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

PETER O. WATTS,
Petitioner,

vs.

CITY OF TUALATIN,
Respondent,

and

CITY OF WILSONVILLE, WASHINGTON COUNTY,
and METRO,
Intervenors-Respondents.

LUBA No. 2019-053

FINAL OPINION
AND ORDER

Appeal from City of Tualatin.

Peter O. Watts, Portland, filed a petition for review and argued on his own behalf.

Sean T. Brady, City Attorney, Tualatin, filed a joint response brief and argued on behalf of respondent.

Alan A. Rappleyea, County Counsel, Hillsboro, filed a joint response brief and argued on behalf of intervenor-respondent Washington County.

Barbara A. Jacobson, City Attorney, Wilsonville, filed a response brief and argued on behalf of intervenor-respondent City of Wilsonville.

Roger A. Alfred, Senior Assistant Attorney, Portland, filed a response brief and argued on behalf of intervenor-respondent Metro.

1 RYAN, Board Member; ZAMUDIO, Board Chair; RUDD, Board
2 Member, participated in the decision.
3
4 AFFIRMED 10/1/2019
5
6 You are entitled to judicial review of this Order. Judicial review is
7 governed by the provisions of ORS 197.850.

1 Opinion by Ryan.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a decision by the city adopting the Basalt Creek Concept
4 Plan into the city's comprehensive plan, and zoning a 52-acre area within the
5 planning area as Manufacturing Park.

6 **MOTION TO INTERVENE**

7 Metro moves to intervene on the side of respondent. No party opposes the
8 motion and it is allowed.[1]

9 **FACTS**

10 This appeal is related to, but distinct from, the appeals that LUBA
11 dismissed in *Watts v. Metro*, __ Or LUBA __ (LUBA Nos 2018-055/057, Nov
12 27, 2018) (*Watts I*). In *Watts I*, we set out the lengthy history of the concept
13 planning process for a planning area located in both the cities of Tualatin and
14 Wilsonville, known as the Basalt Creek Planning Area. We repeat relevant
15 portions of that history here:

16 "This dispute arises over a longstanding disagreement between the
17 cities of Wilsonville and Tualatin (the cities) regarding a concept
18 plan for the future zoning of a 52-acre portion of the Basalt Creek
19 Planning Area known as the Central Subarea, located within
20 Washington County.

21 "Metro is a metropolitan service district organized under ORS
22 chapter 268, whose primary responsibilities under its charter and

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[1] In a previous order, we granted the City of Wilsonville's and Washington County's motions to intervene.

governing statutes include managing the Portland metropolitan area's urban growth boundary (UGB) and coordinating the growth of the cities in the region, along with planning for regional parks, open spaces and recreational facilities, and the regional transportation system.

"In 2002, Metro expanded the UGB to add 17,458 acres of land, with 15,047 acres added for residential purposes and 2,411 acres for employment purposes (commercial and industrial). * * * In its 2002 decision, Metro found that the amount of land being added for employment purposes was insufficient to meet the identified 20-year need.

"In 2004 Metro adopted Ordinance No. 04-1040B 'to increase the capacity of the [UGB] to accommodate growth in industrial employment.' * * * As a result, the UGB was expanded to include 1,940 acres of land for industrial use, including the 646-acre Basalt Creek Planning Area which lies between the cities of Tualatin and Wilsonville. * * *

"Under Title 11 of Metro's Urban Growth Management Functional Plan (UGMFP), cities and counties are required to prepare concept plans for new UGB areas in order to guide future comprehensive plan and land use regulations for those areas, and to promote efficient urbanization in a manner that is coordinated between the affected local governments. Metro Code 3.07.1105-1120. In 2007, Metro awarded a grant to Wilsonville and Tualatin to perform concept planning for the Basalt Creek Planning Area, which was then outside city limits in Washington County.

"In 2011 Wilsonville, Tualatin, Metro and Washington County (the parties) entered into an Intergovernmental Agreement (IGA), which provided that the parties would agree upon a concept plan for the Basalt Creek Planning Area, which is required before it can be annexed into and developed by the cities. By 2016, the concept planning process was moving forward, albeit slowly, and the cities appeared to have reached agreement. The cities agreed they would each designate their respective portions of the planning area for industrial uses. At that point, however, the Tualatin City Council

> received testimony from the public, including from petitioner Peter Watts (Watts), asking that the proposed designation of a 52-acre portion of the planning area be designated as residential, not industrial. * * * The Tualatin City Council changed its designation of its portion of the Central Subarea to residential, leading to a stalemate between the cities.
>
> "In 2017, in order to attempt to resolve the dispute, the cities approached Metro and asked that it arbitrate the matter. Accordingly, the cities, Washington County, and Metro entered into another IGA (2017 IGA), this time to agree to bind themselves to a decision made pursuant to a process created by Metro to arbitrate their dispute, and where Metro would act as arbitrator. * * *
>
> "* * * * *
>
> "On March 26, 2018, the Metro [Chief Operating Officer] COO issued her recommendation, which provided a review of the evidence and arguments submitted by the cities and Washington County, concluding that the Central Subarea should be designated as an employment area. * * *
>
> "* * * * *
>
> "At Metro's May 3, 2018 meeting, the Metro Council voted unanimously in favor of Resolution 18-4885 and adopted the COO Recommendation as supporting findings, along with the supplemental findings prepared by Metro Staff. * * * The challenged decision in this matter is the May 3, 2018 Metro Council Resolution 18-4885 * * *.
>
> "Following Metro's adoption of the resolution, petitioners appealed the resolution to LUBA." *Id.* (slip op at 2-7) (record citations omitted).

In *Watts I*, we concluded that the challenged Metro resolution was not a "land use decision" as defined at ORS 197.015(10)(a), because it was not a "final"

1 decision within the meaning of ORS 197.015(10)(a).[2] We explained one of the
2 several reasons that we concluded that the Metro resolution was not a "final"
3 decision was that the dispute resolution process set out in the IGA should be
4 construed in the context of the statutes and administrative rules governing post-
5 acknowledgement plan amendments. We explained:

6 "[T]the arbitration process that Metro devised contemplates that the
7 final decision regarding the comprehensive plan designation of the
8 Central Subarea will be determined in the post-acknowledgement
9 plan amendments adopted by the cities and county, pursuant to ORS
10 197.610 to 197.625. Those city and county ordinances must fully
11 comply with all applicable procedures and standards for amending
12 the respective comprehensive plans, including establishing
13 consistency with the applicable statewide planning goals, and
14 further those decisions must be supported by adequate findings and
15 substantial evidence. The city and county decisions can be appealed
16 to LUBA, and if appealed, we see nothing in Metro's arbitration
17 process or elsewhere that would preclude consideration of any issue
18 or challenge to the adoption of the city or county ordinances." *Watts*
19 *I*, __ Or LUBA __ (slip op at 12-13).

20 Our decision went on to explain:

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[2] ORS 197.015(10)(a)(A) defines "land use decision" to include:

"A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

"(i) The goals;

"(ii) A comprehensive plan provision; [or]

"(iii) A land use regulation[.]"

> "It is true that in considering applications for post-acknowledgment plan amendments to designate the Central Subarea the elected members of the governing city and county bodies might feel compelled—by contract, comity, or other non-land use considerations—to follow Metro's ruling that the subject property should be designated for industrial and employment uses, regardless of whether the governing body decision establishes that the designation is consistent with applicable approval standards. If the opponents of such a city or county decision believe that the city or county erred in that regard, the opponents could appeal the decision to LUBA and assign error on that basis. Even in that circumstance, however, it is reasonably clear that it is the city or county decision that would be the final decision regarding the designation of the Central Subarea, for purposes of ORS 197.015(10)(a), not the outcome of Metro's arbitration process." *Id.* (slip op at 13).

Following *Watts I*, the city adopted a resolution that "accepted" the Basalt Creek Concept Plan. Record 1660. Following the city's adoption of that resolution, the city council adopted Ordinance 1418-19 (the Ordinance), which adopted the city's portion of the Basalt Creek Concept Plan as text and map amendments to the Tualatin Comprehensive Plan (TCP), and applied the Manufacturing Park (MP) zoning designation to the Central Subarea's 52 acres. This appeal followed.

FIRST ASSIGNMENT OF ERROR

In his first assignment of error, we understand petitioner to argue that the city's decision to apply the MP zoning designation to the Central Subarea fails to comply with unspecified statewide planning goals, is not supported by substantial

1 evidence in the whole record, and improperly construes the applicable law.[3]
2 Petition for Review 9. Petitioner does not develop any cognizable argument that
3 the Ordinance fails to comply with any statewide planning goal. Petitioner also
4 does not argue that the Ordinance improperly construed any provision of the
5 TCP. Rather, according to petitioner, three city councilors improperly based their
6 decision to zone the Central Subarea MP on their belief that they were required
7 to follow Metro's recommendation for industrial zoning. In support of his
8 argument, petitioner relies on statements made by three city councilors during the
9 April 8, 2018 hearing on the Ordinance. Petition for Review 11-12; Record 3314-
10 16, 3318-19, 3328, 3330-32.

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[3] ORS 197.835(6) provides that "[t]he board shall reverse or remand an amendment to a comprehensive plan if the amendment is not in compliance with the goals."

ORS 197.835(9)(a) provides in relevant part:

> "(9) In addition to the review under subsections (1) to (8) of this section, the board shall reverse or remand the land use decision under review if the board finds:
>
> "(a) The local government or special district:
>
> "* * * * *
>
> "(C) Made a decision not supported by substantial evidence in the whole record; [or]
>
> "(D) Improperly construed the applicable law."

1 The city and intervenors-respondents Washington County, Metro, and the
2 City of Wilsonville (together, respondents) respond that petitioner's arguments
3 provide no basis for reversal or remand. First, respondents argue the comments
4 petitioner cites were made at a hearing during which the city council took public
5 testimony. At its next meeting, after the close of the hearing on the Ordinance at
6 which the statements petitioner relies on were made, the city adopted the
7 Ordinance together with 115 pages of findings that explain the city's conclusion
8 that all applicable criteria are satisfied and demonstrate that the city addressed all
9 competing policy goals in making its decision. Record 14-119. Petitioner does
10 not acknowledge or challenge those findings.
11 Second, respondents point out that LUBA has repeatedly held that "the
12 reviewable land use decision in an appeal before LUBA is the final written
13 decision, not what individual parties, staff or members of the decision making
14 body may have stated from time to time during the course of local government
15 proceedings." *Waker Associates, Inc. v. Clackamas County*, 21 Or LUBA 588,
16 591 (1991). Accordingly, respondents argue, the statements of three city
17 councilors that were made two weeks before the city council's final vote to adopt
18 the Ordinance and findings do not provide a basis to reverse or remand the city's

1 decision to adopt the Ordinance. We agree with respondents. Petitioner's
2 arguments do not provide a basis for reversal or remand of the decision.[4]
3 The first assignment of error is denied.

4 **SECOND ASSIGNMENT OF ERROR**

5 In his second assignment of error, we understand petitioner to argue that
6 the city council's decision to zone the Central Subarea MP is not supported by
7 substantial evidence in the record. ORS 197.835(9)(a)(C).[5] As the city points out,
8 petitioner does not explain which part of the Ordinance and 115 pages of findings
9 are not supported by substantial evidence, but rather broadly argues that the
10 decision to zone the Central Subarea MP is not supported by substantial evidence
11 and that the evidence in the record supports a residential zoning designation.

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[4] To the extent petitioner's first assignment of error relies on dicta in *Watts I*, quoted above, that acknowledged the possibility that local elected officials might feel bound by "contract, comity, or other non-land use considerations" to zone the property industrial "regardless of whether the governing body decision establishes that the designation is consistent with applicable approval standards" and that opponents "could * * * assign error on that basis," that dicta does not eliminate or affect the requirement that petitioner must still establish that the governing body's decision is inconsistent with applicable approval standards and thereby provide a basis for reversal or remand. *Id.* __ Or LUBA __ (slip op at 13); ORS 197.835(6), (9).

[5] Legislative land use decisions must be supported by an adequate factual base. Statewide Planning Goal 2 (Land Use Planning). The requirement for an adequate factual base is identical to the substantial evidence requirement for quasi-judicial land use decisions. *1000 Friends of Oregon v. City of North Plains*, 27 Or LUBA 372, 377-78 (1994), *aff'd* 130 Or App 406, 822 P2d 1130 (1994).

1 Petitioner points to evidence in the record that in 2004, when Metro
2 included the Basalt Creek Planning Area in the Metro UGB (2004 UGB
3 Decision), the findings adopted in support of that 2004 decision stated that land
4 needed for industrial uses should generally have slopes of less than 10 percent.
5 However, petitioner fails to explain why Metro's 2004 UGB Decision is either
6 evidence, an applicable approval criterion, or a relevant consideration for the city
7 in determining the correct zoning designation for the Central Subarea. Petitioner
8 also does not argue that any provision of the TCP or the Tualatin Development
9 Code prohibits properties with greater than 10 percent slopes from being zoned
10 MP. Moreover, the city adopted findings addressing petitioner's argument, and
11 petitioner does not acknowledge or challenge the reasoning or conclusions in
12 those findings. Record 16-19.

13 Similarly, petitioner also argues that Metro's 2014 housing need
14 projections anticipated 1,214 housing units by 2040 in the Basalt Creek Planning
15 Area, but in the challenged decision the city estimates that the Basalt Creek
16 Planning Area will provide 581 housing units. We understand petitioner to argue
17 that the MP zoning that the city applied leaves the city with almost 600 units less
18 than Metro's 2014 projected need for housing and accordingly, there is not
19 substantial evidence in the record to support the city's decision to zone the
20 property MP. We understand petitioner's argument to be that Metro's 2014
21 population forecast somehow undercuts the city's decision not to zone the Central
22 Subarea residential. Petitioner has not established that Metro's 2014 population

1 forecast applies to the city's decision at all or provides evidence of the city's
2 housing need. Further, Metro responds that Metro's 2014 housing projection has
3 been superseded by a later decision to remove the Central Subarea from Metro's
4 inventory of buildable residential lands, and accordingly, is not evidence to
5 support a residential designation.

6 Petitioner also cites a 2016 U.S. Department of Housing and Urban
7 Development's housing need projection; and Metro's currently adopted buildable
8 lands inventory, as evidence that the city should have zoned the Central Subarea
9 as residential.

10 Petitioner's second assignment of error alleges that there is not substantial
11 evidence in the record to support the city's designation of the Central Subarea as
12 MP, and cites evidence in the record to support petitioner's position that the city
13 should designate the area as residential. But as Metro points out, "in reviewing a
14 substantial evidence challenge, LUBA's role is not to reweigh the evidence, but
15 rather to determine if a reasonable person, viewing the whole record, could reach
16 the conclusion that the decision maker reached." *1000 Friends of Oregon v.*
17 *Marion County*, 116 Or App 584, 587-88, 842 P2d 441 (1992). The choice
18 between conflicting evidence belongs to the local government. *Friends of*
19 *Deschutes County v. Deschutes County*, 49 Or LUBA 100, 104 (2005). Petitioner
20 has not established that the city's decision is not supported by substantial
21 evidence or an adequate factual base.

1 Petitioner also cites Basalt Creek Concept Plan Guiding Principle
2 (Guiding Principle) 6, which is to "[m]eet regional responsibility for jobs and
3 housing," and Guiding Principle 8, which is to "[m]aximize assessed property
4 value." Record 393-94. We understand petitioner to argue that the Guiding
5 Principles require the city to zone the Central Subarea as residential. The city
6 responds that the Guiding Principles are not applicable approval criteria and
7 accordingly, to the extent petitioner argues that the decision fails to satisfy them,
8 that argument provides no basis for reversal or remand. We agree. Petitioner does
9 not attempt to establish that the Guiding Principles are approval criteria or explain
10 why the city was required to establish compliance with them.

11 The remainder of petitioner's second assignment of error appears to
12 challenge previous Metro decisions that implicated the Basalt Creek Planning
13 Area. Petition for Review 16-18. Those previous Metro decisions are not before
14 us.

15 The second assignment of error is denied.

16 The city's decision is affirmed.