

SEP 11 3 56 PM '84

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

3 MICHAEL MCPHERSON and)
4 GARY SUNDQUIST,)
5)
6 Petitioners,)
7 vs.)
8 METROPOLITAN SERVICE DISTRICT,)
9 Respondent.)
10 and)
11 STEVE BERREY and JAMES BERREY,)
12 dba CORNER TERRACE,)
13 Respondents.)

LUBA No. 84-047

FINAL OPINION
AND ORDER

14 Appeal from Metropolitan Service District.

15 Douglas Fowler, Portland, filed the Petition for Review and
16 argued the cause on behalf of Petitioners. With him on the
17 brief were Hedrick & David.

18 Eleanore S. Baxendale, Portland, filed the response brief
19 and argued the cause on behalf of Respondent Metropolitan
20 Service District.

21 DeMar Batchelor, Hillsboro, filed the response brief and
22 argued the cause on behalf of Respondents Steve Berrey and
23 James Berrey (dba Corner Terrace). With him on the brief were
24 Schwenn, Bradley, Batchelor, Brisbee & Stockton.

25 DUBAY, Referee; BAGG, Chief Referee; KRESSEL, Referee;
26 participated in this decision.

REMANDED 09/11/84

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

1 NATURE OF DECISION

2 This is an appeal of an ordinance adopted by the
3 Metropolitan Service District (MSD). The ordinance changed the
4 District's Urban Growth Boundary (UGB) in Washington County by
5 including a 30 acre tract known as Corner Terrace. The
6 ordinance also removed approximately 20 acres of other land
7 known as the Malinowski Tract from the UGB.

8 FACTS

9 MSD Ordinance No. 81-105, which has been acknowledged by
10 the Land Conservation and Development Commission as in
11 compliance with state planning goals, provides a procedure for
12 adjusting UGBs by adding land to the UGB when other land is
13 removed from the UGB. The adjustment must meet certain
14 standards in the ordinance.

15 The Corner Terrace site is in part zoned Agricultural and
16 Forestry-20 acre lot size (AF-20) and in part Exclusive Farm
17 Use (EFU). The Malinowski site is zoned Low Density
18 Residential (R-5). The Corner Terrace site is part of a larger
19 tract used for agricultural purposes and contains Class II and
20 III agricultural soils. The part of the tract not proposed for
21 inclusion in the UGB is to remain in farm use.

22 Petitioners challenge the inclusion of Corner Terrace in
23 the UGB but not the removal of the Malinowski site. There is
24 one assignment of error. In it, petitioners allege the
25 decision is not supported by findings and conclusions meeting
26 four of the five ordinance criteria for adjustments to the

1 UGB.¹ Petitioners add that there is no evidence supporting
2 the findings regarding two of the general criteria for UGB
3 adjustments.

4 OPINION ON THE MERITS

5 First, petitioners allege the findings and conclusions do
6 not show compliance with §8(a)(1), Ordinance 81-105. That
7 section provides:

8 "Orderly and economic provision of public facilities
9 and services. A locational adjustment shall result in
10 a net improvement in the efficiency of public
11 facilities and services, including but not limited to
12 water, sewage, storm drainage, transportation, fire
13 protection and schools in the adjoining areas within
14 the UGB; any area to be added must be capable of being
15 served in an orderly and economical fashion."

16 Petitioners argue that in order to demonstrate a net
17 improvement in the efficiency of public facilities and
18 services, it is first necessary to demonstrate an existing
19 inefficiency. They then assert there are no findings of
20 existing inefficiencies in the public services, only a
21 recitation that the area is capable of being served by all
22 necessary public facilities.

23 The above ordinance section requires a demonstration how
24 the alteration of the boundary will result in a net improvement
25 in efficiency. The ordinance does not specify how a net
26 improvement in efficiency is to be demonstrated. Findings
showing correction of an inefficiency, as petitioner suggests,
are one possible method. However, we do not believe the
ordinance restricts the manner of showing compliance to this

1 one method. MSD took another approach. After finding water
2 and sewer lines had been designed and installed sufficient to
3 serve the property, and that schools, fire protection and bus
4 services are also available, MSD concluded:

5 "To maximize the use and availability of existing in
6 place facilities and services is the best method of
7 increasing the net efficiency of facilities and
8 services, as opposed to the continued construction of
9 new facilities and broader provision of services to
10 currently undeveloped areas where facilities and
11 services do not exist." Record at 201.

12 Petitioners challenge this method of showing an increase in
13 net efficiency of public services. Petitioners assume any
14 unused service capacity was taken into account when the UGB was
15 originally adopted. They then argue any unused capacity is
16 somehow tied to development within the original boundary.
17 However, petitioners have not pointed to any evidence that
18 public services available to Corner Terrace have been committed
19 elsewhere. We have no basis for an assumption they are.

20 MSD's method of measuring efficiency of facilities under
21 §8(a)(1) by measuring the degree of utilization of existing
22 facilities and services is reasonable and not contrary to the
23 express provisions of the ordinance.² We therefore accept
24 this view. Allius v. Marion County, 7 Or LUBA 98 (1982).

25 This subassignment of error is denied.

26 The second criterion at issue states:

"Maximum efficiency of land uses. Considerations shall include existing development densities on (sic) the area included within the amendment, and whether the amendment would facilitate needed development on adjacent existing urban land." Section 8(a)(2), MSD

1 Ordinance No. 81-105.

2 Petitioners make four points regarding this criterion:

- 3 1. There are no findings or conclusions, supported
4 by evidence regarding "needed development on
adjacent existing urban lands."
- 5 2. Use of a ridge line as a natural boundary for the
6 area to be included is imprecise.
- 7 3. The finding that the existing farm dwelling would
8 not inhibit urbanization is a misinterpretation
of the criterion prohibiting
9 urbanization from inhibiting agricultural
activities.
- 10 4. There is no finding supported by evidence
11 supporting MSD's conclusion that leaving one
12 quadrant vacant and unused at an intersection of
arterial streets is inefficient, results in poor
urban form and creates conflicts between
incompatible land use types.

13 We take these claims in the above order.

14 Section 8(a)(2) has two parts. The first clause requires a
15 finding showing existing development has been considered. It
16 does not require proof of a particular condition or
17 satisfaction of a definite standard, but rather that
18 "consideration" has been given to certain aspects bearing on
19 the decision. The second part does contain a definite
20 standard. It requires a finding certain facts exist. That is,
21 the ordinance asks whether adding to the UGB will "facilitate
22 needed development" on adjacent land already inside the UGB.
23 Petitioners say this second part of §8(a)(2) was not addressed
24 at all in the findings and conclusions.

25 The findings cover the division of the tax lot by the
26 proposed UGB, the use of a ridge line as a boundary to minimize

1 the need for pumping stations for sewers, existence of a single
2 residence and farm buildings on the site, and the similarity of
3 the Corner Terrace site to other property already inside the
4 boundary. The findings also conclude the "land would use
5 existing urban services, and contribute to the support and
6 maintenance of those services, and to this extent would
7 facilitate the development of adjacent lands within the UGB
8 that are also dependent upon these services." Record at 203.
9 This is the only finding addressing the second part of §8(a)(2).

10 Respondents answer by saying all development on land within
11 an Urban Growth Boundary is by definition "needed" development
12 as that term is used in Ordinance 81-105. We disagree. The
13 word "needed" in §8(a)(2) would be surplusage if all proposed
14 development on urban land were needed as respondents contend.
15 Absent a showing by the parties of a different legislative
16 intent, we believe the ordinance requires a demonstration of an
17 existing need for development which will be facilitated by the
18 boundary adjustment.

19 We agree with petitioners that the findings neither
20 describe what development is needed nor how the proposed change
21 will facilitate such development. The finding that Corner
22 Terrace would use existing urban services, and therefore
23 contribute to their support, does not directly or indirectly
24 demonstrate what development is needed on existing urban land.
25 Neither does the finding explain how joint use and payment for
26 public services will facilitate development within the existing

1 Urban Growth Boundary. The criterion requires findings of this
2 sort, and their absence from the findings here requires us to
3 sustain this claim.

4 The second claim in this subassignment of error is a
5 challenge to the statement in the findings that "[i]t has been
6 determined by Metro and LCDC that it is more efficient for the
7 UGB to utilize natural features" (as a boundary). To support
8 their challenge, petitioners point to a letter from the
9 Director of the Department of Land Conservation and Development
10 to MSD. In the letter, the Director encouraged "the retention
11 of boundaries subject to more precise identification than a
12 ridge line (or perhaps require a survey description of a ridge
13 line)...." Record at 147.

14 Petitioners' claim of error based on this evidence must
15 fail. While the finding recites Metro and LCDC determined
16 natural features make efficient boundaries, the letter from the
17 Director only encourages boundaries to be accurately
18 described. The letter does not detract from the finding about
19 the efficiency of natural features as boundaries.

20 Petitioners' third point claims the findings reflect a
21 "complete misunderstanding of applicable criteria that require
22 that urbanization shall not inhibit agricultural activities,
23 rather than the converse." Assuming the criterion petitioners
24 refer to is §8(a)(2) of MSD Ordinance No. 81-105, we do not
25 discern how that criterion refers to conflicts between urban
26 and agricultural uses. Petitioners do not develop this

1 argument. Neither shall we. Deschutes Development v.
2 Deschutes City, 5 Or LUBA 218, 220 (1982). However,
3 compatibility between urban and agricultural uses is the
4 subject of §8(a)(5), discussed infra at page 13.

5 The last argument petitioners make in this subassignment of
6 error voices objection to the findings that "to leave one
7 quadrant vacant and unused at such an intersection is
8 inefficient, results in poor urban form and creates conflicts
9 between incompatible land types." Record at 203. Petitioners
10 challenge this conclusion as not supported by any finding.

11 We agree. There are no findings explaining the effects of
12 one vacant quadrant on three quadrants zoned for urban uses at
13 the intersection. Nor did MSD explain how it reached the
14 conclusion from the facts in the record. Green v. Hayward, 275
15 Or 693, 552 P2d 815 (1976). Further, respondents have not
16 pointed to any comprehensive plan or ordinance provision
17 proscribing this alignment of an Urban Growth Boundary at
18 street intersections. Most importantly, the findings do not
19 explain how adding the vacant Corner Terrace quadrant to the
20 UGB will facilitate needed development on other existing urban
21 land, that is, the three quadrants inside the existing UGB.
22 This subassignment of error is sustained.

23 The next criterion petitioners discuss is §8(a)(4) of
24 Ordinance No. 81-105. It states:

25 "When a petition includes land with Class I through IV
26 soils that is not irrevocably committed to non-farm
use, the petition shall not be approved unless the

1 existing location of the UGB is found to have severe
2 negative impacts on service or land use efficiency in
3 the adjacent urban area, and it is found to be
4 impractical to ameliorate those negative impacts
5 except by means of the particular adjustment
6 requested."

7 We read this criterion to require particular findings where
8 farm lands not committed to non-farm use are proposed for
9 inclusion within the UGB. The findings must show severe
10 negative impacts on adjacent urban areas and the impacts
11 practically can be improved only by inclusion in the UGB.
12 Petitioners say there are no findings supported by substantial
13 evidence of severe negative impacts on adjacent lands which
14 will be improved by the proposed change.

15 Respondents argue the findings identify the negative impact
16 to be the extra burden adjacent lands carry because the Corner
17 Terrace property cannot use, and therefore cannot help pay for,
18 the waterline sized to serve it. MSD also found the
19 restrictions on development on one quadrant of the arterial
20 street intersection "will result in severe impacts on the scope
21 and scale of use and development of the remaining quadrants."

22 The findings addressing this criterion describe the
23 property as having Class II and III agricultural soils, and
24 again note the availability of sewer, water and bus services.
25 Findings addressing other criteria describe the payment by
26 nearby Portland Community College for a waterline, sized large
enough to serve the college and other undeveloped properties,
including Corner Terrace. The college has a reimbursement

1 agreement with the water district.³ The agreement binds the
2 water district to refuse new connections to that line until the
3 college has been partially reimbursed for its cost of the
4 waterline installation. The findings then state

5 "...the failure to fully utilize existing public
6 services and facilities to the site and permit the
7 recovery and full use of the expenditure of public
8 funds for such services can be considered a severe
9 negative impact on land use in the adjacent urban
10 area. Public facility and service providers assumed
11 an area larger than the site as an ultimate service
area in the immediate vicinity. The addition of the
site to the UGB is the most logical and practical
means of ameliorating the negative impact of the
artificially restricted use of the public facilities
and services which were planned and engineered for
larger service areas."

12 We observe the findings do not state any facts directly
13 describing or quantifying negative impacts on adjacent urban
14 lands resulting from the location of the UGB. That is, the
15 basic facts show the waterline is sized to handle future
16 demands of the area, including the Corner Terrace property, and
17 that the college paid for the larger than necessary waterline.
18 The findings of fact also show the adjusted UGB will allow
19 development on one quadrant at the street intersection to the
20 same extent as development is allowed on the other three
21 quadrants.

22 These facts do not specify particular impacts on adjacent
23 urban areas. The conclusions of financial burden on adjacent
24 lands and a hindrance to development on the other three
25 quadrants at the intersection may be inferred from these facts,
26 but such inferences must be connected to the primary facts by a

1 rational basis. See City of Roseburg v. Roseburg City
2 Firefighters, 292 Or 266, 271, 639 P2d 90 (1981). This
3 rationale or statement of reasons must be stated in the
4 decision. Sunnyside Neighborhood v. Clackamas Co. Comm., 280
5 Or 3, 569 P2d 1063 (1977).

6 Here, MSD concludes the nonuse of available facilities is a
7 severe negative impact inside the existing UGB. The stated
8 reason for this conclusion is that costs inside the present UGB
9 necessarily will be greater, and the college may not be
10 reimbursed for its cash payment. These statements however,
11 require us to assume the water district and the landowners of
12 existing urban land have increased expenses because of the
13 present location of the UGB. Without evidence of the costs of
14 services to land within the existing UGB and the effect of the
15 UGB location on those costs, there is no basis for the
16 assumption. Without this kind of evidence to support a
17 connection between the UGB location and costs of public
18 services, it is conjecture to say the UGB location creates a
19 negative impact on development inside the UGB.

20 Even if we made the assumption of a financial burden on
21 properties inside the existing UGB, there are no facts or
22 reasons in the findings supporting a conclusion such burden
23 amounts to a severe negative impact, as the ordinance requires.

24 Similarly, the statement regarding severe impact on the
25 three quadrants now within the UGB is a conclusion based solely
26 on the basic finding three quadrants are within the UGB and one

1 is not. Why this situation creates a severe negative impact on
2 portions within the UGB is not explained. The findings do
3 include a reference to a statement in the record that pockets
4 of agriculture mixed with urban uses seems inadvisable. Record
5 at 123.⁴ Neither this statement nor any other finding
6 articulates a reason why the one quadrant in agricultural use
7 creates a severe negative impact on other quadrants at the
8 arterial intersection.

9 In order to justify the UGB adjustment, given the facts
10 regarding available utility service capacities and the division
11 of the properties at the intersection, the findings should
12 provide a reasonable nexus between those facts and the
13 conclusion of severe negative impacts. Here there are neither
14 primary fact findings, supported by evidence, of negative
15 impacts on adjacent urban areas, nor a rationale given why the
16 stated facts support the conclusion of severe negative
17 impacts. Accordingly, we uphold this assignment of error.

18 Last, petitioners challenge the findings regarding
19 compatibility between urban and agricultural uses. The
20 criterion stated in §8(a)(5) of Ordinance No. 81-105 reads:

21 "Compatibility of proposed urban uses with nearby
22 agricultural activities. When a proposed
23 adjustment would allow an urban use in proximity
24 to existing agricultural activities, the
justification in terms of factors (1) through (4)
of this subsection must clearly outweigh the
adverse impact of any incompatibility."

25 This ordinance section requires findings showing the §8(a)
26 factors clearly outweigh incompatibility between urban uses and

1 nearby existing farm uses. The findings conclude the proposed
2 urban uses are not incompatible with nearby agricultural uses
3 when buffering such as fencing, landscaping with trees and
4 shrubbery and setback restrictions are utilized and if service
5 extensions beyond the UGB are prohibited in the future. The
6 converse of these findings is that there is incompatibility
7 between urban and agricultural uses if special buffering
8 techniques are not utilized. Thus, the ordinance recognizes
9 the need for special buffering techniques but does not make
10 them a condition of the UGB adjustment.

11 The §8(a)(5) criterion does not call for findings showing
12 how incompatibility may be minimized, but how the effects of
13 incompatibility are outweighed by other factors. A balancing
14 of benefits and detriments is called for, and here the findings
15 make no balancing analysis. They therefore do not respond to
16 the incompatibility issue in the terms of the ordinance. There
17 are two ways this criterion may be satisfied. First, the
18 findings may set forth facts supporting a conclusion there will
19 be no incompatibility. That approach has not been taken here,
20 as we note above. Second, if the adjacent uses are not
21 compatible, facts and reasons should be set forth showing why
22 the factors outlined in the ordinance outweigh any
23 incompatibility. Since neither approach is taken in these
24 findings, we sustain this assignment of error.

25 The matter is remanded to MSD for further action.

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FOOTNOTES

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1 Section 8 of Ordinance No. 81-105 includes the standards for all UGB changes in subsection (a), for deletions of land from the UGB in subsection (b), for both removal and addition in subsection (c), and for additions only in subsection (d). The criteria at issue in this appeal are those in §8(a) only.

2 There may be a point when additional users of a public facility system will overburden the system and therefore create inefficiency. However, petitioners make no such claim here.

3 The agreement between the college and the water district is not in the record.

4 The statement is from MSD's Urban Growth Boundary findings made in 1979. The statement appears in this proceeding in a letter to MSD from the participant's land use consultant. The MSD statement is not, apparently, directed at the Corner Terrace property, but is general in nature.