BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

NEILSON ABEEL, ROBERT AMES,
LAWRENCE DULLY, WAYNE KINGSLEY,
OLIVER NORVILLE and JEFFREY TASHMAN,
Petitioners,

vs.

CITY OF PORTLAND,
Respondent,

and

PORTLAND DEVELOPMENT COMMISSION,
Intervenor-Respondent.

LUBA No. 2008-117

FINAL OPINION
AND ORDER

Appeal from City of Portland.

Neilson Abeel, Robert Ames, Lawrence Dully, Wayne Kingsley, Oliver Norville and Jeffrey Tashman, Portland, filed a joint petition for review. Oliver Norville and Jeffrey Tashman argued on their own behalf.

Kathryn S. Beaumont, Senior Deputy City Attorney, Portland, filed a joint response brief and argued on behalf of respondent. With her on the brief was David J. Elott.

David J. Elott, Portland, filed a joint response brief and argued on behalf of intervenor-respondent. With him on the brief was Kathryn S. Beaumont.

BASSHAM, Board Chair; HOLSTUN, Board Member, participated in the decision.

RYAN, Board Member, did not participate in the decision.

REMANDED 01/30/2009

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

Opinion by Bassham.

NATURE OF THE DECISION

Petitioners appeal a city decision amending and enlarging the River District Urban Renewal Area.

MOTION TO INTERVENE

Portland Development Commission (intervenor) moves to intervene on the side of the respondent in this appeal. There is no opposition to the motion and it is granted.

MOTION TO DISMISS

The city and intervenor (together, respondents) move to dismiss petitioners Friends of Urban Renewal and Patrick LaCrosse from this appeal because they failed to file a petition for review. Although all the petitioners appealed the decision under a single notice of intent to appeal, and were at that time represented by the same attorney, later in the appeal the attorney withdrew from representation. Thereafter, each of the petitioners represented themselves. A petition for review was timely filed, signed by all named petitioners except Friends of Urban Renewal and Patrick LaCrosse. Respondents argue that the failure of those two named petitioners to file a timely petition for review requires that we dismiss those petitioners from this appeal. OAR 661-010-0030(1).[1]

We do not agree with respondents that the failure of petitioners Friends of Urban Renewal and Patrick LaCrosse to sign the petition for review necessarily means that they have "failed to file a timely petition for review," with the consequence that they must be

[1] OAR 661-010-0030(1) provides:

> "Fi1ing and Service of Petition: The petition for review together with four copies shall be filed with the Board within 21 days after the date the record is received or settled by the Board. See OAR 661-010-0025(2) and 661-010-0026(6). The petition shall also be served on the governing body and any party who has filed a motion to intervene. Failure to file a petition for review within the time required by this section, and any extensions of that time under OAR 661-010-0045(9) or OAR 661-010-0067(2), shall result in dismissal of the appeal and forfeiture of the filing fee and deposit for costs to the governing body."

dismissed from this appeal under OAR 661-010-0030(1). *See Kane v. City of Beaverton*, 49 Or LUBA 512, 518, *aff'd* 202 Or App 431, 122 P3d 137 (2005) (unrepresented petitioners may request permission to file an amended signature page with their signatures, and thereby join a timely filed petition for review filed by other unrepresented petitioners, even after the deadline for filing the petition for review has passed).

Nonetheless, because neither petitioner opposes the motion to dismiss, has requested leave to join the petition for review, or indeed attempted any communication with the Board on their own behalf, we treat that lack of opposition as an agreement to dismiss those petitioners from this appeal.[2] Accordingly, Friends of Urban Renewal and Patrick LaCrosse are dismissed from this appeal.

MOTION TO FILE AMICUS BRIEF

The League of Women Voters moves to file an amicus brief in support of petitioners. The city and intervenor object to the motion. Respondents argue that the amicus brief contains evidence not in the record and policy arguments that are not relevant to the issues in this appeal. The amicus brief is allowed, but the Board will not consider evidence outside of the record, and any argument that is not directed to the issues in the petition for review will be disregarded.

FACTS

The city adopted the River District Urban Renewal Plan (original plan) in 1998. The original plan encompassed areas of downtown Portland, and established a maximum indebtedness of $224,780,350. In 2007, intervenor began considering various amendments to the original plan, including a proposal to (1) expand the original plan area to include a net 42 acres of contiguous land, (2) to increase the maximum indebtedness by approximately

[2] In addition, we note that Friends of Urban Renewal is not a person, but an organization of some kind, and therefore can appear as a party before the Board only if represented by an attorney. OAR 661-010-0075(6). Because Friends of Urban Renewal is no longer represented by an attorney, it could continue as a party in this appeal only if it is represented by an attorney.

$325,000,000, so that the new total maximum indebtedness is more than double the original total maximum indebtedness, and (3) to extend the expiration date one year, to June 30, 2021.[3] Intervenor recommended a number of new and amended urban renewal projects within the urban renewal plan area, as amended. As required by ORS 457.085(3), intervenors prepared a report to accompany the proposed amendments.

The city planning commission recommended approval of the proposed amendment, with some modifications. The city council approved the proposed amendments on June 25, 2008. This appeal followed.

FIRST ASSIGNMENT OF ERROR

Petitioners argue that the city failed to comply with ORS 457.220, which provides that a substantial urban renewal amendment must be approved in the same manner as the original plan, including making the required findings under ORS 457.095(1) that "[e]ach urban renewal area is blighted."[4]

A. Whether the Original Area Is Still Blighted

To address the ORS 457.095(1) requirement to find that the "urban renewal area is blighted," the city relied on its original findings of blight adopted in 1998 when the original

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[3] Specifically, intervenor recommended that a total of 47 acres be removed from the Downtown Waterfront Urban Renewal Area, and 3.20 acres be removed from the South Park Blocks Urban Renewal Area, and both sets of acreage be transferred to the River District Urban Renewal Area. Intervenor also recommended removing 8.25 acres from the River District Urban Renewal Area, for a net gain of approximately 42 acres, involving a number of separate "expansion areas" that are contiguous to the existing plan area.

[4] ORS 457.220 provides:

> "1) Except for the provisions of subsection (2) of this section, an urban renewal agency shall carry out the urban renewal plan approved under ORS 457.095.
>
> "(2) Any substantial change made in the urban renewal plan shall, before being carried out, be approved and recorded in the same manner as the original plan.
>
> "(3) No land equal to more than 20 percent of the total land area of the original plan shall be added to the urban renewal areas of a plan by amendments."

plan was enacted, combined with findings that the new areas added to the plan area are blighted:

> "A finding of blight was made in the original ordinance adopting the Plan * * *. Since the original Plan has not been completed, the original findings of blight continue to be accurate. In addition, the [Portland Development] Commission's report accompanying the Amended and Restated Plan includes findings of blight with respect to property to be added to the River District Urban Renewal Area by the Amended and Restated Plan." Record 80.

Petitioners assign error to this approach, arguing that in the ten years since the original plan was adopted conditions in the original River District Urban Renewal Area have improved substantially. Petitioners note the city council findings that the urban renewal district has "successfully converted former rail yards and an underutilized warehouse area into the new and vibrant Pearl Neighborhoods" and the "results have dramatically exceeded the overall targets for new housing units and more housing continues to be developed." Record 244-46. Additionally, the total assessed value in the urban renewal area has increased from $358,684,364 to over $1,350,000,000. According to petitioners, under these circumstances the city must evaluate *current* conditions in the plan area as a whole and make a finding based on those current conditions that the urban renewal plan area is still "blighted" as that term is defined at ORS 457.010(1).[5]

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[5] ORS 457.010(1) provides:

> "'Blighted areas' means areas that, by reason of deterioration, faulty planning, inadequate or improper facilities, deleterious land use or the existence of unsafe structures, or any combination of these factors, are detrimental to the safety, health or welfare of the community. A blighted area is characterized by the existence of one or more of the following conditions:
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> "(a) The existence of buildings and structures, used or intended to be used for living, commercial, industrial or other purposes, or any combination of those uses, that are unfit or unsafe to occupy for those purposes because of any one or a combination of the following conditions:
>
> "(A) Defective design and quality of physical construction;
>
> "(B) Faulty interior arrangement and exterior spacing;

Respondents defend the city's approach, arguing that in amending an urban renewal area the city is obligated to adopt findings of blight only for any new areas added to the original urban renewal area, and the city may simply rely on the original findings of blight with respect to the original renewal area. Respondents contend that petitioners' approach of requiring that the city evaluate whether the original plan area is still blighted would be contrary to the central purpose and function of the urban renewal statutes. According to respondents, the central purpose and function of urban renewal areas is to eliminate blight, which is accomplished when the city borrows funds to finance projects within the area, those projects improve conditions within the area, the improved conditions increase property

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"(C) Overcrowding and a high density of population;

"(D) Inadequate provision for ventilation, light, sanitation, open spaces and recreation facilities; or

"(E) Obsolescence, deterioration, dilapidation, mixed character or shifting of uses;

"(b) An economic dislocation, deterioration or disuse of property resulting from faulty planning;

"(c) The division or subdivision and sale of property or lots of irregular form and shape and inadequate size or dimensions for property usefulness and development;

"(d) The laying out of property or lots in disregard of contours, drainage and other physical characteristics of the terrain and surrounding conditions;

"(e) The existence of inadequate streets and other rights of way, open spaces and utilities;

"(f) The existence of property or lots or other areas that are subject to inundation by water;

"(g) A prevalence of depreciated values, impaired investments and social and economic maladjustments to such an extent that the capacity to pay taxes is reduced and tax receipts are inadequate for the cost of public services rendered;

"(h) A growing or total lack of proper utilization of areas, resulting in a stagnant and unproductive condition of land potentially useful and valuable for contributing to the public health, safety and welfare; or

"(i) A loss of population and reduction of proper utilization of the area, resulting in its further deterioration and added costs to the taxpayer for the creation of new public facilities and services elsewhere."

values and hence property tax revenue, and those higher revenues are then used to repay the borrowed funds. Respondents argue that, under petitioners' approach, the logical consequence of requiring the city to evaluate whether the original renewal area is still blighted when amending the plan would be to require the *removal* of all non-blighted portions from the renewal area, which in turn would mean the loss of the higher-valued property that generates the revenue necessary to repay the loans. The result, respondents argue, is that no urban renewal area could ever be amended, once conditions start to improve within the area and property values start to rise. Therefore, respondents argue, ORS 457.220(2) and ORS 457.095(1) should not be interpreted to prohibit the city from relying on the original findings of blight adopted 10 years ago when the city established the original plan, or require the city to evaluate whether the renewal plan area is still blighted.

We do not understand petitioners to argue that in amending the urban renewal area and evaluating whether the area is still "blighted" the city is thereby obligated to *remove* any non-blighted property from the renewal area. We disagree with respondents that removal of non-blighted property is the necessary consequence of interpreting ORS 457.220(2) and ORS 457.095(1) to requiring the city to find that the renewal plan area is still blighted, based on current conditions rather than conditions 10 years earlier, when the original plan was adopted. When adopting an original urban renewal plan under ORS 457.095(1), there is no requirement that every single property in the urban renewal district be blighted—only that the "urban renewal area is blighted" in one or more of the ways described in ORS 457.010(1). It is the area as a whole that must be blighted, not every individual property that is included in that area. Similarly, when adopting a substantial amendment to the urban renewal plan under ORS 457.220, a finding that the urban renewal area, as amended, remains blighted would not necessarily require removing all property from the area that is not blighted or is no longer blighted.

Whether the relevant statutes require that an amendment to an urban renewal plan be based on an evaluation of current conditions within the entire "urban renewal area" or only the proposed addition to the urban renewal area is a question of statutory construction, which we resolve by application of the principles set forth in *PGE v. Bureau of Labor and Industries,* 317 Or 606, 859 P2d 1143 (1993). We must attempt to determine the meaning of the statutes enacted by the legislature. *Id*. at 610. We first examine the statutory text in context and, if necessary, legislative history and canons of statutory construction. *Id*. at 610-12. In examining the text, we are constrained "not to insert what has been omitted, or to omit what has been inserted." ORS 174.010.

ORS 457.220(2) requires that a substantial change to an urban renewal plan be approved and recorded in the same manner as the original plan. In adopting the original plan, the city was required to demonstrate, based on the report required by ORS 457.085(3), that the "urban renewal area is blighted." Notably, that requirement is framed in the present tense. ORS 457.085(3)(a) requires that the plan be accompanied by a report that describes the "physical, social and economic conditions in the urban renewal areas of the plan[,]" among other information. The report must describe "[t]he relationship between each project to be undertaken under the plan and the *existing* conditions in the urban renewal area." ORS 457.085(3)(c)(emphasis added).[6] Those requirements govern the initial adoption of an urban renewal area, and they also apply to a substantial amendment to an existing urban renewal area.

A different result might be possible if the proposed amendments simply added territory to the existing urban renewal area, and only proposed projects to improve conditions within those newly added territories. In that circumstance, the only part of the urban renewal

[6] As noted, the report that accompanied the proposed amendments did not attempt to describe the physical, social and economic conditions in the original areas of the plan, nor describe the relationship between the proposed new and amended projects and "existing conditions in the urban renewal area." The city relied entirely on the original report and findings, adopted 10 years earlier.

area where new projects would be proposed would have to be found to be currently blighted. If that were the extent of the proposed amendments, it might be that the city would not need to re-evaluate "existing conditions" within the original plan area or determine whether the urban renewal plan area as a whole is blighted. Petitioners allege, however, and respondents do not dispute, that the amendments propose a number of new and amended projects within the boundaries of the original renewal plan area, and authorize a significant increase in indebtedness in part to pay for those projects.

We might also agree with respondents that the city could simply rely on its original findings of blight with respect to the original plan area, if either a relatively short interval of time had passed since adoption of the original plan, or the city found that conditions had not significantly changed within the original plan area during the intervening years. In *Holladay Investors, LTD v. City of Portland*, 22 Or LUBA 90, 99-100 (1990), we rejected an argument that in amending the original plan two years after adoption the city was required to update its original findings regarding the "physical, social and economic conditions in the urban renewal areas of the plan[,]" for purposes of ORS 457.085(3), to reflect changes that had occurred in the intervening two years. We held that, while it might have been preferable to update the report, the report was only two years old and the minor changes that petitioners identified did not demonstrate that the original report was inadequate to comply with ORS 457.085(3). Although petitioners' argument in the present case is based on ORS 457.095(1) rather than ORS 457.085(3), we would likely reach a similar conclusion in the present case if the proposed amendments were adopted shortly after the original plan was adopted, or the city had found that conditions had not significantly changed. However, ten years have passed since adoption of the original plan, and the city found, and no party disputes, that there have been significant changes within the original plan boundary in the intervening years.

In sum, we agree with petitioners that ORS chapter 457 requires the city to address the existing conditions in the urban renewal area as a whole, and adopt a finding supported by substantial evidence that the urban renewal area as a whole is blighted. That finding may be based on the original findings of blight adopted 10 years ago, to the extent the city finds that those findings are still accurate.

This subassignment of error is sustained.

B. Whether Buildings Are Unfit or Unsafe to Occupy

The city found that several of the proposed expansion areas added to the urban renewal area are "blighted areas," under ORS 457.010(1)(a):

> "The existence of buildings and structures, used or intended to be used for living, commercial, industrial or other purposes, or any combination of those uses, *that are unfit or unsafe to occupy for those purposes because of any one or a combination of the following conditions*:
>
> "(A) Defective design and quality of physical construction;
>
> "(B) Faulty interior arrangement and exterior spacing;
>
> "(C) Overcrowding and a high density of population;
>
> "(D) Inadequate provision for ventilation, light, sanitation, open spaces and recreation facilities; or
>
> "(E) Obsolescence, deterioration, dilapidation, mixed character or shifting of uses[.]" (Emphasis added.)

Petitioners argue that the city found that some of the conditions of ORS 457.010(1)(A-E) were present in the expansion areas, but failed to make the predicate finding with respect to any of the identified buildings that those conditions cause the buildings to be "unfit or unsafe to occupy." According to petitioners, unless the conditions render the buildings "unfit or unsafe to occupy" the buildings are not "blighted" under the statute. Petitioners cite to evidence that most of the identified buildings are occupied and many are well-maintained older buildings, notwithstanding alleged deficiencies such as noncompliance with current seismic codes or an allegedly "faulty" interior arrangement.

Respondents counter that ORS 457.010(1)(a) requires only a finding that buildings in the area have one or more of the conditions listed in (A) through (E), and does not require a finding that that condition or conditions cause the building to be "unfit or unsafe to occupy." Respondents argue that for each of the identified buildings the city found, based on substantial evidence, that the buildings are subject to one or more of the conditions listed in ORS 457.010(1)(a)(A) through (E). Such findings are sufficient, respondents argue, to conclude that the area in which those buildings are located is blighted.

We agree with petitioners that, as ORS 457.010(1)(a) is worded, the statute requires a conclusion that identified buildings or structures are either "unfit" for their intended purpose or "unsafe to occupy" for those purposes, *because of* the existence of one or more of the listed conditions. That explicit causal element means that the mere existence of one or more conditions listed in (A) through (E) is not sufficient, in itself, to demonstrate that the area including such buildings is blighted. The city must conclude, based on substantial evidence, that the identified buildings are "unfit" or "unsafe to occupy" *because of* one or more of the listed conditions.

That said, the statute does not elaborate on what "unfit" or "unsafe to occupy" means, and the context in which those terms appear does not suggest that the building must be literally unusable or uninhabitable. We disagree with petitioners that it is a dispositive consideration that a building is presently occupied, or is well-maintained. We agree with respondents, for example, that the city could reasonably conclude that an older building that does not meet current seismic codes is thereby "unfit" for its intended purpose or "unsafe to occupy," even if the building is in fact occupied and otherwise habitable and well-maintained.

Nonetheless, petitioners are correct that if the city relies on ORS 457.010(1)(a), it must find that identified buildings are either unfit or unsafe to occupy "because of" one or

more of the listed conditions. The city did not do so, and remand is necessary for the city to consider that question.

This subassignment of error is sustained.

C. Proper Utilization of the Firestone Expansion Area

The city found that the Firestone Expansion area, which is developed with a single story building, is blighted under ORS 457.010(1)(h), which defines "blighted areas" to include areas characterized by the existence of "[a] growing or total lack of proper utilization of areas, resulting in a stagnant and unproductive condition of land potentially useful and valuable for contributing to the public health, safety and welfare[.]" Petitioners argue that there is not a lack of proper utilization of the area, only that the current development of the property is below its optimum level of development, which petitioners contend is an insufficient basis to find that an area is blighted under ORS 457.010(1)(h).

The city's findings state:

> "Land to improvement value ratios for 'healthy' properties in areas adjacent to the Firestone Expansion Area range from 5:1 to 7:1. The specific land to improvement ratio for this Firestone Expansion Area is 0.28:1 and can be improved with strategic redevelopment investments.
>
> "The [land to improvement ratio] for this area is grossly undervalued for the capacity of the parcel as established in the zoning code. The value of the property in the Firestone Expansion Area is low, resulting in a stagnant and unproductive condition of land. The property, if upgraded, is potentially useful and valuable to contributing to the public health, safety and welfare of the community, thereby eliminating blight. This constitutes blight in the area per ORS 457.010(1)(h)." Record 110-11.

Respondents explain that the single-story building on the Firestone parcel could be redeveloped with a six-story building under current regulations, which would be a much more productive use of that parcel, similar to adjacent parcels. We agree with respondents that petitioners have not demonstrated why such underutilization of development capacity is not sufficient to constitute blight as defined by ORS 457.010(1)(h).

This subassignment of error is denied.

D. Proper Utilization of the East Retail Core Area

Petitioners argue that the city's findings that the East Retail Core area is blighted under ORS 457.010(1)(h) are not supported by substantial evidence. Petitioners make a similar argument to that made in the previous subassignment of error.

Respondents argue that the city did not find the East Retail Core area was blighted under ORS 457.010(1)(h), but rather relied exclusively on ORS 457.010(1)(a). The city's findings are not entirely clear on this point, but we agree with respondents that the city did not appear to rely on ORS 457.010(1)(h) to find that the East Retail Core area is blighted. Accordingly, petitioners' arguments under this assignment of error do not provide a basis for reversal or remand.

This subassignment of error is denied.

The first assignment of error is sustained, in part.

SECOND ASSIGNMENT OF ERROR

ORS 427.020(5) is one of the listed purposes of the urban renewal statutes, and states a legislative finding:

> "That the acquisition, conservation, rehabilitation, redevelopment, clearance, replanning and preparation for rebuilding of these areas, and the prevention or the reduction of blight and its causes, are public uses and purposes for which public money may be spent and private property acquired and are governmental functions of state concern."

Petitioners argue that the city violated the ORS 427.020(5) purpose requirement of the urban renewal statutes by failing to detail specifically how each of the proposed new or amended projects in the urban renewal area relates to the identified conditions of blight.

ORS 427.020 is the declaration of necessity and purpose for the urban renewal statutes. We do not see that it provides specific approval criteria or requirements for urban renewal plans or amendments to those plans. ORS 427.085 provides the requirements for urban renewal plans, and ORS 427.095 provides the approval requirements for such plans and amendments. The necessity and purpose statements are implemented by those more

specific statutes. ORS 427.020 does not provide additional requirements for urban renewal plans or amendments, and therefore petitioners' arguments under this assignment of error do not provide a basis for reversal or remand.

The second assignment of error is denied.

THIRD ASSIGNMENT OF ERROR

In the first of six subassignments of error, petitioners argue that proposed projects to be undertaken under the amended renewal plan are not adequately described and that there is insufficient information for the city to make "its requisite finding of feasibility." Petition for Review 16. Although it is not clear, petitioners appear to argue that the amended plan violates ORS 457.085(2)(a), which requires that the urban renewal plan include "[a] description of each urban renewal project to be undertaken." In addition, or alternatively, petitioners may be arguing that the report accompanying the plan fails to comply with ORS 457.085(3)(g), which requires that the plan include a financial analysis with "sufficient information to determine feasibility." A third possibility is that petitioners believe the city failed to adequately address ORS 457.095(6), which requires a finding that the plan is economically sound and feasible. However, petitioners do not cite to any of these statutes under this assignment of error.

Petitioners identify four proposed projects, and argue that neither the amended plan nor the accompanying report adequately describes the projects or provides sufficient financial information. Respondents cite to various portions of the amended plan and report that discuss the four projects in some detail. Absent a more focused argument from petitioners, we cannot say that the plan and report descriptions of the four projects violate ORS 457.085(2)(a), ORS 457.085(3)(g), or ORS 457.095(6). These four subassignments of error are denied.

In a fifth subassignment of error, petitioners argue that Table 6 to the report lists unspecified "Economic Development" expenditures of $54 million, but identifies no specific

projects for these funds. However, petitioners make no attempt to link that alleged failure to any statutory requirement.

Under the sixth subassignment of error, petitioners similarly argue that Table 6 identifies $35 million in expenditures on behalf of Multnomah County, but it is not clear what this expenditure is for. Respondents cite portions of the report that link that expenditure to renovation of the Mead and McCoy buildings, which are owned by Multnomah County.

Finally, petitioners argue that the $35 million expenditure on behalf of Multnomah County does not comply with ORS 427.085(2)(j), which states that when a project involves a public building that the plan must provide "an explanation of how the building serves or benefits the urban renewal area." Respondents argue that while the Mead building is currently owned by the county, the project proposed for that building does not involve a public use or continued public ownership. If that changes in the future, respondents argue, then an amendment to the plan would be necessary. With respect to the McCoy building, the city's findings state:

> "[The building] provides a health clinic and administration. The health clinic provides services to residents of the [River District Area], including the residents of the proposed expansion areas in this amendment." Record 122.

We agree with respondents that that finding appears to adequately explain how the McCoy building will serve or benefit the urban renewal area.

The fifth and sixth subassignments of error are denied.

The third assignment of error is denied.

The city's decision is remanded.