LUBA 220, aff'd 67 Or App 801 (1984).

Furthermore, even if petitioner were correct that the chairman should not have participated in the planning commission proceedings, and that the planning commission would therefore have been deprived of a quorum and would not have been able to make a recommendation on the proposed plan map amendment to the city council, those facts would not constitute a sufficient basis for reversal or remand of the city council's decision. Petitioner does not point to, and we are not aware of, any provisions of state statute or city plan or land use regulations which make a planning commission recommendation on a proposed plan amendment a necessary prerequisite to action by the city council. See Sunnyside Neighborhood v. Clackamas Co. Comm., 280 Or 1, 8, 569 P2d 1063 (1977).

The first assignment of error is denied.

SECOND ASSIGNMENT OF ERROR

Petitioner contends the city's decision violates state law and the city's acknowledged comprehensive plan. Petitioner points out the city found that the Buildable Lands Inventory in its comprehensive plan establishes that there is a deficiency of 330 single family residential lots. Record 19. Petitioner argues that by changing the plan map

designation of the subject property from Single Family Residential to Light Industrial, this deficiency is increased. According to petitioner, this is inconsistent with Statewide Planning Goal 10 (Housing) because it adversely impacts the city's ability to meet the housing needs projected in its plan.

Goal 10 requires cities and counties "[t]o provide for the housing needs of citizens of the state." Goal 10 also provides:

"Buildable lands for residential use shall be inventoried and plans shall encourage the availability of adequate numbers of housing units * * *."

"Buildable Lands -- refers to lands in urban and urbanizable areas that are suitable, available and necessary for residential use.

"* * * * *"

Intervenor argues the city did not err in redesignating the subject area Light Industrial, because the subject land should not be considered as land "available" for residential use in the city's inventory of buildable lands. Intervenor points out the owner of the land, the Port of Umatilla, is charged by statute with the promotion of industrial development, transportation, shipping and agriculture. See ORS 777.003, 777.210 to 777.258. Intervenor argues that, in general, land which is publicly owned should be considered "unavailable" for residential use. LCDC Continuance Order (City of Turner, November 20, 1980). Intervenor also argues

the city could find the plan amendment would result in no actual decrease of developable lots because the subject area, located between Draper Road and an area zoned heavy industry, "would likely never be developed as housing." Intervenor-Respondent's Brief 16.

Intervenor also argues the city's decision does not violate Goal 10 because the decision would result in the loss of only 60 potential single family residential lots, and the remaining available lots will be more than sufficient to meet the city's needs. Intervenor asserts the city's comprehensive plan was originally adopted in 1977, a time of high economic growth, but virtually no growth has occurred since 1980. According to intervenor, when the city's comprehensive plan was subject to periodic review in 1987, it was noted that only 21 residential building permits had been issued since 1980. Intervenor calculates that even with a loss of 60 single family lots from its Buildable Lands Inventory, "there would remain 41 times more single family lots available than the total [number] of lots that have been developed in the previous seven years." (Emphasis in original.) Intervenor-Respondent's Brief 16.

The city adopted the following finding concerning its inventory of buildable land:⁵

⁵The city council adopted as its findings the January 22, 1990 staff report found at Record 17-32. Record 44. We note that this staff report in many instances addresses the impacts from changing the plan map designation of the entire 42 acre area which was the subject of the

"Buildable Lands for Housing in the City Limits and UGB

"Lots Needed for Housing Lots Available for Housing

"Single Family	1,315	985	(deficiency 330)
"Mobile Homes	630	631	
"Multi-Family	794	827	

"Based on 20 year population projection to 2006. (See attached Appendix I for discussion of how these figures were computed.)"⁶ Record 19.

original application, rather than the impacts from changing the plan map designation of the eastern subarea, which is what was actually approved by the city council in the challenged decision.

⁶Appendix I contains the following excerpts from the Periodic Review Order adopted by the city on September 21, 1987, pursuant to ORS 197.640 to 197.649:

"The City completed a Buildable Lands Inventory in 1976 as part of its Comp Plan. During a period immediately following the development and adoption of the Comp Plan, the City experienced a period of extremely rapid growth culminating in almost a 50 percent increase in population by 1980. Since 1980, however, development has all but stopped in the City. During Periodic Review, the residential Buildable Lands Inventory was updated and the following acreages of residential lands are currently available within each residential plan designation within the City and the UGB.

"R-1 [Single Family Residential] 226 acres
** * * * *

** * * The City continues to use [its 1977] housing mix assumptions as follows:

"Single Family Dwellings (R-1) 48 percent
** * * * *

"These housing mix assumptions were then utilized to determine the projected housing needs projections for the City during the planning period from 1986 to 2006. The City and the County have agreed to a 20-year population projection for the City during that period of 11,200. * * *

** * * * *

Goal 10 requires local governments to inventory their buildable land, identify needed housing, and designate and zone enough buildable land to satisfy the identified housing need. See McIntyre-Cooper Co. v. Board of Comm. Washington County, 2 Or LUBA 126, 129 (1980), aff'd 55 Or App 78, rev den 292 Or 589 (1981).

Here, the city has adopted a Buildable Lands Inventory as part of its comprehensive plan. Intervenor concedes that the subject property was inventoried as buildable single family residential designated land prior to the appealed decision.⁸ The Buildable Lands Inventory and the city findings establish that prior to the appealed plan map amendment, the city was 330 lots (25%) short of having enough land designated to meet its projected need for land for single family dwellings.⁹ Record 19, 31-32. We agree with petitioner that for the city to remove another 60-90 lots¹⁰ from its inventory of available single family

⁸Intervenor nevertheless contends that the subject property should not have been so inventoried. However, intervenor cannot contest in this proceeding the city's prior identification of the subject property as buildable single family residential land.

⁹Contrary to intervenor's argument, the excerpt from the city's periodic review order adopted as part of the findings clearly indicates the projected need for buildable residential land on which the city bases its determination of the single family residential lot deficiency does reflect the downturn in growth which occurred after 1980.

¹⁰The city's decision identifies the property which was the subject of the original plan amendment application as totalling 42 acres, but does not identify the acreage of the eastern subarea for which it actually approved a change of plan map designation. Intervenor contends the eastern subarea

residential designated land, without any explanation of how it can nevertheless satisfy its need for such land, as currently identified in its comprehensive plan, violates Goal 10.¹¹ Gresham v. Fairview, 3 Or LUBA 219, 228-229 (1981).

The second assignment of error is sustained.

THIRD ASSIGNMENT OF ERROR

Petitioner argues that the city improperly based its decision to amend the plan map designation for the subject property on the location of Draper Road. As we understand it, petitioner contends that Draper Road was improperly constructed by the county for the purpose of serving industrial uses, although located in an area then designated for single family residential use. According to petitioner, there is no evidence in the record to support the city's decision to change the plan designation of the eastern subarea to Light Industrial save for the location of Draper Road.

Intervenor argues that petitioner cannot challenge the approval or location of Draper Road in this appeal. Intervenor maintains that Draper Road is relevant to the city's decision only to the extent it would provide access

comprises about 14 acres (60 buildable lots); petitioner contends that it comprises about 21 acres (90 buildable lots).

¹¹If, as intervenor suggests, the city now believes its plan overstates the number of single family residential lots needed for the 20 year planning period, the city must first revise its plan to lower the projected need, before using the lower projection as a basis for plan map amendments.

to and serve as an effective barrier between residential land to the west and industrial land to the east.

We agree with intervenor that how Draper Road came to be located where it is is not an issue in this appeal. Petitioner offers no other reason why the city should be precluded from considering the existence of Draper Road in deciding whether to grant the proposed plan map amendment.¹²

The third assignment of error is denied.

The city's decision is remanded.

¹²Petitioner cites nothing in the city plan, land use regulations or record which supports his contention that under the city's decision, Draper Road could only serve the industrially designated land to the east and, therefore, another road would have to be built to serve the residentially designated area to the west of Draper Road.