

BEFORE THE METRO COUNCIL

DENYING URBAN GROWTH BOUNDARY ) ORDINANCE NO. 99-816  
LOCATIONAL ADJUSTMENT CASE 98-7: )  
JENKINS/KIM, AND ADOPTING THE HEARINGS )  
OFFICER'S REPORT INCLUDING FINDINGS ) Introduced by Mike Burton,  
AND CONCLUSIONS ) Executive Officer

WHEREAS, Metro received a petition for a locational adjustment for 18.85 acres located southeast of the intersection of Kaiser and Springville roads in unincorporated Washington County, as shown in Exhibit A; and

WHEREAS, Metro staff reviewed and analyzed the petition, and completed a written report to the Hearings Officer, recommending approval of the petition; and

WHEREAS, Metro held a hearing to consider the petition on May 24, 1999, conducted by an independent Hearings Officer; and

WHEREAS, The Hearings Officer submitted his report on July 1, 1999, 30 days after the close of the record on June 1, 1999, recommending denial of the petition; and; now, therefore,

THE METRO COUNCIL HEREBY ORDAINS AS FOLLOWS:

1. To accept the Hearings Officer's *Report and Recommendation*, as attached herein as Exhibit B; and

2. The Hearing Officer's *Findings, Conclusions & Final Order*, attached herein as Exhibit C, be adopted denying the petition in Case 98-7:

Jenkins/Kim

ADOPTED by the Metro Council this \_\_\_\_\_ day of \_\_\_\_\_, 1999.

\_\_\_\_\_  
Rod Monroe  
Presiding Officer

ATTEST:

Approved as to Form:



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Recording Secretary

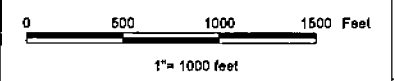
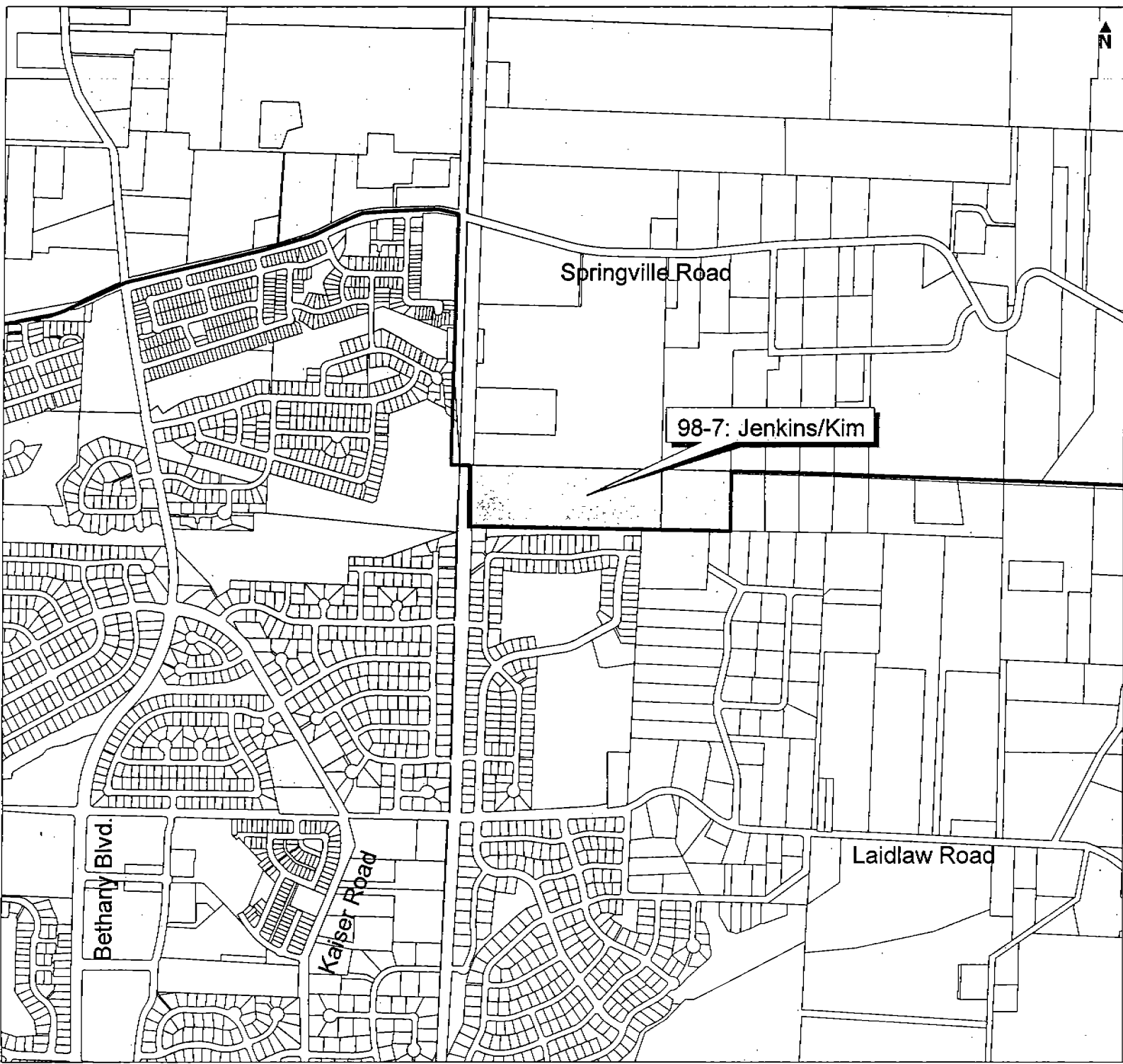
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Daniel B. Cooper  
General Counsel

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# Proposed Adjustment

UGB Case 98-7  
Jenkins/Kim

-  Urban Growth Boundary
-  Subject Property



**METRO**

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EXHIBIT A

**DRAFT**

BEFORE THE METRO COUNCIL

In the matter of the petition of Michael Jenkins and Sang ) HEARINGS OFFICER  
Kim for a Locational Adjustment to the Urban Growth ) MEMORANDUM ON  
Boundary between Laidlaw and Springville Roads east ) RECONSIDERATION  
of Kaiser Road in unincorporated Washington County ) **Contested Case No. 98-07**

On September 16, 1999, the Metro Council voted to adopt Ordinance 99-816, denying a proposed locational adjustment to the Urban Growth Boundary (“UGB”) in the matter of Contested Case 98-07 (Jenkins/Kim). In a subsequent action later that day, the Council voted to reconsider this ordinance. This memorandum is offered to facilitate discussion by the Council when it reconsiders the ordinance.

Whatever decision the Council makes, it must be supported by findings addressing the approval criteria for a locational adjustment. Adoption of Ordinance 99-816 is supported by findings in the draft order the hearings officer filed with the Council on July 1, 1999 (the “Draft Order”). The findings explain the legal reasoning for Council’s decision. Council action on reconsideration could result in at least 3 outcomes:

- Adoption of Ordinance 99-816 as is (i.e., without changes to the Draft Order);
- Adoption of Ordinance 99-816 with selected changes to the Draft Order;
- Adoption of a different ordinance approving the locational adjustment with substantial changes to the Draft Order.

This memo could help Council members reconsider the case. It provides a structured format for review of the issues raised by Council members at the September 16 hearing in light of the goal of having findings to support whatever decision Council ultimately makes.

This memorandum is organized in terms of the relevant approval criteria for a locational adjustment. After each criterion is quoted in italic typeface, the memorandum summarizes:

- The original finding(s) in the Draft Order related to a disputed issue;
- The nature of the dispute raised by the original finding(s);
- Arguments on each side and Council discussion of the issue; and
- Recommended amendments to the original finding(s) depending on how Council resolves each disputed issue listed herein.

The matter on reconsideration continues to be constrained and guided by Metro Code (“MC”) sections 3.01.035(b), (c) and (f), with which a locational adjustment must comply.

1. MC section 3.01.035(b) provides:

*Area of locational adjustments. All locational adjustment additions ... for any one year shall not exceed 100 net acres and no individual locational adjustment shall exceed 20 net acres...*

a. In the draft order, the hearings officer found that locational adjustments have not added more than 100 acres to the UGB in 1999. But the hearings officer found that the locational adjustment in this case would include more than 20 acres if it included all similarly situated lands, as required by MC 3.01.035(f)(2).

b. There was a dispute about whether adjoining land to the north was similarly situated. The hearings officer found that adjoining land to the north is similarly situated, largely because it is similar physically. The petitioner disagreed. Council members appeared divided on the issue, with the majority appearing to find that the land north of the site is similarly situated. However other Council members found land to the north is not similarly situated, largely because it is in a different county. *The issue of whether abutting lands are similarly situated is addressed more in response to MC 3.01.035(f)(2) below:*

c. If Council decides land to the north is similarly situated, no changes need to be made to the Draft Order. This would indicate that, under the circumstances of this case (e.g., where the land is physically similar, some urban services cross the county line and the site approaches 20 acres), the petitioner failed to show the county boundary and other facts sufficiently distinguish the site from the adjoining land to the north.

d. If Council decides land to the north is not similarly situated, (e.g., because the county boundary and the fill north of the site sufficiently distinguish the site from land to the north), then finding II.2 on p. 10 of the Draft Order should be amended as illustrated by the strike throughs and underlines below to read as follows:

2. No locational adjustments or administrative adjustments have been approved in 1999. Therefore not more than 100 acres has been added to the UGB this year. The petition in this case proposes to add 18.85 acres to the UGB, which is less than 20 acres, and adjoining lands outside the Urban Growth Boundary are not similarly situated. Therefore, as proposed, the petition complies with Metro Code section 3.01.035(b). ~~However, if all similarly situated land is included in the adjustment, the area of the adjustment would exceed 20 acres. See the findings regarding Metro Section 3.01.035(f)(3) for more discussion of the "similarly situated" criterion.~~

Findings regarding MC 3.01.035(f)(2) should be amended to be consistent with any changes made to findings for MC 3.01.035(b). They are addressed more below.

2. Metro Code section 3.01.035(c)(1) provides:

*A locational adjustment shall result in a net improvement in the efficiency of public facilities and services, including but not limited to, water, sewerage, storm drainage, transportation, parks and open space in the adjoining areas within the UGB; and any area to be added must be capable of being served in an orderly and economical fashion.*

a. **School services**

i. In the original Draft Order, the hearings officer found that the subject property can be served in an orderly and economic manner by most public facilities and services, based on service provider comments. However the hearings officer concluded that the petitioner failed to show that school services can be provided to the subject property in an orderly and economical manner, largely because there was un rebutted evidence in the record that the elementary and high school that would serve the site are now over capacity, and the middle school would be at capacity within two years. For the same reasons, the hearings officer found the locational adjustment would not result in a net improvement in the efficiency with which school services would be provided to land already in the UGB. The school district declined to provide a written statement addressing these issues, preferring to undertake such an analysis as part of the review of a future comprehensive plan map amendment (i.e., after the locational adjustment is approved).

ii. Counsel for the petitioner disagreed with the findings in the Draft Order. He argued that schools are not a relevant consideration under MC 3.01.035(c)(1), because “schools” is not expressly on the list of relevant services under that section. Assuming schools are relevant under MC 3.01.035(c)(1), he argued elementary and middle schools are close to the site, and that is sufficient to show that school services can be provided, notwithstanding the school capacity evidence in the record. Counsel for petitioner did not address the related issue of whether including the site in the UGB would improve the efficiency with which school services can be provided to land already in the UGB.

iii. Some members of Council appeared to agree with petitioner that the proximity of the schools to the site was sufficient to meet the petitioner’s burden of proof that school services can be provided. Council members did not discuss the efficiency with which school services could be provided. It appeared from its deliberations that Council members believe school services are a relevant consideration under MC 3.01.035(c)(1).

iv. If Council finds that school services are a relevant consideration, and that there is not sufficient evidence in the record to show school services can be provided in an orderly and economical manner and to show that including the site in the UGB would increase the efficiency with which school services can be provided, no changes need to be made to Ordinance 99-816 or to findings addressing MC 3.01.035(b)(1) in the Draft Order.

v. If Council finds that schools are not a relevant urban service under MC 3.01.035(b)(1), then finding II.3.b.i on p. 12 of the Draft Order should be amended as illustrated by strike throughs and underlines to read as follows:

- ~~ib.~~ Schools are not expressly included in the list of services in this criteria, and Council finds they are not a relevant urban service for locational adjustments. ~~However the list is expressly non-exclusive. Therefore the Council finds that school capacity is a relevant service and this criteria is not met.~~

If this is Council's choice, it would render the discussion of school services moot and irrelevant. Therefore the remainder of finding II.3.b and footnote 2 on page 11 of the Draft Order would be deleted in conjunction with this change, and the remaining finding would be renumbered. Also finding II.4.a on p. 12 of the Draft Order would be deleted, and remaining findings would be renumbered accordingly.

vi. If Council decides that school services are a relevant consideration, but that the record is sufficient to show school services can be provided to the site in an orderly and economical manner, then finding II.3.b on p. 11 of the Draft Order should be amended as illustrated by the strike throughs and underlines below to read as follows:

3. The Council finds that the subject property can be served in an orderly and economic manner by ~~most~~ public facilities and services, including water, sanitary sewers, roads, storm drainage, transit and emergency services, based on the comments in the record from the service providers. ~~However the Council further finds that the petitioner failed to demonstrate that school services can be provided to the subject property in an orderly and economic fashion...~~
- b. ~~There is no substantial evidence that school services can be provided to the subject property in an orderly and economical fashion. The applicant testified (page 18 of the petition, Exhibit 3) that the elementary school and high school which would serve this site are both currently over capacity. The middle school which is currently under construction south of the site is projected to reach capacity within two years after completion.<sup>2</sup> Development on the subject property is projected to generate 59 students (33 elementary, 14 middle and 12 high school), Exhibit 4. The Beaverton School District testified that it would address school capacity issues through~~

~~the Comprehensive Plan Amendment process. Exhibit 3H of the Petition, Exhibit 3. Therefore Council finds that there is no substantial evidence that school services can be provided to the subject property in an orderly and economical fashion, because there are schools in close proximity to the site.~~

vii. If Council decides that the record is sufficient to show that including the subject site in the UGB would increase the efficiency with which school services can be provided to land already in the UGB, then finding II.4.a on p. 12 of the Draft Order should be amended as illustrated by the strike throughs and underlines below to read as follows:

a. Including the subject property in the UGB will ~~reduce~~ increase the net efficiency of school services, because ~~there is insufficient capacity to accommodate students, and residential development on this site will increase the burden on the School District~~ it increases the school age population within walking distance of schools in the area, thereby reducing the cost to transport students to school.

b. **Sanitary sewer services**

i. In the original Draft Order, the hearings officer found that the subject property can be served with sanitary sewer services in an orderly and economic manner. See finding II.3.a on p. 11 of the Draft Order. That finding is not disputed.

ii. The hearings officer also found that including the east part of the subject site in the UGB would increase the efficiency with which sanitary sewer services can be provided to land already in the UGB, because gravity flow sewer service can be provided to the Malinowski property east of the site only across the subject site. The hearings officer erroneously stated that the Malinowski property could be served by a pump station. Unified Sewerage Agency (“USA”) rules prohibit use of a pump station to serve land in the UGB if the sewer is within 5000 feet. which it is in this case. To correct this error, the hearings officer recommends the Council amend finding II.4.b to read as follows:

b. Including the subject property in the UGB increases the net efficiency of sewer service, because it enables the petitioners to serve properties east of the subject property (the Malinowski properties) with a gravity flow sewer line. Based on the testimony of Nora Curtis with USA, the Malinowski property cannot be served by a pumped station, because sewers are situated within 5000 feet of that property, if the subject property is not included in the UGB, then the Malinowski properties would have to be served with a pump station. Exhibit 1. That is inherently less efficient than a gravity flow line, because a pump station contains mechanical and hydraulic parts that require maintenance and repair and relies on electricity to operate instead of gravity. This finding is consistent with the Council action in UGB Case 8-04 (Bean) and UGB Case 94-01 (Starr/Richards) where locational adjustments allowed gravity flow systems instead of pump stations.



iii. At the September 16, 1999 hearing, Mr. O'Brien and the Malinowskis testified that the sewer in Greenwood Drive has been placed at sufficient depth to allow gravity flow sewer service to the western portion of the Malinowski properties. The owner of one of the intervening properties is willing to grant an easement allowing extension of sanitary sewer across his property toward the Malinowski properties. See Exhibit 21. Owners of two other properties would have to agree to allow the sewer to cross their property to reach the Malinowski property by a practicable route. To reflect this testimony, the hearings officer recommends the Council amend finding II.4.b.i to read as follows:

- i. ~~There is no substantial evidence that~~ Alternative routes for gravity flow sewer service ~~can be provided~~ to the Malinowski property inside the UGB ~~from the stub~~ are not practicable or available. It was alleged that sewers could be extended to the Malinowski properties through the powerline right of way south of the subject property within the existing UGB. However sewer lines do not extend to the powerline right of way now. Sewer lines serving the Greenwood Hill subdivision were stubbed in NW Greenwood Drive south of the site. Gravity sewers could be extended to the Malinowski properties from this stub ("Option 2" identified by the applicant in Attachment C of the Staff Report, Exhibit 18). However ~~there is no substantial evidence that this sewer extension could serve the western portion of the Malinowski properties, which are a lower elevation, with gravity flow sewers~~ there is no legal right for a sewer to cross all intervening properties at this time, and topography between Greenwood Drive and the western portion of the Malinowski property may impede gravity flow service to that area even if a line is extended from Greenwood Drive. Therefore the gravity flow line from Greenwood Drive, while possible, is not sufficiently timely or certain to be practicable and available.

iv. Finding II.4.b.ii on p. 13 of the Draft Order addresses the fact that only the eastern portion of the subject site needs to be included in the UGB to provide sewer efficiencies to land already in the UGB. Based on the *Parklane* decision, this factor is relevant to whether the petition demonstrates --- on balance --- a sufficient improvement in the efficiency with which public services can be provided to land already in the UGB. If Council disagrees, finding II.4.b.ii should be deleted.

c. **Park and open space services**

i. In the original Draft Order, the hearings officer found that including the subject property in the UGB has no effect on the net efficiency of park and open space services and facilities. The hearings officer failed to acknowledge the written statement by the Tualatin Hills Park and Recreation District ("THPRD") that including the subject site in the UGB would result in increased efficiency. The hearings officer treated the site as "open space" for purposes of MC 3.01.035(c)(1), because it is not developed with urban improvements, uses or structures.

ii. Counsel for the petitioner pointed out the omission of the hearings officer with regard to the THPRD statement, and he disputed the interpretation made by the hearings officer that any undeveloped land is “open space” for purposes of MC 3.01.035(c)(1). Councilor Bragdon and others pointed out the use of the term “public” before the list of public services that includes “park and open space” services in MC 3.01.035(c)(1). There appeared to be majority support on the Council for changing the Draft Order to reflect the THPRD statement and to construe the term “park and open space” to mean land used or owned by the public for park or open space purposes, rather than to mean all undeveloped land. Accordingly the hearings officer recommends the Council amend finding II.4.c to read as follows:

- c. The Council finds that including the subject property in the UGB ~~has no effect on~~ increases the net efficiency of park and open space services and facilities. The April 12, 1999 letter from the THPRD states that ~~the Park District “welcomes the proposed development area into the District...” It does not state that~~ approval of this petition results in increased efficiency of park and open space services.
- i. Approval of the petition could increase the amount of open space within the Park District because the wetland areas of the subject property could be dedicated to the THPRD when the subject property is developed. The area proposed to be dedicated is adjacent to the existing open space within the Kaiser Woods subdivision to the west.<sup>1</sup> Therefore approval of this petition will expand the amount of contiguous open space area in the Park District. Increasing the area of open space increases the efficiency of open space services for purposes of this section.
- ii. ~~However the Council also recognizes that, under e~~Existing zoning, use of the subject property is so constrained that it is reasonably likely to remain undeveloped and ~~substantially in an open space even if it is not included in the UGB. If the petition is approved, roughly one third of the subject property, about 7.33 acres, will be cleared and developed for urban uses, substantially reducing the amount of actual open space in the area. Therefore, i~~including the subject property in the UGB ~~actually may~~ is likely to reduce the undeveloped area of the site open space in fact if not in designation. Given these facts, the Council concludes that, on balance, ~~including the subject property has no net effect on open space efficiency. This is consistent with prior Council decisions. See UGB Case 95-02 (Knox Ridge). But, under MC 3.01.035(c)(1), the only parks and open spaces that are relevant are “public” parks and open spaces, i.e., land owned or used by the public for park or open space purposes. Therefore the loss of undeveloped land as a result of the locational adjustment petition is not relevant.~~

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<sup>1</sup> Although the Kaiser Woods open space is separated from this site by the intervening powerline right of way, the right of way is designated open space in the Bethany Community Plan.

d. **Transportation services**

i. In the original Draft Order, the hearings officer found that the petitioner failed to bear the burden of proof that including the site in the UGB would increase the efficiency with which transportation services would be provided to land already in the UGB. Although including the subject site in the UGB could result in access that cannot be provided otherwise, there is no certainty such a result will occur. It depends on the timing of development of large undeveloped tracts east of the Dogwood Park neighborhood and on the redevelopment of that neighborhood. On balance, the hearings officer found no net improvement in transportation efficiency. See finding II.4.d on p. 14 of the Draft Order.

ii. Counsel for the petitioner disputed the findings in the Draft Order regarding transportation efficiencies. But the hearings officer did not observe any movement on the Council toward the petitioner's position.

iii. If Council finds that petitioner failed to sustain the burden of proof regarding transportation service efficiencies to land already in the UGB, no changes need to be made to the Draft Order.

iv. If Council finds that petitioner sustained the burden of proof regarding transportation service efficiencies to land already in the UGB, findings II.4.d.iii and II.4.e should be amended to read as follows:

iii. Whether including the subject property in the UGB results in increased transportation efficiency depends on whether the Malinowski property is developed before the barriers are removed and Greenwood Drive is extended to the east. There is no certainty when the adjoining land in the UGB will develop or when the barriers in Greenwood Drive will be removed. Including the property in the UGB may or may not increase transportation efficiency. There is no substantial evidence that including the subject property will necessarily enhance transportation efficiency. But, on balance, Council finds that creating a potential second means of providing access and cross-circulation in the area is sufficient to show that including the subject site in the UGB results in a net improvement in transportation services to land already in the UGB.

e. The Council concludes that the petitioner ~~failed to bear~~ sustained the burden of proof that approval of this petition will increase efficiency of emergency services. As discussed above, approval of this petition may enhance east-west circulation in the area. ~~However this petition will result in a substantial efficiency only if the Malinowski properties redevelop and extend streets to the east before the barriers are removed and Greenwood Drive is extended to the east.~~ Such enhancement would benefit emergency service access to land already in the UGB.

e. **Water services**

i. In the original Draft Order, the hearings officer found that the petitioner failed to bear the burden of proof that including the site in the UGB would increase the efficiency with which water services would be provided to land already in the UGB. Although including the subject site in the UGB could result in a looped water system, the petitioner failed to show that such looping could not be achieved without the locational adjustment (i.e., within the existing UGB). On balance, the hearings officer found no net improvement in water system efficiency. See finding II.4.g on p. 15 of the Draft Order.

ii. Counsel for the petitioner disputed the finding regarding water system efficiency in the Draft Order. But the hearings officer did not observe any movement on the Council toward the petitioner's position.

iii. If Council finds that petitioner failed to sustain the burden of proof that including the site in the UGB would increase the efficiency with which water services can be provided to land already in the UGB, no changes need to be made to the Draft Order.

iv. If Council finds that petitioner sustained the burden of proof regarding water service efficiencies to land already in the UGB, finding II.4.g should be amended to read as follows:

g. The Council concludes that the petitioner ~~failed to bear~~ sustained the burden of proof that this locational adjustment will result in a net improvement in the efficiency of water services in the adjoining area already in the UGB. TVWD testified that this locational adjustment would allow the creation of a looped water system through the site and provide for future extension to properties to the east within the existing UGB. ~~However there is no substantial evidence that a similar efficiency cannot be achieved by construction of a looped water system through lands southeast of the subject property within the existing UGB when they are redeveloped in the future. Such a looped system is inherently more efficient.~~

f. **Other services**

i. In the original Draft Order, the hearings officer found that the petitioner failed to bear the burden of proof that including the site in the UGB would increase the efficiency with which surface water management/storm drainage, natural gas, electricity or fire protection services would be delivered to land already in the UGB. On balance, the hearings officer found no net improvement in efficiencies for these services. See finding II.4.h on p. 15 of the Draft Order.

ii. Counsel for the petitioner disputed the findings regarding the foregoing services, arguing the locational adjustment will increase efficiencies by increasing the population in the area. But the hearings officer did not observe any movement on the Council toward the petitioner's position, and petitioner's position on this issue is substantially at odds with Council action in past cases. That is, Council has consistently held that it is not an increase in efficiency simply to have more people served resulting in a marginally lower per person cost.

iii. If Council finds that petitioner failed to sustain the burden of proof that including the site in the UGB would increase the efficiency with which those services can be provided to land already in the UGB, no changes need to be made to the Draft Order.

iv. If Council finds that petitioner sustained the burden of proof that including the site in the UGB would increase the efficiency with which surface water management/storm drainage, natural gas, electricity or fire protection services can be provided to land already in the UGB, finding II.4.h should be amended to read as follows:

~~h. It is not apparent from the record that including the subject property in the UGB will increase the net efficiency of surface water management/storm drainage, natural gas, electricity and fire protection for land already in the UGB, except by marginally increasing the population served by those facilities and thereby spreading their cost over a slightly larger population base, making them somewhat more economical to residents of land already in the UGB. However this impact is not enough by itself to conclude these services will be more efficient if the property is included in the UGB based on prior locational adjustment cases (see, e.g., UGB Case 88-02 (Mt. Tahoma) and UGB Case 95-02 (Knox Ridge)).~~

g. **Wrap-up finding for MC 3.01.035(c)(1)**

Finding 4.i at page 15 of the Draft Order is a summary of the preceding findings regarding compliance with MC 3.01.035(c)(1). To the extent the Council modifies the findings regarding compliance with MC 3.01.035(c)(1), finding 4.i should be modified to be consistent.

3. MC 3.01.035(c)(2) provides:

*Maximum efficiency of land uses. The amendment shall facilitate needed development on adjacent existing urban land. Needed development, for the purposes of this section, shall mean consistent with the local comprehensive plan and/or applicable regional plans.*

a. In the Draft Order, the hearings officer found that including the subject property in the UGB facilitates needed development on adjacent existing urban land, (i.e., the Malinowski property), because it makes it possible to serve that land with a gravity flow sewer. However, as noted above, the petitioner testified that USA required the sewer stub on Greenwood Drive to be low enough to provide gravity flow sewer service to the Malinowski property across properties already in the UGB. The hearings officer recommends Council amend finding II.5.b to read as follows so that it is consistent with amended finding II.4.b.i:

b. The Council acknowledges that it is not necessary to include the subject property in the UGB to provide any form of sewer service to the Malinowski properties. The Malinowski properties could be served by extending a sewer line from the southwest, from the existing stub in Greenwood Drive or from the south up 137th Avenue. However, ~~based on the topography in the area and the statement from USA, alternative routes for sewer lines would require pumping of sewage from portions of the Malinowski properties~~ there is no legal right for a sewer to cross all intervening properties at this time, and topography between Greenwood Drive and the western portion of the Malinowski property may impede gravity flow service to that area even if a line is extended from Greenwood Drive. Therefore the gravity flow line from Greenwood Drive, while possible, is not certain.

b. Counsel for the petitioner argued that approval of this petition facilitates needed development on adjacent existing urban land, because service from the Greenwood Drive stub is uncertain, it must cross intervening properties, and it may be constrained by topography to serve the west end of the Malinowski property.

c. Although there was discussion of this issue by Council, the hearings officer did not perceive a desire on the part of the majority of the Council to change the findings in the Draft Order regarding this issue.

d. Council could find that the locational adjustment does not facilitate needed development, because the Malinowskis have no desire to redevelop there property. If so, it is irrelevant that including the subject site in the UGB would make more timely and certain extension of sewers to the Malinowski property. However the Council historically has not considered it relevant whether owners of land inside the UGB want to develop their land. Council consistently has assumed in past locational adjustment cases that it is inevitable that land inside the UGB will development.

e. Council could find that gravity flow sewer can be provided to the Malinowski property now, based on Mr. Lindell's willingness to grant an easement for a sanitary sewer across his land from the Greenwood Drive stub to the Malinowski property; therefore the addition of the subject site to the UGB is not needed to facilitate development in the existing UGB. If Council so finds, it should amend finding II.5.c to read as follows:

~~c. Given the importance of the efficiency of service delivery in section 3.01.035(e)(1), the Council finds that the availability of a less efficient means of sewer service can be provided to the Malinowski property from the Greenwood Drive stub, (i.e., a system that relies on a pump station), does not preclude and is not inconsistent with a finding that the locational adjustment in this case facilitates development on the Malinowski properties by enabling it to be served with a more efficient sewer system. This is consistent with and similar to the Council's action in the matter of UGB Case 88-04 (Bean) and UGB Case 94-01 (Starr/Richards). Therefore inclusion of the subject site is not necessary to provide sewer service to land already in the UGB and thereby facilitate its needed development.~~

f. On the other hand, Council could find that including the subject property in the UGB facilitates urban development of the Malinowski property, because it removes the uncertainties of intervening owners and topographic constraints regarding sewer service. This was the hearings officer finding, based on the record before September 16.

g. If the Council finds that including the subject property in the UGB facilitates development of the Malinowski property, by providing greater certainty that sewer can serve that property, Council should amend finding II.5.c to read as follows:

~~c. Given the importance of the efficiency of service delivery in section 3.01.035(e)(1), the Council finds that the availability of a less efficient possibility of another means of sewer service, (i.e., a system that relies on a pump station extends from the Greenwood Drive stub), does not preclude and is not inconsistent with a finding that the locational adjustment in this case facilitates development on the Malinowski properties by enabling it to be served with a more efficient sewer system in a more certain and timely manner. This is consistent with and similar to the Council's action in the matter of UGB Case 88-04 (Bean) and UGB Case 94-01 (Starr/Richards).~~

h. In the Draft Order, the hearings officer found that including the subject property in the UGB does not otherwise facilitate needed development on adjacent existing urban land (i.e., other than providing for sewer service to the Malinowski property). See finding II.6 on pp. 16-17 of the Draft Order. The petitioner did not specifically argue the issue, and Council did not discuss it at the September 16 hearing. Therefore changes to this finding do not appear warranted and are not provided.

Finding II.6 does not support approval. It supports denial. It does not dictate denial if including the site in the UGB assures necessary sewer service will be provided, facilitating urban development of land already in the UGB.

4. MC 3.01.035(c)(3) provides:

*Environmental, energy, social & economic consequences. Any impact on regional transit corridor development must be positive and any limitations imposed by the presence of hazard or resource lands must be addressed.*

In the Draft Order, the hearings officer finds the petitioner sustained the burden of proof regarding this criterion. The petitioner did not challenge that finding, and Council did not address this issue in its deliberations. Therefore changes to this finding do not appear warranted and are not provided. This finding supports approval.

5. MC 3.01.035(c)(4) provides:

*Retention of agricultural land. When a petitioners includes land with Agricultural Class I-IV soils designated in the applicable comprehensive plan for farm or forest use, the petition shall not be approved unless it is factually demonstrated that:*

*(A) Retention of any agricultural land would preclude urbanization of an adjacent area already inside the UGB, or*

*(B) Retention of the agricultural land would make the provision of urban services to an adjacent area inside the UGB impracticable.*

a. In the Draft Order, the hearings officer found that retaining the subject site as agricultural land will not preclude urbanization of adjacent lands and will not render provision of urban services to land inside the UGB impracticable. See findings II.8.a and b on pp. 17-18 of the Draft Order. The hearings officer found that public services and facilities can be provided to the Malinowski properties through lands within the existing UGB. The hearings officer relied on provision of sewer service to the Malinowski property by means of a pump station to conclude that sewer services could be provided to that property, albeit less efficiently than gravity flow sewers. It is a factual error that a pump station can be used; this should be corrected. Based on the testimony at the September 16 hearing, gravity flow sewer can be provided from the Greenwood Drive stub, although it would be harder than from the petitioner's site. Based on corrected information, the analysis in the Draft Order needs to be amended a little, but the ultimate conclusion of law could be the same.



b. Petitioner argued that including the subject site in the UGB is the only certain, timely way to provide sewer service to the Malinowski property. Therefore retaining the site as farm land would preclude urbanization of the Malinowski property. Because of the difficulties associated with providing gravity flow service from the Greenwood Drive stub (i.e., acquiring easements and overcoming topography), petitioner argued extending sewer service to the Malinowski property from the subject site is more practicable.

c. The Council did not consider finding II.8 specifically, but it is related logically to findings regarding compliance with MC 3.01.035(C)(1) and (2). Therefore the hearings officer provides alternative findings for consideration by the Council.

i. If Council finds that sewer service to the Malinowski property can be provided practicably through land already in the UGB, then it should amend finding II.8.b to read as follows:

b. ~~The Council further finds that retaining the subject property as agricultural land will not make the provision of urban services to adjacent properties inside the UGB impracticable. Sewer service can be provided to the Malinowski properties by means of a pump station gravity flow sewers extended from the Greenwood Drive stub. The Council finds that, although pumping sewage is less efficient than a gravity flow sewers, it extending across the Lindell property (and others as necessary) is a practicable alternative. All other urban services will be provided to abutting properties within the UGB as properties to the south and east are redeveloped in the future.~~

ii. If Council finds that the only practicable way to provide sewer service to the Malinowski property is by including the subject site in the UGB, then it should amend findings II.8.a and b to read as follows:

a. ~~The Council finds that retaining the subject property as agricultural land will not preclude urbanization of adjacent lands. Public gravity flow sewer services and facilities cannot be provided practicably to the Malinowski properties through lands within the existing UGB, just not as efficiently. However efficiency is not relevant to the findings under this section; only practicability of service is relevant.~~

b. ~~The Council further finds that retaining the subject property as agricultural land will not make the provision of urban services to adjacent properties inside the UGB impracticable. Sewer service cannot be provided to the Malinowski properties by means of a pump station or other practicable alternative. The Council finds that, although pumping sewage is less efficient than gravity flow, it is a practicable alternative. All other urban services will be provided to abutting properties within the UGB as properties to the south and east are redeveloped in the future.~~

6. MC 3.01.035(c)(5) provides:

*Compatibility of proposed urban uses with nearby agricultural activities. When a proposed adjustment would allow an urban use in proximity to existing agricultural activities, the justification in terms of this subsection must clearly outweigh the adverse impact of any incompatibility.*

a. In the Draft Order, the hearings officer found that the petitioner failed to bear the burden of proving that adverse impacts of urban use of the subject site would be outweighed by other merits of the petition. In fact the hearings officer found that urban use of the subject site would have significant adverse impacts to agricultural activities on land inside and outside the UGB, and including the subject site in the UGB has few growth management benefits. See finding II.9 at pp. 18-19 of the Draft Order.

b. The hearings officer understands from Council discussion that there are two issues raised by this section: (1) whether adverse impacts on agricultural activities inside the UGB are relevant and (2) whether, in this case, the merits of the locational adjustment clearly outweigh its adverse impacts on relevant agricultural activities:

c. With regard to the first issue, the hearings officer concluded that MC 3.01.035(c)(5) applies to all agricultural activities regardless of location. This section refers to "existing agricultural activities". It makes no distinction based on the location of those activities. The hearings officer believes the Council cannot construe the words used in MC 3.01.035(c)(5) to apply only to land outside the UGB, because it would be inconsistent with the unambiguous meaning of the words. Agricultural use of the portion of the Malinowski property within the UGB is an outright permitted use by existing zoning. It is not a non-conforming use. The hearings officer recommends the Council rely on that fact and the unambiguous meaning of the words in the section to find that agricultural activities on land inside the UGB is relevant to MC 3.01.035(c)(5) under the facts here.

d. If the Council finds that the applicability of MC 3.01.035(c)(5) is ambiguous, and it construes that section to apply only to lands outside the UGB, then Council should amend finding II.9.a and b to refer to the agricultural activities by the Malinowskis northeast of the site (see more below) and should amend finding II.9.c to read as follows:

c. Agricultural activities on ~~The fact that the Malinowski properties are located within the UGB is~~ are irrelevant to this criterion, because the locational adjustment rules assume urban development of all land within the UGB, and agricultural use of land in the UGB should not be protected against impacts of urban development. The Code does not distinguish between existing agricultural uses based on their location within or outside the UGB.

e. With regard to the second issue, the hearings officer concluded that urban development of the subject site would have adverse impacts on nearby agricultural activities, based on the testimony and personal experiences of the Malinowskis and one of the petitioners. The petitioner failed to show those impacts will not occur or are outweighed by positive results of the locational adjustment. Even if the agricultural activities in question are limited to those outside the UGB, the hearings officer continues to recommend that Council find the merits of the locational adjustment do not outweigh its adverse impacts on agricultural activities, because its merits to the public are so slim and its impacts on agricultural activities, even at a distance, are significant and unmitigated.

f. If Council finds that the merits of the locational adjustment do not clearly outweigh its adverse impacts on relevant agricultural activities in the vicinity, it should amend finding II.9 as warranted to be consistent with its finding regarding applicability to lands inside the UGB.

i. If Council finds MC 3.01.035(c)(5) applies to agricultural activities on lands inside the UGB, then no changes need to be made to finding II.9.

ii. If Council finds MC 3.01.035(c)(5) applies to agricultural activities only on lands outside the UGB, then it should amend findings II.9, a and b to read as follows:

9. The Council finds, based largely on the testimony of the Malinowskis and Dr. Jenkins at the hearing, that the proposed adjustment will be incompatible with ongoing agricultural activities on the Malinowski properties outside the UGB. The minimal service efficiencies achieved by including subject property in the UGB do not “clearly outweigh” the adverse impacts of its urban development on existing agricultural activities outside the UGB.

a. The Malinowskis testified that their property ~~abutting~~ abutting north of the east boundary of the subject property is in active agricultural use. They harvest hay and graze cattle on this portion of their property. The petitioner, Dr. Jenkins, testified based on his own experience that these activities are incompatible with urban development on abutting properties. Both Dr. Jenkins and the Malinowskis testified that their fences have been cut, allowing their livestock to escape. The Malinowskis testified that they receive complaints about noise and dust from their harvesting activities under existing conditions.

b. The Council finds that urban development on this site will increase the potential for such conflicts by allowing urban residential development abutting the southwest boundary of the Malinowski property outside the UGB. The Malinowski property is largely buffered from urban development under existing conditions. The powerline right of way along the south boundary of their property provides a buffer between their

property and abutting urban lands. Properties to the north are outside the UGB and designated for rural development in the Multnomah County Comprehensive Plan. Properties to the east are within the UGB, but they are not currently developed with urban uses. The subject property, ~~abutting the west boundary of the Malinowski property,~~ is designated exclusive farm use by the Washington County Comprehensive plan. Approval of this petition would bring urban development closer to agricultural activities on the Malinowski property outside the UGB, thereby increasing the likelihood of conflicts between urban and farm uses.

f. If Council finds that the merits of the locational adjustment clearly outweigh its adverse impacts on relevant agricultural activities in the vicinity, it should amend finding II.9 to read as follows:

9. The Council finds, ~~based largely on the testimony of the Malinowskis and Mr. Jenkins at the hearing,~~ that the proposed adjustment will not be incompatible with ongoing agricultural activities on the Malinowski properties [outside the UGB]. ~~The minimal (i.e., service efficiencies such as water looping and sanitary sewer extension achieved by including subject property in the UGB), do not~~ Such efficiencies “clearly outweigh” the adverse impacts of its urban development on existing agricultural activities.
  - a. ~~The Malinowskis’ agricultural activities are separated from the subject site by a sufficient distance that potential adverse impacts of urban development on the subject site will dissipate to insignificant levels before reaching the agricultural activities and vice versa. testified that their property abutting the east boundary of the subject property is in active agricultural use. They harvest hay and graze cattle on this portion of their property. The petitioner, Dr. Jenkins, testified based on his own experience that these activities are incompatible with urban development on abutting properties. Both Dr. Jenkins and the Malinowskis testified that their fences have been cut, allowing their livestock to escape. The Malinowskis testified that they receive complaints about noise and dust from their harvesting activities under existing conditions.~~
  - b. ~~The Council finds that urban development on this site will increase the potential for such conflicts by allowing urban residential development abutting the west boundary of the Malinowski property. The Malinowski property [outside the UGB] is largely buffered from urban development under existing conditions. The powerline right of way along the south boundary of their property provides a buffer between their property and abutting urban lands. Properties to the north are outside the UGB and designated for rural development in the Multnomah County Comprehensive Plan. Properties to the east are within the UGB, but they are not currently developed with urban uses. The subject property, abutting the west boundary of the Malinowski property, is designated exclusive farm use by the Washington County Comprehensive plan. Approval of this petition would bring urban development closer to the Malinowski property, thereby increasing the likelihood of conflicts between urban and farm uses.~~

7. MC 3.01.035(f)(2) provides:

***Superiority.*** [T]he proposed UGB must be superior to the UGB as presently located based on a consideration of the factors in subsection (c) of this section.

a. In the Draft Order, the hearings officer finds the proposed UGB is not superior for five reasons. The petitioner failed to bear the burden of proof that: (1) schools can be provided to the site in an orderly and economic manner; (2) the size of the adjustment was commensurate with the increase in land use efficiencies in which it results; (3) retention of the site in agricultural use would preclude or render impracticable urban use of land already in the UGB; (4) the merits of the adjustment clearly outweigh its adverse impacts on agricultural activities in the vicinity; and (5) the site includes all similarly situated land. See finding II.10 on pp. 19-20 of the Draft Order. This is a summary finding. It should be amended to be consistent with Council's action on the other relevant standards.

b. The petitioner argued a straight UGB boundary is inherently superior to a crooked boundary. Some members of Council appeared to favor that argument. The hearings officer believes there is nothing inherently superior about a straight UGB line. The UGB commonly is not a straight line. The factors in MC 3.01.035(c) suggest that service delivery boundaries, natural feature boundaries and significant man-made features could be a superior UGB. In this case the county line is not a boundary for all services; USA provides sanitary and storm drainage services on both sides of the line. It does not correspond to any natural resource boundary or to significant man-made features. Under these facts, a straight UGB line farther north is not superior to the existing line.

8. MC 3.01.035(f)(3) provides:

***Similarly situated land.*** The proposed UGB amendment must include all similarly situated contiguous land which could also be appropriately included within the UGB as an addition based on the factors above.

a. In the Draft Order, the hearings officer finds the petition does not include all similarly situated property, and, that if it did, the locational adjustment would exceed 20 acres, contrary to MC 3.01.035(b). If as little as 26 feet of the land north of the subject site is similarly situated and therefore included in the petition, the petition would include more than 20 acres. See finding II.11 on pp. 20-21 of the Draft Order.

i. The site and adjoining 26 feet to the north are similar in terms of zoning, elevation, slope and soils based on SCS classifications.

ii. Services could be extended 26 feet north easily to serve the off-site land if it was converted to urban use.

iii. To an extent, the land to the north is more suited for urban use than the subject site, because it adjoins a water reservoir and other urban development, rather than land used for farming.

iv. The petitioner argued the abutting land has “better quality agricultural soils.” Petition at page 30. But there is no substantial evidence in the record to support this statement or to show that the change in soil types coincides with the property line. And it is inconsistent with the petitioner’s testimony that the subject site and land to the north have been farmed or grazed together in the past.

v. The petitioner argued that the land to the north is not similar, because land to the north is not necessary to extend urban services to the adjoining land already in the UGB (i.e., the Malinowski property). But neither is inclusion of most of the subject property necessary to provide that service, so that does not sustain a distinction.

c. There is a dispute about whether the county line is relevant to the similarly situated determination. As noted above the hearings officer concluded that the county line is not relevant to the criteria regarding similarly situated lands. The petitioner argued it is relevant (if not determinative). Members of Council discussed the issue. The majority appeared to find that, however relevant the line might be in general, it is not determinative under the facts of this case, and it does preclude a finding that lands on both sides of the line are similarly situated, much the same as Council has found in past locational adjustment cases that land in different ownership can be similarly situated. See UGB Case 95-02 (Knox Ridge) and UGB Case 98-10 (JJ Development).

d. If Council finds that the county line is relevant but not determinative, and that the petitioner failed to show that at least 26 feet of the land north of the site is not similarly situated, Council does not need to make any changes to the Draft Order.

e. If Council finds that the petitioner has sustained the burden of proof that land north of the site is not similarly situated, then it should amend finding II.11 to read as follows:

11. Council finds the evidence in the record shows insufficient difference between the subject site and the adjoining land to the north to conclude that such lands are not similarly situated.

- a. ~~Based on the aerial photographs in the record, the southern portion of t~~The soils on the abutting property are not similar, because their surface is fill from the area excavated for the TVWD reservoir to the north. ~~is not being actively farmed and appears indistinguishable from the subject property (the area outlined in blue on the aerial photograph attached to Exhibit 21).~~
- b. The adjoining property also is owned by petitioner Jenkins and zoned EFU. The adjoining property is similar physically to the subject property in terms of soils and slopes. ~~If anything, the adjoining land to the north is better suited for urban use, because it is not similar, because does not contain extensive wetlands found on the subject property, and it adjoins a water district reservoir to the north and urban subdivisions to the west.~~
- c. ~~Although the a~~Adjoining land to the north is not similar, because it is not necessary to extend urban services to the adjoining land already in the UGB (i.e., the Malinowski property), ~~neither is inclusion of most of the subject property necessary to provide that service.~~
- d. The petitioner distinguishes the adjoining land to the north is not similar largely because it is in a different county; ~~but such jurisdictional boundaries are not relevant to the criteria regarding similarly situated lands. That boundary does not create an obstacle to development between the subject site and abutting properties. There is no physical barrier between the subject property and the adjoining 26 feet to the north, such as a highway, street or railroad track, that distinguishes the subject property from adjoining land.~~
- e. ~~The petitioner did not demonstrate that the s~~Soil conditions on this site and the adjoining land to the north are different. ~~On the contrary the petitioner testified that such lands have been farmed or grazed in the past together with the subject site. The petitioner argued that the abutting property contains "better quality agricultural soils." Petition at page 30. However there is no substantial evidence in the record to support this statement. The petition does not include a soils map or similar evidence of the soils on this and the abutting properties. In addition, this statement conflicts with petitioners' statement that "[s]eed production is limited on the Class IV soils immediately adjacent to the Jenkins/Kim site because of poor drainage." Petition at page 27. This statement is consistent with the aerial photographs in the record which show the northern portion of the abutting property is cultivated while the southern portion is undisturbed.~~
- f. The Council finds the evidence in this case can be distinguished from the evidence in prior cases regarding the "similarly situated" criterion. ~~Many of the properties proposed for addition in prior cases had some natural or man-made physical feature that separated the subject property from adjoining non-urban land. See, e.g., UGB Case 94-01 (Starr/Richards) (I-5 freeway), UGB Case 95-01 (Harvey) (railroad tracks) and UGB Case 87-4 (Brennt) (steep slopes). In this case, the subject property is not physically distinguishable from adjoining non-urban land, similar to the situation in UGB Case 95-02 (Knox Ridge).~~
- g. ~~Therefore the Council concludes the petition does not include all similarly situated properties. If it did include all such lands, it would exceed 20~~

~~acres. It is not evident to Council how far north similarly situated lands go, but they include at least 1.15 acres of the land north of the subject site. If as little as 26 feet of the land adjoining the north edge of the subject property is included in the UGB, the petition would include more than 20 acres. The evidence is insufficient to show the adjoining 26 feet of land is not similarly situated to the subject site based on the relevant criteria.~~

## 9. Conclusions

The conclusions at pp. 21-22 of the Draft Order should be amended to be consistent with the findings ultimately adopted by the Council.

Respectfully submitted,  
LARRY EPSTEIN, PC

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Larry Epstein, AICP  
Metro Hearings Officer



JUL 0 1 1999

BEFORE THE METRO COUNCIL

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2  
3 In the matter of the petition of Michael Jenkins and Sang ) HEARINGS OFFICER'S  
4 Kim for a Locational Adjustment to the Urban Growth ) REPORT AND  
5 Boundary between Laidlaw and Springville Roads, east ) RECOMMENDATION  
6 of Kaiser Road in unincorporated Washington County ) **Contested Case No. 98-07**

7  
8 I. INTRODUCTION AND SUMMARY  
9

10 This report summarizes the findings the hearings officer recommends to the Metro  
11 Council regarding a proposed locational adjustment to the Urban Growth Boundary  
12 ("UGB"). After balancing the relevant factors in the approval criteria, the hearings officer  
13 to conclude that the petitioners failed to bear the burden of proof that the petition complies  
14 with those criteria. A different balance could be struck, but the hearings officer believes the  
15 recommendation is consistent with Council action on other petitions for locational  
16 adjustments. The petition in this case raises the following major issues:

17  
18 1. Whether public services and facilities can be provided to the subject property in  
19 an orderly and economical fashion. The hearings officer found the petition failed to show  
20 that school services can be provided in an efficient manner.  
21

22 2. Whether the petition includes all contiguous similarly situated lands. If as much  
23 as 26 feet of the adjoining land is included in the petition, it would exceed the 20 acres  
24 maximum permitted for locational adjustments. The hearings officer found that the  
25 evidence in the record is insufficient to distinguish the subject property from the adjoining  
26 land to the north, and that the subject property is similarly situated with at least the  
27 adjoining 26 feet of land to the north.  
28

29 3. Whether granting the petition results in a superior UGB and a net improvement  
30 in the efficiency of public facilities and services relevant to the adjustment. The hearings  
31 officer found that it does not result in sufficient net improvement and that more land is  
32 proposed to be included in the UGB than is necessary to provide any service efficiency.  
33 Therefore the proposed UGB is not superior to the existing one.  
34

35 4. Whether retaining the subject property as agricultural land would preclude  
36 urbanization of an adjacent area already inside the UGB or make the provision of urban

1 services to an adjacent area inside the UGB impracticable. The hearings officer found that,  
2 although including a portion of the subject property in the UGB would provide more  
3 efficient sewer service to land already in the UGB, less efficient service could be provided  
4 if the subject property is not included in the UGB.

5  
6 5. Whether efficiencies created by including the subject property in the UGB  
7 clearly outweigh any incompatibility with existing agricultural activities. The hearings  
8 officer found that the increased efficiencies potentially provided by the petition do not  
9 outweigh adverse impacts of increased urban development adjoining farm uses.

10  
11 **II. SUMMARY OF BASIC FACTS AND PROCEDURE**

12  
13 1. December 1, 1998, Michael Jenkins and Sang Kim ("petitioners") filed a  
14 petition for a locational adjustment to the metropolitan area UGB. The petitioners propose  
15 to add to the UGB an 18.85-acre parcel identified as Tax Lot 1100, Section 21, T1N-R1W  
16 and Tax Lot 101, Section 21BA, T1N-R1W, WM, Washington County (the "subject  
17 property"). The subject property is situated in unincorporated Washington County. The  
18 UGB forms the south, west and east boundaries of the subject property. The Washington/  
19 Multnomah County line is the north edge of the subject property. The subject property was  
20 originally included in the UGB. In 1982 the site was removed from the UGB as a trade  
21 with another property located adjacent to Tualatin. See Metro Ordinance 82-149.

22  
23 a. The Washington County Comprehensive Plan designation and zoning  
24 for the subject property is EFU (Exclusive Farm Use). Adjoining land inside the UGB is  
25 zoned R6 (Residential, 6 units per acre) and R5 (Residential, 5 units per acre).

26  
27 b. The subject property is now undeveloped pasture, wetlands and forest.  
28 It slopes to the southwest at less than five percent. It is not served by public services. The  
29 petition was accompanied by comments from the relevant service providers who certified  
30 they can, with certain exceptions, provide urban services in an orderly and timely manner.  
31 If the locational adjustment is approved, petitioners propose to develop the subject property  
32 as a residential subdivision and to extend a public road through the site as a loop street with  
33 stubs to the east boundary, to extend public water through the site to form a looped system  
34 with existing off-site lines, to extend public sewer into the site with stubs to the east  
35 boundary, and to dedicate or reserve a portion of the site as open space.

1           2. Metro hearings officer Larry Epstein (the "hearings officer") held a duly noticed  
2 public hearing on May 24, 1999 to receive testimony and evidence regarding the petition.  
3 Eleven witnesses testified in person or in writing, including Metro staff, the petitioners'  
4 representatives, and seven area residents. The hearings officer held the record open for one  
5 week to allow the petitioners to submit a closing statement. The hearings officer closed  
6 record in this case at 5:00 pm on June 1, 1999. The hearings officer submitted this report  
7 and recommendation together with a draft final order to Metro on July 1, 1999.

8  
9           **III. SUMMARY OF APPLICABLE STANDARDS AND RESPONSIVE FINDINGS**

10  
11           1. A locational adjustment to add land to the UGB must comply with the relevant  
12 provisions of Metro Code ("MC") sections 3.01.035(c) and (f). The following findings  
13 highlight the principal policy issues disputed in the case.

14  
15           2. MC § 3.01.035(c)(1) requires a petitioner to show (1) that granting the petition  
16 would result "in a net improvement in the efficiency of public facilities and services" and  
17 (2) that the area to be added can be served "in an orderly and economic fashion."

18  
19           a. There was a dispute about whether school services can be provided to  
20 the subject site in an orderly and economic fashion. The hearings officer concluded that  
21 there is insufficient evidence that school services can be provided, because the enrollment at  
22 elementary and high schools serving the subject property currently exceeds capacity. The  
23 school district declined to certify that it could provide services in an orderly and economic  
24 fashion, prejudicing the case for the petition.

25  
26           b. There is a dispute whether granting the petition results in a net  
27 improvement in efficiency of transportation, sanitary sewer, open space and police and fire  
28 services. The hearings officer found including the subject property in the UGB would  
29 have a positive effect on the efficiency with which sewer service could be provided to land  
30 already in the UGB, would have no net effect on the efficiency of transportation services,  
31 open space or emergency services, and would have a negative effect on efficiency of school  
32 services. On balance, the hearings officer found that the increased efficiency of providing  
33 gravity flow sewer service to abutting properties is outweighed by the reduced efficiency in  
34 providing school services, particularly because including only a small portion of the subject  
35 property would achieve the positive sewer efficiency. It is not necessary to include most of  
36 the subject property to achieve a net increase in efficiency of urban services.

1  
2 3. MC § 3.01.035(c)(2) is entitled “maximum efficiency of land use” and requires  
3 the amendment to facilitate permitted development of adjacent land already in the UGB.  
4

5 a. There is a dispute about whether development on abutting properties is  
6 “needed” when the owners have no desire to develop their property for urban uses. The  
7 hearings officer found that development is “needed” as that term is used in the Code  
8 because the abutting property is designated for urban development by the Washington  
9 County Comprehensive plan.  
10

11 b. The hearings officer further found that granting the petition would  
12 facilitate needed development on properties east of the subject parcel which already are in  
13 the UGB. The hearings officer found the petition does comply with § 3.01.035(c)(2),  
14 based in part on prior Council decisions in other cases.  
15

16 4. MC § 3.01.035(c)(3) requires an analysis of environmental, energy, social and  
17 economic impacts of granting the petition, particularly with regard to transit corridors and  
18 hazard or resource land. There is a dispute about the impacts of existing wetlands and a  
19 natural gas pipeline on the subject property. The hearings officer concluded that any  
20 development constraints created by these existing conditions can be addressed when the  
21 property is developed and therefore the petition does comply with §3.01.035(c)(3), based  
22 in part on prior Council decisions in other cases.  
23

24 5. MC § 3.01.035(c)(4) requires retention of agricultural land, such as the subject  
25 property, unless retaining that land as such makes it impracticable to provide urban services  
26 to adjacent properties inside the UGB. The hearings officer concluded that retaining the  
27 subject property as agricultural will not make provision of urban services to land already in  
28 the UGB impracticable, because all urban services except gravity flow sewer can be  
29 provided to abutting properties within the UGB by other means. Sewer service can be  
30 provided to abutting properties by means of a pumped system. Therefore including the  
31 subject property is not necessary to practicably serve land in the UGB, and the petitioners  
32 failed to bear the burden of proof sufficient to comply with MC § 3.01.035(c)(4).  
33

34 6. MC § 3.01.035(c)(5) requires urban development of the subject property to be  
35 compatible with nearby agricultural activities. There is a dispute about whether the petition  
36 complies with this standard. The hearings officer finds that the petition does not comply

1 with this standard based on the testimony regarding conflicts between existing agricultural  
2 and urban uses. Urban development on the subject property will increase the potential for  
3 such conflicts. Therefore the petitioners failed to bear the burden of proof sufficient to  
4 comply with MC § 3.01.035(c)(5).

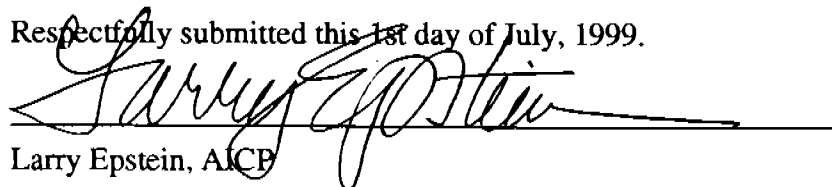
5  
6 7. MC § 3.01.035(f)(2) requires the proposed UGB to be superior to the existing  
7 UGB. The hearings officer found the proposed UGB is not superior to the extent it does  
8 not comply with the other relevant approval criteria cited above.

9  
10 8. MC § 3.01.035(f)(3) requires a proposed locational adjustment to include all  
11 contiguous similarly situated lands. Petitioners argued that the site is not similarly situated  
12 to contiguous lands based on jurisdictional boundaries and soil types. The hearings officer  
13 found that jurisdictional boundaries are irrelevant, and the petitioners failed to introduce  
14 sufficiently probative substantial evidence regarding soil types of abutting properties to  
15 support a finding that soil types are different. The hearings officer found land to the north  
16 of the subject property is similarly situated based on the factors listed in MC § 3.01.035(c).  
17 Although the exact limit of such similarly situated land is uncertain, at least 26 feet of the  
18 adjoining property to the north is similarly situated. If the similarly situated lands are  
19 included in the petition, it will exceed 20 acres, which is the maximum permitted area for a  
20 locational adjustment under MC section 3.01.035(b). Therefore the hearings officer found  
21 the petition does not comply with MC sections 3.01.035(b) and (f)(3).

22  
23 IV. ULTIMATE CONCLUSION AND RECOMMENDATION

24  
25 For the foregoing reasons, the hearings officer concludes the petitioners failed to bear the  
26 burden of proof that granting the petition would comply with all of the relevant approval  
27 standards in Metro Code section 3.01.035 for a locational adjustment. Therefore the  
28 hearings officer recommends the Metro Council deny the petition, based on this Report and  
29 Recommendation and the Findings, Conclusions and Final Order attached hereto.

30  
31 Respectfully submitted this 1st day of July, 1999.

32   
33 \_\_\_\_\_

34 Larry Epstein, AICP  
35 Metro Hearings Officer

## BEFORE THE METRO COUNCIL

1  
2  
3 In the matter of the petition of Michael Jenkins and Sang ) FINDINGS,  
4 Kim for a Locational Adjustment to the Urban Growth ) CONCLUSIONS &  
5 Boundary between Laidlaw and Springville Roads, east ) FINAL ORDER  
6 of Kaiser Road in unincorporated Washington County ) **Contested Case No. 98-07**  
7

8 I. BASIC FACTS, PUBLIC HEARINGS AND THE RECORD

9  
10 1. On December 1, 1998, Michael Jenkins and Sang Kim ("petitioners") completed  
11 filing a revised petition for a locational adjustment to the Urban Growth Boundary  
12 ("UGB"), including exhibits required by Metro rules for locational adjustments. See  
13 Exhibit 3 for the original petition for locational adjustment (the "petition"). Basic facts  
14 about the petition include the following:  
15

16 a. The land to be added to the UGB is described as Tax Lot 1100,  
17 Section 21, T1N-R1W and Tax Lot 101, Section 21BA, T1N-R1W, WM, Washington  
18 County (the "subject property").<sup>1</sup> It is located roughly 1800 feet south of Springville  
19 Road, roughly 2100 feet north of Laidlaw Road and roughly 2200 feet east of Kaiser Road  
20 in unincorporated Washington County. The present UGB forms the east, west and south  
21 edges of the subject property. The Washington/Multnomah County line forms the north  
22 boundary of the site. Land to the east, west and south is inside the UGB and  
23 unincorporated Washington County. Land to the north is outside the UGB and in  
24 unincorporated Multnomah County. See Exhibits 3, 8 and 17 for maps showing the  
25 subject property. Land to the south, east and west is zoned R6 (Residential, 6 units per  
26 acre). Land to the southeast is zoned R5 (Residential, 5 units per acre). Land to the  
27 northwest is zoned EFU (Exclusive Farm Use, 80 acre minimum lot size). Land to the  
28 northeast is zoned MUA-20 (Multiple Use Agriculture, 20 acre minimum lot size). See  
29 Exhibit 1E of the petition, Exhibit 3.  
30

31 b. The subject property is a rectangularity-shaped parcel 450 feet north-  
32 south by about 1900 feet east-west. The site contains 18.85 acres. It is designated and  
33 zone EFU (Exclusive Farm Use) on the acknowledged Washington County  
34 Comprehensive Plan and zoning map.

<sup>1</sup> The subject property was originally included in the UGB. In 1982 the site was removed from the UGB as a trade with another property located adjacent to Tualatin. See Metro Ordinance 82-149.

1  
2 c. The subject property slopes southwest from a high of about 410 feet  
3 above mean sea level ("msl") at the northeast corner to a low of about 360 feet msl along  
4 the southwest corner. Average slope is less than five percent (Attachment C of exhibit 3).  
5

6 d. The petition was accompanied by comments from affected jurisdictions  
7 and service providers. See Exhibits 1, 2, 6, 7, 9.  
8

9 i. The Washington County Board of Commissioners adopted an  
10 order in which it made no recommendation on the merits of the petition. See Exhibit 16.  
11

12 ii. The Tualatin Valley Water District ("TVWD") testified that it  
13 could serve the subject property, and that approval of the petition would improve water  
14 service delivery in the UGB. TVWD expressed support for the petition. See Exhibit 2.  
15

16 iii. The Beaverton School District testified that it would review the  
17 status of school facilities in response to an application for Comprehensive Plan Amendment  
18 on the subject property. The School District adopted a neutral position regarding the  
19 petition. See Exhibit 3H to the petition, Exhibit 3.  
20

21 iv. The Unified Sewerage Agency of Washington County ("USA")  
22 testified that the subject property is not located within the Agency's service area, but is  
23 located within the drainage basin. USA could not "definitively state that there is or isn't  
24 [sanitary sewer] capacity for this parcel," because the site is located outside of USA's  
25 current service area. However approval of the petition would result in a net increase in  
26 efficiency of sanitary sewer service within the UGB. Approval of the petition would not  
27 result in a net deficiency of storm water services. See Exhibits 1 and 7.  
28

29 v. Tualatin Valley Fire & Rescue ("TVFR") commented that it could  
30 serve the subject property, and that approval of the petition would have "very little impact  
31 on fire department services." TVFR adopted a neutral position regarding the petition.  
32

33 vi. The Washington County Sheriff's Office commented that it  
34 could serve the subject property, and that approval of the petition would improve efficiency  
35 of service delivery in the UGB. See Exhibit 3C to the petition, Exhibit 3.  
36

1                   vii. The Tualatin Hills Parks and Recreation District (“THPRD”)  
2 commented that it has sufficient capacity to serve the subject property if it is annexed into  
3 the park district. See Exhibit 10. THPRD’s comment letter did not discuss efficiency.  
4

5                   viii. Tri-Met did not comment on this petition.  
6

7                   2. Metro staff mailed notices of a hearing to consider the petition by certified mail  
8 to the owners of property within 500 feet of the subject property, to the petitioners, to  
9 Washington County, the Department of Land Conservation and Development (“DLCD”),  
10 service providers, the local Citizen Planning Organization (CPO-7) and persons, agencies  
11 and organizations who requested notice. See Exhibits 15, 19 and 28. A notice of the  
12 hearing also was published in *The Oregonian* at least 10 days before the hearing.  
13

14                   3. On May 24, 1999, Metro hearings officer Larry Epstein (the "hearings officer")  
15 held a public hearing at the Washington County Public Services Building Auditorium to  
16 consider the petition. All exhibits and records of testimony have been filed with the  
17 Growth Management Division of Metro. The hearings officer announced at the beginning  
18 of the hearing the rights of persons with an interest in the matter, including the right to  
19 request that the hearings officer continue the hearing or hold open the public record, the  
20 duty of those persons to testify and to raise all issues to preserve appeal rights, the manner  
21 in which the hearing will be conducted, and the applicable approval standards. The  
22 hearings officer disclaimed any *ex parte* contacts, bias or conflicts of interest. Eleven  
23 witnesses testified in person.  
24

25                   a. Metro senior regional planner Ray Valone verified the contents of the  
26 record and summarized the staff report (Exhibit 18), including basic facts about the subject  
27 property, the UGB and urban services, and comments from neighboring property owners.  
28 He testified that the petitioners showed that the proposed locational adjustment complies  
29 with all of the applicable approval criteria.  
30

31                   i. He noted that the approval of the petition would result in a net  
32 improvement in efficiency of sewer, water, park and police services, will have no impact  
33 on fire and transportation services and will reduce efficiency of school services.  
34



1                   ii. He noted that approval of the petition will facilitate needed  
2 development of the abutting property east of the site which is located within the existing  
3 UGB (the Malinowski property).  
4

5                   iii. He corrected two minor errors in the Staff Report. The THPRD  
6 letter referenced on page 6 of the Staff Report was dated September 25, 1998. On page 7  
7 the Staff Report should include storm water in the list of services with which the subject  
8 property can served in an orderly and economic fashion.  
9

10                  b. Eric Eisman, Ryan O'Brien and Michael Jenkins appeared on behalf of  
11 the petitioners, Michael Jenkins and Sang Kim.  
12

13                   i. Mr. Eisman noted that the subject property was previously  
14 included in the UGB. The property was removed in 1982, because the subject property  
15 and surrounding area were not expected to be developed with urban services in the near  
16 future. Circumstances have changed since that time.  
17

18                               (1) He argued that there are no "similarly situated"  
19 properties based on the soils classifications on the site and the ability to provide services to  
20 land within the existing UGB. He introduced a service provider "matrix" summarizing the  
21 service provider statements submitted in response to the petition. Exhibit 27.  
22

23                               (2) He argued that this petition allows maximum efficiency  
24 of land use by providing access around the Dogwood Park Area of Special Concern  
25 ("ASC"), permitting properties to the east to develop at urban densities.  
26

27                               (3) He argued that "on-balance," retention of this site as  
28 agricultural land would make the provision of urban services to adjacent areas inside the  
29 UGB impracticable. Although there are alternative means of providing services, they are  
30 not practicable due to cost, environmental impacts, timing and lack of willing buyers and  
31 sellers. He argued that urban services are "needed" to serve abutting properties based on  
32 their urban designation in the County's Comprehensive Plan. The current plans of the  
33 property owners are not relevant.  
34

35                               (4) He testified that the site plan is only intended to show  
36 that the property can be developed consistent with the County's minimum density

1 standards. The petition responded to the Goal 5 issues based on the Goal 5 resources  
2 identified in the Washington County inventory. The petitioners delineated the wetlands on  
3 the site. Development on this site may impact wetlands to some extent. But such impacts  
4 are permitted subject to mitigation. The petitioners' traffic study considered all  
5 intersections identified as intersections of concern by Washington County. He argued that  
6 the site can be developed around the natural gas pipeline.

7  
8 (5) He argued that the alleged comments from USA staff  
9 regarding the feasibility of alternative sewer extensions are not in the record and therefore  
10 are not substantial evidence.

11  
12 (6) He argued that the petition is consistent with the  
13 Dogwood Park ASC and the Bethany Community Plan. Adding this site to the UGB will  
14 allow development while minimizing impacts on the ASC.

15  
16 ii. Mr. O'Brien argued that inclusion of this property in the UGB is  
17 necessary to provide urban services to properties within the existing UGB within 5 to 10  
18 years. It is unlikely that urban services will be provided to the abutting properties through  
19 alternative means within this time period. Therefore retention of the subject property as  
20 agricultural land will make it impracticable to provide urban services to properties within  
21 the existing UGB.

22  
23 (1) He noted that, although the wetlands on the subject  
24 property limit development, it is feasible to develop this site. Development on this property  
25 will provide an opportunity for enhancement of the existing wetlands. State law prohibits  
26 development on this site from causing flooding on adjacent properties.

27  
28 (2) He argued that the land within the powerline right of  
29 way south of the subject property is entirely wetlands. The Oregon Division of State Lands  
30 ("DSL") and the Army Corps of Engineers (the "Corps") do not want sewers located in  
31 wetlands. The electrical utilities do not want other public services located within the right  
32 of way due to concerns about equipment near the powerlines. In addition, the Greenwood  
33 Hills development was not required to extend sewer stubs to the north and east boundaries  
34 of that site.

1 (3) Sewers could be extended in the low areas within  
2 Dogwood Park. But that would require easements across several private properties. USA  
3 prefers that sewers be located in public streets. Public services are unlikely to be extended  
4 through Dogwood Park in the near future.

5  
6 iii. Dr. Jenkins argued that development on this site will not impact  
7 the farm operation on his property north of the site: the cultivated areas shown in the aerial  
8 photographs. He currently leases the property for grass seed production, but it has been  
9 planted with a variety of crops by different farmers during the 19 years he has owned the  
10 property. The owners of adjacent properties have never complained about impacts from  
11 farm practices. He argued that the subject property is not useable for farming or pasture  
12 due to the urban development to the west. "They're not going to want cow manure and  
13 flies in their backyards." People cut his fences to prevent use of his property for cattle  
14 grazing. He argued that the Malinowskis are not aggressively farming their property east  
15 of the subject site. They use it for limited grazing. They do not harvest hay. Most of their  
16 pastures are further north, in Multnomah County and separated from the subject property  
17 by intervening properties.

18  
19 (1) He summarized the development potential in the area.  
20 He argued that the areas southeast of the site will develop in the near future as sanitary  
21 sewer service is extended. Development on the subject property will assist development in  
22 the area by enhancing east-west circulation around the Dogwood Park ASC. He argued  
23 that the Teufel letter (exhibit 20) demonstrates that, unless this petition is approved, the  
24 Malinowski property will remain isolated for many years. Road and sewer access through  
25 this site will be lost, because the abutting property south of the site (the Bosa North  
26 subdivision) will be developed.

27  
28 (2) He argued that development on this site will extend  
29 sanitary sewers within public streets rather than in private easements, consistent with  
30 USA's preferences. He testified that Don Scholander, the owner of the Greenwood Hill  
31 subdivision, will not grant an easement to allow sanitary sewer extension to the  
32 Malinowski property. He opined that sanitary sewers are unlikely to be extended through  
33 the Dogwood Park ASC, because it would removal of numerous trees.

34  
35 c. Chris Warren testified on behalf of Lexington Homes, the owner of the  
36 Bosa North subdivision south of the site, in support of the petition. He argued the petition

1 needs to be approved to enhance cross circulation in the area. If this petition is denied  
2 Lexington Homes will develop the proposed street stubs south of the subject property as  
3 residential lots within one year.

4  
5 d. Greg and Richard Malinowski, the owners of the property east of the  
6 site, testified in opposition to the petition.

7  
8 i. Greg Malinowski summarized his written testimony (Exhibit 21).

9  
10 (1) He testified that they are farming their property. They  
11 have no plans to develop it. Development on the subject property would threaten the  
12 continued operation of their farm. He argued that the subject property should be retained in  
13 agricultural use and as a natural wetland. He summarized their farm operations. He  
14 testified that they are seeking to “trade” their property out of the UGB. Approval of this  
15 petition could eliminate that option.

16  
17 (2) He argued that the property north of the site (outlined in  
18 blue on the aerial photo attached to exhibit 21) is similarly situated and owned by petitioner  
19 Jenkins. If this petition is approved, petitioner Jenkins will argue that the abutting property  
20 is too small to farm and therefore should also be included in the UGB.

21  
22 (3) He argued that the majority of the subject site is wetland  
23 based on Metro’s “flood prone soils” maps. This site (and their property to the east) are  
24 wet for three months of the year. He introduced photographs showing standing water on  
25 the site, exhibits 25a and b. He expressed concern that development on this site will  
26 increase flooding on their property east of the site. They cut hay on their property and  
27 graze cattle during the summer and fall.

28  
29 (4) He argued that approval of this petition is not required to  
30 provide sanitary sewer service to their property. Equally efficient alternatives are available.  
31 Sanitary sewers can be extended to their property within the powerline right of way south  
32 of the site, within the existing UGB. The petitioners do not own the right of way, and it is  
33 not part of the subject property. There are no trees or slopes which might interfere with  
34 extension of sanitary sewer lines. Allen Lindell, the owner of the property southeast of the  
35 site, is willing to grant an easement allowing extension of sanitary sewers across his  
36 property. A sewer line in this location would also serve future redevelopment of Mr.

1 Lindell's property. Sewer lines in the Greenwood Hills development would be too high to  
2 serve future development on lands east of Greenwood Hills.

3  
4 (5) He testified that issues regarding public services and  
5 access to their property were addressed when the subject property was removed from the  
6 UGB in 1982. The subject property would not have been removed at that time if it would  
7 have prevented extension of services to their property.

8  
9 ii. Richard Malinowski argued that approval of this petition will  
10 have an adverse impact on their active farm operations due to increasing conflicts with  
11 urban uses. He testified that they frequently run their equipment in the early mornings and  
12 late evenings during the summer. They have received complaints and threats from  
13 neighbors regarding noise and dust under existing conditions. He expressed concern that  
14 urban residents will use their fields for playgrounds; leaving debris which could damage  
15 harvesting equipment, knocking down crops and opening gates allowing animals to escape.  
16 In the past people have cut their fences in order to ride motorcycles and four-wheel drive  
17 vehicles on their fields. These impacts will increase with increasing development on  
18 abutting properties.

19  
20 e. Mary Manseau opined that the ASC designation will not prevent  
21 extension of urban services and future development in the area. Greenwood Drive will be  
22 extended in the future when adequate sight distance is available at the 137th/Laidlaw Road  
23 intersection. She argued that orderly extension of public services can occur without this  
24 locational adjustment. Extending sewers through this site will only provide service to the  
25 western portion of the Malinowski site. She argued that area schools are already over  
26 capacity. Elementary students are being bussed to other schools. Development on the  
27 subject property will add to the problem if this petition is approved. She argued that the  
28 transportation report is incomplete, because it failed to address impacts on streets to the  
29 south and east. She argued that roads to access this site would impact open space and  
30 wetland mitigation sites within the Bosa North development. She argued that this petition  
31 is inconsistent with the Bethany Community plan which recommends that powerline  
32 corridors, streams, wetlands and similar features to define the boundaries of the  
33 community. She questioned whether the site can be developed with 80 lots as proposed  
34 due to the large wetlands on the site. She argued that the Staff Report overstates the  
35 potential adverse environmental impacts of continued agricultural use and fails to consider

1 the impacts to the wetlands of urban development on this site. The forested upland areas of  
2 the site must be clear cut to allow development on the site.

3  
4 f. April Debolt argued that the wetlands on this site are an important natural  
5 resource, and they form a natural boundary on this site. Red-legged frogs and western  
6 pond turtles, listed as endangered or threatened species in Oregon, live in the wetlands on  
7 the site. She opined that livestock grazing on the site, during the right time of year, can  
8 enhance the complexity of the wetland ecosystem. She argued that development on this site  
9 is inefficient. It is located several hundred feet from existing urban development and it  
10 abuts existing agricultural uses. Access to this site through Bosa North will impact the  
11 open space/wetlands areas preserved on that site. She argued that the applicant ignored the  
12 existing 16-inch high pressure natural gas line which crosses this site. She argued that  
13 sewer lines could be extended within the open space on the north edge of the Bosa North  
14 development without removing any trees.

15  
16 g. Tom Hamann argued that the subject property should remain rural.  
17 Development on this site will put pressure on other lands outside the UGB to convert to  
18 urban uses.

19  
20 h. Ted Nelson expressed concerns that development on this site could  
21 impact his property to the north. His property is roughly 100 feet higher in elevation, and  
22 it is very wet during the winter. Development on this site may block natural storm water  
23 flows and cause increased flooding on his property.

24  
25 i. George and Susan Teufel submitted written testimony in opposition to  
26 the petition. Exhibit 20.

27  
28 j. Mary Kyle McCurdy submitted written testimony in opposition to the  
29 petition on behalf of 1000 Friends of Oregon. Exhibit 23.

30  
31 k. The hearings officer held the record open for 1 week to allow the  
32 petitioners an opportunity to submit a closing statement. The record in this case closed at  
33 5:00 pm on June 1, 1999.

34  
35 5. On July 1, 1999, the hearings officer filed with the Council a report,  
36 recommendation, and draft final order denying the petition for the reasons provided therein.

1 Copies of the report and recommendation were timely mailed to parties of record together  
2 with an explanation of rights to file exceptions thereto and notice of the Council hearing to  
3 consider the matter.

4  
5 6. The Council held a duly noticed public hearing to consider testimony and timely  
6 exceptions to the report and recommendation. After considering the testimony and  
7 discussion, the Council voted to deny the petition for Contested Case No. 98-7  
8 (Jenkins/Kim), based on the findings in this final order, the report and recommendation of  
9 the hearings officer, and the public record in this matter.

10  
11 **II. APPLICABLE APPROVAL STANDARDS AND RESPONSIVE FINDINGS**

12  
13 1. Metro Code section 3.01.035(b) and (c) contains approval criteria for all  
14 locational adjustments. Metro Code section 3.01.035(f) contains additional approval  
15 criteria for locational adjustments to add land to the UGB. The relevant criteria from those  
16 sections are reprinted below in italic font. Following each criterion are findings explaining  
17 how the petition does or does not comply with that criterion.

18  
19 The relevant goals, rules and statutes are implemented by the procedures in Chapter  
20 3.01. Metro Code section 3.01.005.

21  
22 *Area of locational adjustments. All locational adjustment additions*  
23 *and administrative adjustments for any one year shall not exceed 100 net*  
24 *acres and no individual locational adjustment shall exceed 20 net acres...*  
25 Metro Code section 3.01.035(b)

26  
27 2. No locational adjustments or administrative adjustments have been  
28 approved in 1999. Therefore not more than 100 acres has been added to the UGB  
29 this year. The petition in this case proposes to add 18.85 acres to the UGB, which  
30 is less than 20 acres. Therefore, as proposed, the petition complies with Metro  
31 Code section 3.01.035(b). However, if all similarly situated land is included in the  
32 adjustment, the area of the adjustment would exceed 20 acres. See the findings  
33 regarding Metro Section 3.01.035(f)(3) for more discussion of the “similarly  
34 situated” criterion.

1           ***Orderly and economic provisions of public facilities and***  
2           ***services. A locational adjustment shall result in a net improvement in the***  
3           ***efficiency of public facilities and services, including but not limited to,***  
4           ***water, sewerage, storm drainage, transportation, parks and open space in***  
5           ***the adjoining areas within the UGB; and any area to be added must be***  
6           ***capable of being served in an orderly and economical fashion.***

7           Metro Code section 3.01.035(c)(1)

8  
9           3. The Council finds that the subject property can be served in an orderly and  
10          economic manner by most public facilities and services, including water, sanitary sewers,  
11          roads, storm drainage, transit and emergency services, based on the comments in the  
12          record from the service providers. However the Council further finds that the petitioner  
13          failed to demonstrate that school services can be provided to the subject property in an  
14          orderly and economic fashion.

15  
16                 a. USA testified that it could not “definitively state that there is or isn’t  
17          [sanitary sewer] capacity for this parcel.” However if the petition is approved, the  
18          developer would be required to pay for any necessary upgrades to the capacity of collection  
19          system and treatment facilities. Therefore the Council finds that adequate sewer capacity  
20          can be provided to serve this property.

21  
22                 b. There is no substantial evidence that school services can be provided to  
23          the subject property in an orderly and economical fashion. The applicant testified (page 18  
24          of the petition, Exhibit 3) that the elementary school and high school which would serve  
25          this site are both currently over capacity. The middle school which is currently under  
26          construction south of the site is projected to reach capacity within two years after  
27          completion.<sup>2</sup> Development on the subject property is projected to generate 59 students (33  
28          elementary, 14 middle and 12 high school), Exhibit 4. The Beaverton School District  
29          testified that it would address school capacity issues through the Comprehensive Plan  
30          Amendment process. Exhibit 3H of the Petition, Exhibit 3. Therefore Council finds that  
31          there is no substantial evidence that school services can be provided to the subject property  
32          in an orderly and economical fashion.

33  

---

<sup>2</sup> Findley Elementary School has a capacity of 691 students and 1998-99 enrollment of 787. Sunset High School has a capacity of 1,508 students and 1998-99 enrollment of 1,617.



1 i. Schools are not expressly included in the list of services in this  
2 criteria. However the list is expressly non-exclusive. Therefore the Council finds that  
3 school capacity is a relevant service and this criteria is not met.  
4

5 4. Metro rules do not define how to calculate net efficiency of urban services. In  
6 the absence of such rules, the Council must construe the words in practice. It does so  
7 consistent with the manner in which it has construed those words in past locational  
8 adjustments. The Council concludes that the locational adjustment proposed in this case  
9 does not result in a net improvement in the efficiency of services sufficient to comply with  
10 Metro Code section 3.01.035(c)(1), based on the following findings:  
11

12 a. Including the subject property in the UGB will reduce the net efficiency  
13 of school services, because there is insufficient capacity to accommodate students, and  
14 residential development on this site will increase the burden on the School District.  
15

16 b. Including the subject property in the UGB increases the net efficiency of  
17 sewer service, because it enables the petitioners to serve properties east of the subject  
18 property (the Malinowski properties) with a gravity flow sewer line. Based on the  
19 testimony of Nora Curtis with USA, if the subject property is not included in the UGB,  
20 then the Malinowski properties would have to be served with a pump station. Exhibit 1.  
21 That is inherently less efficient than a gravity flow line, because a pump station contains  
22 mechanical and hydraulic parts that require maintenance and repair and relies on electricity  
23 to operate instead of gravity. This finding is consistent with the Council action in UGB  
24 Case 8-04 (Bean) and UGB Case 94-01 (Starr/Richards) where locational adjustments  
25 allowed gravity flow systems instead of pump stations.  
26

27 i. There is no substantial evidence that alternative routes for gravity  
28 flow sewer service are practicable or available. It was alleged that sewers could be  
29 extended to the Malinowski properties through the powerline right of way south of the  
30 subject property within the existing UGB. However sewer lines do not extend to the  
31 powerline right of way now. Sewer lines serving the Greenwood Hill subdivision were  
32 stubbed in NW Greenwood Drive south of the site. Gravity sewers could be extended to  
33 the Malinowski properties from this stub ("Option 2" identified by the applicant in  
34 Attachment C of the Staff Report, Exhibit 18). However there is no substantial evidence  
35 that this sewer extension could serve the western portion of the Malinowski properties,  
36 which are a lower elevation, with gravity flow sewers.

1  
2                   ii. It is not necessary to include all of the subject property in the  
3 UGB to provide gravity flow sewer service to the Malinowski property. A sewer line  
4 could be extended from within the eastern portion of the subject site. More than the eastern  
5 half of the subject property is not necessary to provide gravity flow sewer service to the  
6 Malinowski property. Consequently, although sewer service would be more efficient if the  
7 eastern portion of the subject property is included in the UGB, including the western  
8 portion of the subject property in the UGB provides no net efficiencies to sewer service or  
9 other urban services. See pp. 2-3 of Exhibit 23; also see, *Parklane v. Metro*, \_\_ Or LUBA  
10 \_\_ (LUBA No. 97-48, 2/25/99).

11  
12                   c. The Council finds that including the subject property in the UGB has no  
13 effect on the net efficiency of park and open space services and facilities. The April 12,  
14 1999 letter from the THPRD states that the Park District “welcomes the proposed  
15 development area into the District...” It does not state that approval of this petition results  
16 in increased efficiency of park and open space services.

17  
18                   i. Approval of the petition could increase the amount of open space  
19 within the Park District because the wetland areas of the subject property could be dedicated  
20 to the THPRD when the subject property is developed. The area proposed to be dedicated  
21 is adjacent to the existing open space within the Kaiser Woods subdivision to the west.<sup>3</sup>  
22 Therefore approval of this petition will expand the amount of contiguous open space area in  
23 the Park District. Increasing the area of open space increases the efficiency of open space  
24 services for purposes of this section.

25  
26                   ii. However the Council also recognizes that, under existing  
27 zoning, use of the subject property is so constrained that it is reasonably likely to remain  
28 undeveloped and substantially in an open space even if it is not included in the UGB. If the  
29 petition is approved, roughly one third of the subject property, about 7.33 acres, will be  
30 cleared and developed for urban uses, substantially reducing the amount of actual open  
31 space in the area. Therefore, including the subject property in the UGB actually may  
32 reduce the area of open space in fact if not in designation. Given these facts, the Council  
33 concludes that, on balance, including the subject property has no net effect on open space

---

<sup>3</sup> Although the Kaiser Woods open space is separated from this site by the intervening powerline right of way, the right of way is designated open space in the Bethany Community Plan.

1 efficiency. This is consistent with prior Council decisions. See UGB Case 95-02 (Knox  
2 Ridge).

3  
4 d. Council finds the petitioner failed to bear the burden of proof that  
5 including the subject property in the UGB increases the net efficiency of transportation  
6 services for land already in the UGB. The Council finds that including the subject property  
7 in the UGB has no net increase in transportation efficiency.

8  
9 i. The Council finds that development on the subject property  
10 would create an opportunity for additional cross-circulation in the area by extending a stub  
11 street that could serve the Malinowski properties.

12  
13 ii. The Council further finds that east-west cross-circulation will be  
14 provided through the Dogwood Park ASC by the future extension of NW Greenwood  
15 Drive. The Bethany Community Plan requires that this area be “protected” but it also  
16 assumes that this area will eventually redevelop. Although NW Greenwood Drive is  
17 currently barricaded, it is clearly intended to be extended in the future. This street was  
18 stubbed to the east and west boundaries of the Dogwood Park ASC. Washington County  
19 required the developer of the Greenwood Hill subdivision to connect to this street. Future  
20 development to the east will presumably be required to extend this street further east and  
21 south, enhancing cross-circulation in the area.

22  
23 iii. Whether including the subject property in the UGB results in  
24 increased transportation efficiency depends on whether the Malinowski property is  
25 developed before the barriers are removed and Greenwood Drive is extended to the east.  
26 There is no certainty when the adjoining land in the UGB will develop or when the barriers  
27 in Greenwood Drive will be removed. Including the property in the UGB may or may not  
28 increase transportation efficiency. There is no substantial evidence that including the  
29 subject property will necessarily enhance transportation efficiency.

30  
31 e. The Council concludes that the petitioner failed to bear the burden of  
32 proof that approval of this petition will increase efficiency of emergency services. As  
33 discussed above, approval of this petition may enhance east-west circulation in the area.  
34 However this petition will result in a substantial efficiency only if the Malinowski  
35 properties redevelop and extend streets to the east before the barriers are removed and  
36 Greenwood Drive is extended to the east.

1  
2 f. The Council cannot make a finding regarding the efficiency of transit  
3 services, as the petition submittal does not include comments from Tri-Met.  
4

5 g. The Council concludes that the petitioner failed to bear the burden of  
6 proof that this locational adjustment will result in a net improvement in the efficiency of  
7 water services in the adjoining area already in the UGB. TVWD testified that this locational  
8 adjustment would allow the creation of a looped water system through the site and provide  
9 for future extension to properties to the east within the existing UGB. However there is no  
10 substantial evidence that a similar efficiency cannot be achieved by construction of a looped  
11 water system through lands southeast of the subject property within the existing UGB  
12 when they are redeveloped in the future.  
13

14 h. It is not apparent from the record that including the subject property in  
15 the UGB will increase the net efficiency of surface water management/storm drainage,  
16 natural gas, electricity and fire protection for land already in the UGB, except by marginally  
17 increasing the population served by those facilities and thereby spreading their cost over a  
18 slightly larger population base, making them somewhat more economical to residents of  
19 land already in the UGB. However this impact is not enough by itself to conclude these  
20 services will be more efficient if the property is included in the UGB based on prior  
21 locational adjustment cases (see, e.g., UGB Case 88-02 (Mt. Tahoma) and UGB Case 95-  
22 02 (Knox Ridge)).  
23

24 i. Under these circumstances, Council finds that including the subject  
25 property in the UGB does not result in net improvement in public facilities and services.  
26 Approval of this petition will result in a net increase in the efficiency of sewer services.  
27 However approval of this petition will result in a net decrease in the efficiency of school  
28 services. Other services may or may not be more efficient as a result of including the  
29 subject property. Council concludes the petitioner failed to carry the burden of proof that  
30 the petition complies with Metro section 3.01.035(c)(1).  
31

32 *Maximum efficiency of land uses. The amendment shall facilitate*  
33 *needed development on adjacent existing urban land. Needed development,*  
34 *for the purposes of this section, shall mean consistent with the local*  
35 *comprehensive plan and/or applicable regional plans.*

36 Metro Code section 3.01.035(c)(2)

1  
2 5. Including the subject property in the UGB facilitates needed development on  
3 adjacent existing urban land, (i.e., the Malinowski properties), because it makes it possible  
4 to serve that property with a gravity flow sewer.  
5

6 a. The Malinowskis' stated lack of desire to develop their property is  
7 irrelevant to this criteria. The Malinowski properties are designated for urban residential  
8 development in the Washington County Comprehensive Plan. Sewer service must be  
9 provided to the Malinowski properties if they are to be developed consistent with the  
10 comprehensive plan. Therefore the Council finds that including the subject property in the  
11 UGB facilitates needed development on adjacent existing urban land.  
12

13 b. The Council acknowledges that it is not necessary to include the subject  
14 property in the UGB to provide any form of sewer service to the Malinowski properties.  
15 The Malinowski properties could be served by extending a sewer line from the southwest,  
16 from the existing stub in Greenwood Drive or from the south up 137th Avenue. However,  
17 based on the topography in the area and the statement from USA, alternative routes for  
18 sewer lines would require pumping of sewage from portions of the Malinowski properties.  
19

20 c. Given the importance of the efficiency of service delivery in section  
21 3.01.035(c)(1), the Council finds that the availability of a less efficient means of sewer  
22 service, (i.e., a system that relies on a pump station), does not preclude and is not  
23 inconsistent with a finding that the locational adjustment in this case facilitates development  
24 on the Malinowski properties by enabling it to be served with a more efficient sewer  
25 system. This is consistent with and similar to the Council's action in the matter of UGB  
26 Case 88-04 (Bean) and UGB Case 94-01 (Starr/Richards).  
27

28 6. The Council further finds that including the subject property in the UGB does  
29 not otherwise facilitate needed development on adjacent existing urban land. Urban  
30 services other than gravity flow sewers can be provided to adjoining properties within the  
31 existing UGB without approving the petition.  
32

33 a. Development on this site would require extension of urban services,  
34 sewer, water, etc., through the site to the west edge of the Malinowski properties. But  
35 these extensions can be accomplished whether or not the subject property is developed.  
36 Public services, other than gravity flow sewer, will be extended to the Malinowski

1 properties as properties to the southeast are redeveloped in the future. The fact that it may  
2 take longer for services to reach the Malinowski properties through redevelopment within  
3 the existing UGB is irrelevant to this criteria. In addition, there is no substantial evidence  
4 that providing services to the Malinowski properties through this site will encourage the  
5 Malinowski properties to redevelop any sooner than will otherwise occur.

6  
7 ***Environmental, energy, social & economic consequences.*** Any  
8 *impact on regional transit corridor development must be positive and any*  
9 *limitations imposed by the presence of hazard or resource lands must be*  
10 *addressed.* Metro Code section 3.01.035(c)(3)

11  
12 7. Council finds including the subject property in the UGB would not have any  
13 impact on regional transit corridor development, because the nearest regional corridor is  
14 more than one-quarter mile from the site. Council further finds that the subject property is  
15 not subject to hazards identified by Washington County. The presence of a wetlands can  
16 be addressed through compliance with state laws. Although development on this site is  
17 likely to impact these wetlands, such impacts are not prohibited so long as adequate  
18 mitigation is provided. Development constraints created by the existing natural gas pipeline  
19 on the subject property also can be addressed.

20  
21 ***Retention of agricultural land.*** When a petitioners includes land with  
22 *Agricultural Class I-IV soils designated in the applicable comprehensive*  
23 *plan for farm or forest use, the petition shall not be approved unless it is*  
24 *factually demonstrated that:*

25  
26 (A) *Retention of any agricultural land would preclude urbanization*  
27 *of an adjacent area already inside the UGB, or*

28  
29 (B) *Retention of the agricultural land would make the provision of*  
30 *urban services to an adjacent area inside the UGB impracticable.*

31 Metro Code section 3.03.035(c)(4)

32  
33 8. The subject property contains Class III and IV soils, and it is designated and  
34 zoned EFU. Therefore Council finds this criterion does apply. The fact that the petitioners  
35 are not actively farming the subject property is irrelevant to this criteria.

1 a. The Council finds that retaining the subject property as agricultural land  
2 will not preclude urbanization of adjacent lands. Public services and facilities can be  
3 provided to the Malinowski properties through lands within the existing UGB, just not as  
4 efficiently. However efficiency is not relevant to the findings under this section; only  
5 practicability of service is relevant.

6  
7 b. The Council further finds that retaining the subject property as  
8 agricultural land will not make the provision of urban services to adjacent properties inside  
9 the UGB impracticable. Sewer service can be provided to the Malinowski properties by  
10 means of a pump station. The Council finds that, although pumping sewage is less  
11 efficient than gravity flow, it is a practicable alternative. All other urban services will be  
12 provided to abutting properties within the UGB as properties to the south and east are  
13 redeveloped in the future.

14  
15 *Compatibility of proposed urban uses with nearby agricultural*  
16 *activities. When a proposed adjustment would allow an urban use in*  
17 *proximity to existing agricultural activities, the justification in terms of this*  
18 *subsection must clearly outweigh the adverse impact of any incompatibility.*  
19 Metro Code section 3.01.035(c)(5)

20  
21 9. The Council finds, based largely on the testimony of the Malinowskis and Mr.  
22 Jenkins at the hearing, that the proposed adjustment will be incompatible with ongoing  
23 agricultural activities on the Malinowski properties. The minimal service efficiencies  
24 achieved by including subject property in the UGB do not “clearly outweigh” the adverse  
25 impacts of its urban development on existing agricultural activities.

26  
27 a. The Malinowskis testified that their property abutting the east boundary  
28 of the subject property is in active agricultural use. They harvest hay and graze cattle on  
29 this portion of their property. The petitioner, Dr. Jenkins, testified based on his own  
30 experience that these activities are incompatible with urban development on abutting  
31 properties. Both Dr. Jenkins and the Malinowskis testified that their fences have been cut,  
32 allowing their livestock to escape. The Malinowskis testified that they receive complaints  
33 about noise and dust from their harvesting activities under existing conditions.

34  
35 b. The Council finds that urban development on this site will increase the  
36 potential for such conflicts by allowing urban residential development abutting the west

1 boundary of the Malinowski property. The Malinowski property is largely buffered from  
2 urban development under existing conditions. The powerline right of way along the south  
3 boundary of their property provides a buffer between their property and abutting urban  
4 lands. Properties to the north are outside the UGB and designated for rural development in  
5 the Multnomah County Comprehensive Plan. Properties to the east are within the UGB,  
6 but they are not currently developed with urban uses. The subject property, abutting the  
7 west boundary of the Malinowski property, is designated exclusive farm use by the  
8 Washington County Comprehensive plan. Approval of this petition would bring urban  
9 development closer to the Malinowski property, thereby increasing the likelihood of  
10 conflicts between urban and farm uses.

11  
12 c. The fact that the Malinowski properties are located within the UGB is  
13 irrelevant to this criterion. The Code does not distinguish between existing agricultural  
14 uses based on their location within or outside the UGB.

15  
16 *Superiority.* [T]he proposed UGB must be superior to the UGB as  
17 presently located based on a consideration of the factors in subsection (c) of  
18 this section. Metro Code section 3.01.035(f)(2)

19  
20 10. Based on the evidence in the record, Council finds that the proposed UGB is  
21 not superior to the existing UGB, because:

22  
23 a. There is no evidence that public services (schools) can be provided to the  
24 subject property in an orderly and economic fashion;

25  
26 b. The proposed UGB would not result in a net increase in service and land  
27 use efficiencies for the public commensurate with the size and nature of the locational  
28 adjustment;

29  
30 c. Retention of the subject property as agricultural land would not preclude  
31 urbanization of adjacent land already inside the UGB or make the provision of urban  
32 services adjacent urban land impracticable;

33  
34 d. The benefits including the subject property in the UGB do not clearly  
35 outweigh impacts on existing agricultural uses; and



1 e. It does not include all similarly situated land.  
2

3 *Similarly situated land. The proposed UGB amendment must include*  
4 *all similarly situated contiguous land which could also be appropriately*  
5 *included within the UGB as an addition based on the factors above. Metro*  
6 *Code section 3.01.035(f)(3)*  
7

8 11. Council finds the evidence in the record shows insufficient difference between  
9 the subject site and the adjoining land to the north to conclude that such lands are not  
10 similarly situated.  
11

12 a. Based on the aerial photographs in the record, the southern portion of the  
13 abutting property is not being actively farmed and appears indistinguishable from the  
14 subject property (the area outlined in blue on the aerial photograph attached to Exhibit 21).  
15

16 b. The adjoining property also is owned by petitioner Jenkins and zoned  
17 EFU. The adjoining property is similar physically to the subject property in terms of soils  
18 and slopes. If anything, the adjoining land to the north is better suited for urban use,  
19 because it does not contain extensive wetlands found on the subject property, and it adjoins  
20 a water district reservoir to the north and urban subdivisions to the west.  
21

22 c. Although the adjoining land to the north is not necessary to extend urban  
23 services to the adjoining land already in the UGB (i.e., the Malinowski property), neither is  
24 inclusion of most of the subject property necessary to provide that service.  
25

26 d. The petitioner distinguishes the adjoining land to the north largely  
27 because it is in a different county; but such jurisdictional boundaries are not relevant to the  
28 criteria regarding similarly situated lands. That boundary does not create an obstacle to  
29 development between the subject site and abutting properties. There is no physical barrier  
30 between the subject property and the adjoining 26 feet to the north, such as a highway,  
31 street or railroad track, that distinguishes the subject property from adjoining land.  
32

33 e. The petitioner did not demonstrate that the soil conditions on this site and  
34 the adjoining land to the north are different. On the contrary the petitioner testified that  
35 such lands have been farmed or grazed in the past together with the subject site. The  
36 petitioner argued that the abutting property contains "better quality agricultural soils."

1 Petition at page 30. However there is no substantial evidence in the record to support this  
2 statement. The petition does not include a soils map or similar evidence of the soils on this  
3 and the abutting properties. In addition, this statement conflicts with petitioners' statement  
4 that "[s]eed production is limited on the Class IV soils immediately adjacent to the  
5 Jenkins/Kim site because of poor drainage." Petition at page 27. This statement is  
6 consistent with the aerial photographs in the record which show the northern portion of the  
7 abutting property is cultivated while the southern portion is undisturbed.

8  
9 f. The Council finds the evidence in this case can be distinguished from the  
10 evidence in prior cases regarding the "similarly situated" criterion. Many of the properties  
11 proposed for addition in prior cases had some natural or man-made physical feature that  
12 separated the subject property from adjoining non-urban land. See, e.g., UGB Case 94-01  
13 (Starr/Richards) (I-5 freeway), UGB Case 95-01 (Harvey) (railroad tracks) and UGB Case  
14 87-4 (Brennt) (steep slopes). In this case, the subject property is not physically  
15 distinguishable from adjoining non-urban land, similar to the situation in UGB Case 95-02  
16 (Knox Ridge).

17  
18 g. Therefore the Council concludes the petition does not include all  
19 similarly situated properties. If it did include all such lands, it would exceed 20 acres. It is  
20 not evident to Council how far north similarly situated lands go, but they include at least  
21 1.15 acres of the land north of the subject site. If as little as 26 feet of the land adjoining  
22 the north edge of the subject property is included in the UGB, the petition would include  
23 more than 20 acres. The evidence is insufficient to show the adjoining 26 feet of land is  
24 not similarly situated to the subject site based on the relevant criteria.

### 25 26 III. CONCLUSIONS

27  
28 Based on the foregoing findings, the Council adopts the following conclusions.

29  
30 1. Public services and facilities, including water, sanitary sewer, storm drainage,  
31 transportation, and police and fire protection, can be provided to the subject property in an  
32 orderly and economical fashion.

33  
34 2. School services cannot be provided to the subject property in an orderly and  
35 economical fashion.

1           3. On balance, Council concludes the petition does not comply with MC section  
2 3.01.035(c)(1), because the petitioners did not carry the burden of proof that including all  
3 of the subject site in the UGB will result in a net improvement in the efficiency of public  
4 services and facilities. The petition includes more land than necessary to provide service  
5 efficiencies that could result from granting the petition.

6  
7           4. The petitioners showed that the proposed addition will facilitate needed  
8 development on adjacent existing urban land. Therefore Council concludes the petition  
9 does comply with MC section 3.01.035(c)(2).

10  
11           5. The petitioners showed that including the subject property in the UGB will not  
12 affect regional transit corridor development and that limitations imposed by the presence of  
13 wetlands and a natural gas transmission pipeline can be addressed. Therefore Council  
14 concludes the petition does comply with MC section 3.01.035(c)(3).

15  
16           6. The petitioners failed to carry the burden of proof that retention of the subject  
17 property as agricultural land would preclude urbanization of an adjacent area already inside  
18 the UGB, or make the provision of urban services to an adjacent area inside the UGB  
19 impracticable. Thus the petition does not comply with MC section 3.03.035(c)(4).

20  
21           7. The petitioners failed to carry the burden of proof that efficiencies created by  
22 including the subject property in the UGB clearly outweigh the adverse impact of any  
23 incompatibility with existing agricultural activities. Thus the petition does not comply with  
24 MC section 3.01.035(c)(5).

25  
26           8. The petitioners failed to show that the proposed addition will result in a superior  
27 UGB. Thus the petition does not comply with MC section 3.01.035(f)(2)

28  
29           9. The petition does not include all similarly situated contiguous land outside the  
30 UGB. If it did include all such lands, the area in question would exceed 20 acres, which is  
31 the maximum area permitted as a locational adjustment.

1  
2  
3  
4  
5  
6  
7  
8  
9

IV. DECISION

Based on the findings and conclusions adopted herein and on the public record in this matter, the Metro Council hereby denies the petition in Contested Case 98-07 (Jenkins/Kim).

DATED: \_\_\_\_\_

By Order of the Metro Council

By \_\_\_\_\_

ATTACHMENT A TO THE FINAL ORDER IN THE  
MATTER OF CONTESTED CASE 98-07 (Jenkins/Kim) :  
EXHIBITS

Exhibit No.    Subject matter

Ex #	Date	Source	Subject
1	11/05/98	USA	Service provider comment
2	11/24/98	TVWD	Service provider comment
3	12/01/98	Applicants	Petition for locational adjustment and attachments
4	01/07/99	Winterowd (WPS)	Beaverton School District capacity
5	01/19/99	Pacific Hab.Serv.	Wetland permitting & mitigation
6	01/22/99	TVFRD	Service provider comment
7	04/12/99	USA	Service provider comment
8	2/23/99	Washington County	Staff report to planning comm'n & attachments
9	04/14/99	Washington County	Addendum to the Staff report to planning comm'n & attachments
10	04/21/99	THPRD	Service provider comment
11	04/23/99	LDC Design Group	Supplemental information to Washington County
12	04/26/99	Malinowski	Letter in opposition
13	04/27/99	WPS	Summary of 4/27/99 BCC hrg
14	04/27/99	Washington County	Addendum Staff Report to BCC
15	04/28/99	Metro	Notice to DLCD
16	05/03/99	Washington County	Cover letter for county comment
17	05/04/99	Metro	Notice to Washington County special districts and agencies
18	05/13/99	Metro	Staff Report to hearings officer
19	05/24/99	Metro	Public notice
20	05/17/99	Teufel	Letter in opposition
21	05/24/99	Malinowski	Letter in opposition & attachments
22	n.d.	M. Manseau	Letter in opposition
23	05/24/99	1000 Friends	Letter in opposition
24	n.d.	LDC Design Group	11"x14" maps of site and surrounding area
25a	n.d.	Malinowski	Photo of site
25b	n.d.	Malinowski	Photos of site
26	n.d.	LDC Design Group	Aerial photo of site
27	05/24/99	Winterowd (WPS)	Service provider table
28	n.d.	Metro	Mailing list
29	10/20/98	Metro	Reactivation notice
30	06/1/99	Winterowd (WPS)	Final argument
31	06/1/99	Cox	Final argument

## STAFF REPORT

### CONSIDERATION OF ORDINANCE NO. 99-816 DENYING URBAN GROWTH BOUNDARY LOCATIONAL ADJUSTMENT CASE 98-7: JENKINS/KIM AND ADOPTING HEARING OFFICER'S REPORT INCLUDING FINDINGS AND CONCLUSIONS

Date: September 9, 1999

Presented by: Larry Epstein, Hearings Officer  
Prepared by: Ray Valone, Growth Management

#### PROPOSED ACTION

Adoption of Ordinance 99-816, denying *Case 98-7: Jenkins/Kim*, a locational adjustment to the urban growth boundary (UGB). The proposed adjustment is shown on Attachment 1.

#### SUMMARY OF PROCESS

According to Metro Code 3.01.065, the Metro Council may act to approve, deny or remand to the Hearings Officer a petition in whole or in part. When the Council renders a decision that reverses or modifies the proposed order of the Hearings Officer, then the Council shall set forth its findings and state its reasons for taking the action in its order.

The Hearings Officer, Larry Epstein, submitted a report recommending denial of Case 98:7 (Attachment 2). The petitioners filed an exception to the Hearings Officer's Report and Recommendation (Attachment 3). According to Metro Code 3.01.060, parties to the case may file an exception related directly to the interpretation made by the Hearings Officer of the ways in which the petition satisfies the standards for approving a petition for a UGB amendment. According to Metro Code 2.05.045(b), the Council shall, upon receipt of a proposed ordinance and consideration of exceptions, adopt the proposed ordinance, revise or replace the findings or conclusions in a proposed order, or remand the matter to the Hearings Officer.

If the Council votes to deny Case 98-7 and adopt this ordinance, the decision will be consistent with the Hearings Officer's recommendation and findings. If the Council votes to approve the petition, the decision will be consistent with the staff report. If the Council votes to remand the petition to the Hearings Officer, the decision will be consistent with the petitioners' exception request.

In addition, the petitioners filed an Offer of Proof requesting that the Council consider additional evidence before rendering a decision (Attachment 4). Please see the memo from Larry Shaw, dated August 30, 1999, for further explanation of this submittal (Attachment 5).

#### BACKGROUND AND ANALYSIS

##### Proposal Description:

On December 1, 1998, Michael Jenkins and Sang Kim completed filing a petition for an 18.85-acre locational adjustment to the UGB for the purpose developing the site for residential use. The site is approximately one-half mile southeast of the Springville Road/Kaiser Road intersection (Attachment 1). The subject property is located in Washington County with the UGB as its western, southern and eastern boundary, and the Washington/Multnomah County line as a northern boundary. It consists of Tax Lot 1100, Section 21, T1N-R1W and Tax Lot

101, Section 21BA, T1N-R1W. The subject property is zoned for Exclusive Farm Use by Washington County. Land to the west, south and east is zoned R-5 and R-6 residential by Washington County. Land to the north is zoned for exclusive farm use by Multnomah County.

The petitioners propose to adjust the UGB for the purpose of developing the site with residential uses. The applicants intend for the property to be developed with approximately 80 residential dwelling units. On April 27, 1999, the Washington County Board of Commissioners voted 3-0 to forward no recommendation to Metro.

#### Hearings Officer Recommendation and Proposed Findings

The Hearings Officer, Larry Epstein, conducted a public hearing at the Washington County Public Service Building on May 24, 1999. He submitted a report and recommendation to Metro on July 1, 1999, recommending denial of the petition. The case record contains the petitioners' submittals, Metro staff report, notification lists and the Hearings Officer's report. The complete record list is included as part of the Hearings Officer's Report and Recommendation.

The criteria from Metro Code 3.01.035 include: 1) Locational adjustments shall not exceed 20 net acres; 2) The site can be served with public facilities and services in an orderly and economic manner, and the adjustment would result in a net improvement in their efficiency; 3) The amendment will facilitate needed development on adjacent existing urban land; 4) The environmental, energy, economic and social consequences of amending the UGB have been considered; 5) Designated agricultural lands will be retained unless land inside the UGB cannot be developed, or service provision to that would be impracticable; 6) The proposed use would be compatible with nearby agricultural activities; 7) The proposed UGB location would be superior to the existing UGB location; and 8) The proposed adjustment must include all similarly situated contiguous land which could also be appropriately included within the UGB.

The Hearings Officer recommends denial of *Case 98-7: Jenkins/Kim* based upon the findings and conclusions in his report that:

- All application and noticing requirements are met; and
- A public hearing was conducted according the requirements and rules of Metro Code 3.01.050 and 3.01.055; and
- Criteria 2, 5, 6 and 8 for a locational adjustment to the UGB are not met by the petitioners.

The Hearings Officer states in his report that criterion 2 is not met because the petition does not result in a net improvement in the efficiency of services due to there being no substantial evidence that school services can be provided to the site in an orderly and economical fashion (Attachment 2, pages 16-20). Criterion 5 is not met because inclusion of the site into the UGB will not make the provision of services, sewer in particular, to the adjacent Malinowski properties to the east impracticable (Attachment 2, pages 22-23). These adjacent sites could be served by means of a sewer pump station. Criterion 6 is not met because development of the site would be incompatible with ongoing agricultural activities on the Malinowski properties within the UGB (Attachment 2, pages 23-24). Criterion 8 is not met because the southern portion of the Jenkins' property to the north of the subject site is indistinguishable from the subject site. The petition does not include, therefore, all similarly situated land. If as little as 26 feet of land adjoining the northern edge of the subject property is included in the proposal, the petition would be for more than 20 acres and not eligible under the locational adjustment standard (Attachment 2, pages 25-26).

## Comparison of Staff Report and Hearings Officer's Recommendation

According to Metro Code 3.01.033(f), Metro staff shall review all petitions and submit a report to the Hearings Officer. Based on a review of all submitted material from the petitioners, public service providers and Washington County, staff concludes that all criteria are satisfied (Attachment 6).

Staff conclusions differ from the Hearings Officer's recommendation in the following ways:

- Staff concludes that Criterion 2 is satisfied because the petitioners have demonstrated that, on balance, inclusion of the site would result in a net improvement in the efficiency of services to adjoining areas within the UGB. There would be an improvement of efficiency for five services, no change in efficiency for four services and a decrease in efficiency only for school services. Further, the school district has not performed an evaluation of school facilities for the petition (Attachment 6, pages 56-59).  
The Hearings Officer concludes that this criterion is not met because approval of the petition would result in net decrease in efficiency of school services.
- Criterion 5 is contingent upon interpretation of what constitutes "impracticable". Staff concludes this criterion is satisfied because without inclusion of the subject property, provision of sewer service to the Malinowski properties within the UGB is impracticable. The options put forth by the petitioners, Washington County and the Malinowskis for providing sewer service to the Malinowski properties without use of the subject property were judged to not be practicable or feasible. The gravity service options require easements across private residential property; and construction and maintenance of a pump station is not only impracticable, but also not allowed by the Unified Sewerage Agency when a property is within 5000 feet of a public sewer line (Attachment 6, pages 62-63).  
The Hearings Officer concludes that providing sewer service to the Malinowski properties via a pump station is a practicable alternative. The petitioners, therefore, have not demonstrated that retention of the subject property as agricultural land would make provision of urban services to adjacent urban land impracticable.
- Staff concludes that Criterion 6 is satisfied because there would be a limited impact to the agricultural activities, located approximately 300 feet outside the UGB to the north of the site, which would be outweighed by the benefits to the adjoining urban land to the east (Attachment 6, page 64).  
The Hearings Officer concludes that development of the subject property would be incompatible with the agricultural activities taking place on the Malinowski properties within the UGB to the east.
- Staff concludes that Criterion 8 is satisfied because any additional land to the north of the subject site is not an appropriate addition based on the case in criteria 2 through 6.  
The Hearings Officer concludes that the petitioners did not demonstrate that the subject property is different than adjoining land to the north. For this reason, the petition does not include all similarly situated land. If as little as 26 feet of land adjoining the north edge of the subject site is included with the petition, it would exceed the 20-acre limit for locational adjustments.

## BUDGET IMPACT

There is no budget impact from adopting this ordinance.

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