

BEFORE THE METRO COUNCIL

FOR THE PURPOSE OF APPROVING) ORDINANCE NO 00-843
URBAN GROWTH BOUNDARY)
LOCATIONAL ADJUSTMENT 98-7:)
JENKINS/KIM, AND ADOPTING THE) Introduced by Councilor Rod Park
FINDINGS, CONCLUSIONS AND FINAL)
ORDER)

WHEREAS, on December 1, 1998, Metro received a revised 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 Hearing 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 Findings of Fact and Conclusions on all of the criteria applicable to the petition; and

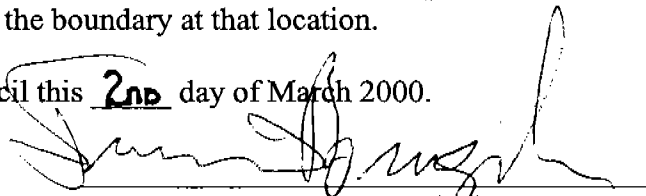
WHEREAS, exceptions to the Hearings Officer Report were filed; and

WHEREAS, arguments were held before the Metro Council on September 16, 1999 and October 28, 1999; now, therefore

THE METRO COUNCIL ORDAINS:

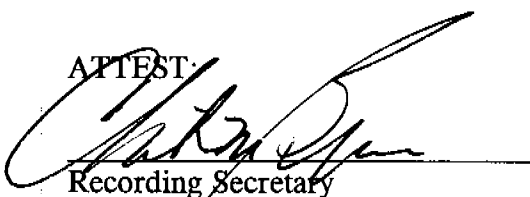
1. That the Findings, Conclusions and Final Order attached and incorporated herein as Exhibit B are hereby adopted; and
2. That the regional urban growth boundary is hereby adjusted by including the 18.85 acres as described in Exhibit B and as shown in Exhibit A attached and incorporated herein in the urban growth boundary to improve the boundary at that location.

ADOPTED by the Metro Council this 2nd day of March 2000.



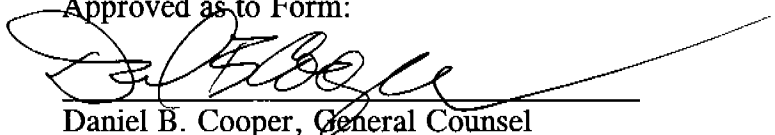
David Bragdon, Presiding Officer

ATTEST:



Recording Secretary

Approved as to Form:



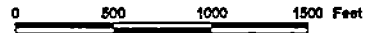
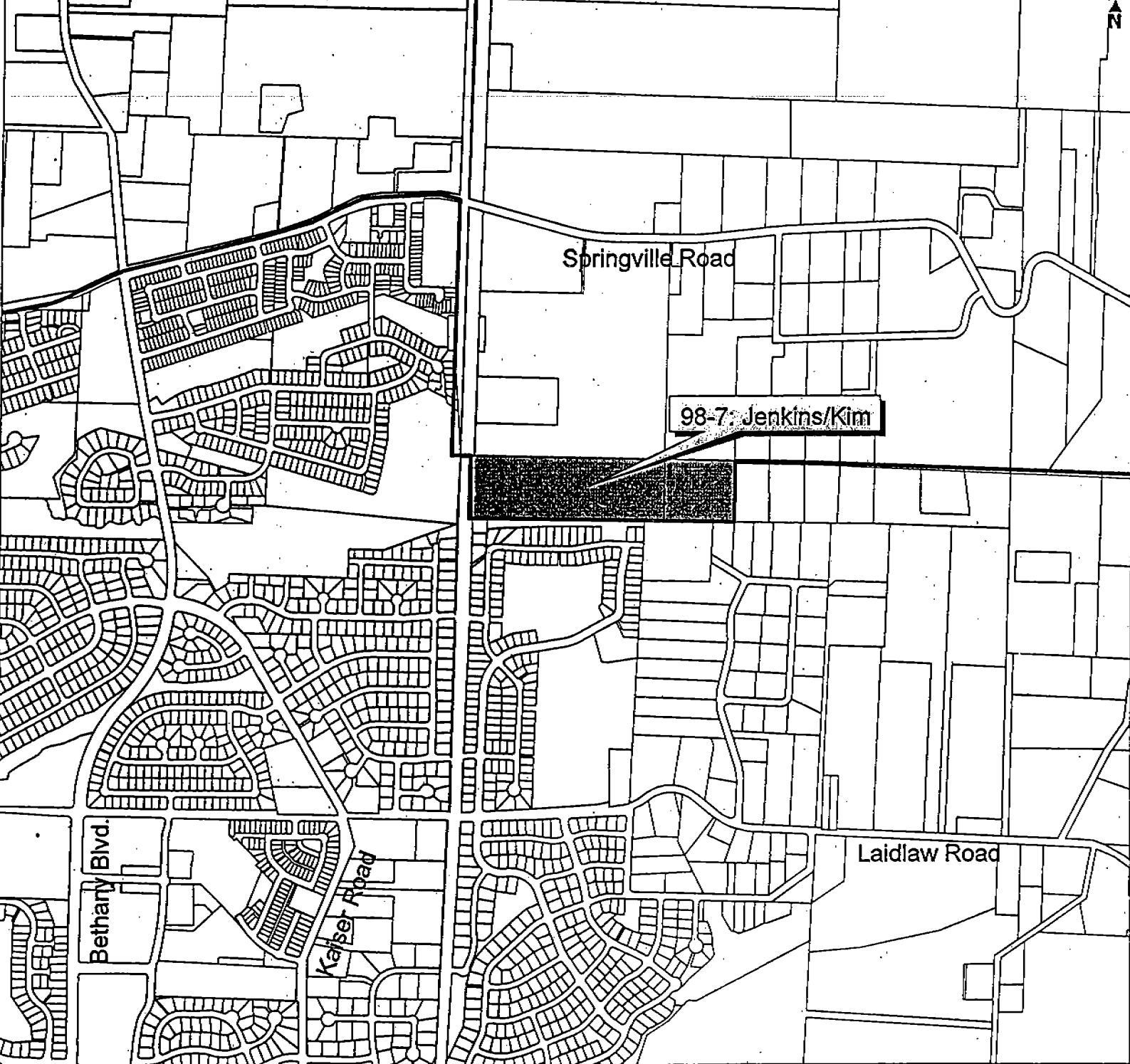
Daniel B. Cooper, General Counsel

Proposed Adjustment

UGB Case 98-7
Jenkins/Kim

 Urban Growth Boundary

 Subject Property



1" = 1000 feet



METRO

600 NE Grand Ave.
Portland, OR 97232-2736
503 797-1742 FAX 503 797-1909
Email: dro@metro.dsl.or.us

EXHIBIT-A

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")
11 completed filing a revised petition for a locational adjustment to the Urban Growth
12 Boundary ("UGB"), including exhibits required by Metro rules for locational
13 adjustments. See Exhibit 3 for the original petition for locational adjustment (the
14 "petition"). Basic facts about the petition include the following:
15

16 a. The land to be added to the UGB is described as Tax Lot 1100, Section
17 21, T1N-R1W and Tax Lot 101, Section 21BA, T1N-R1W, WM, Washington County
18 (the "subject property").¹ It is located roughly 1800 feet south of Springville Road,
19 roughly 2100 feet north of Laidlaw Road and roughly 2200 feet east of Kaiser Road in
20 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 rectangular-shaped parcel 450 feet north-south
32 by about 1900 feet east-west. The site contains 18.85 acres. It is designated and zoned
33 EFU (Exclusive Farm Use) on the acknowledged Washington County Comprehensive
34 Plan and zoning map.

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

4
5 d. The petition was accompanied by comments from affected jurisdictions
6 and service providers. See Exhibits 1, 2, 6, 7, and 9.

7
8 i. The Washington County Board of Commissioners adopted an
9 order in which it made no recommendation on the merits of the petition. See Exhibit 16.

10
11 ii. The Tualatin Valley Water District ("TVWD") testified that it
12 could serve the subject property, and that approval of the petition would make the
13 provision of water service delivery in the UGB more efficient and would result in an
14 orderly and economic provision of services. TVWD expressed support for the petition.
15 See Exhibit 2.

16
17 iii. The Beaverton School District testified that it would review the
18 status of school facilities in response to an application for Comprehensive Plan
19 Amendment on the subject property. The School District took no position regarding the
20 petition. See Exhibit 3H to the petition, Exhibit 3.

21
22 iv. The Unified Sewerage Agency of Washington County
23 ("USA") testified that the subject property is not located within the Agency's service
24 area, but is located within the drainage basin. Approval of the petition would result in a
25 net increase in efficiency of sanitary sewer service within the UGB due to the fact that
26 USA policies prohibit service of the neighboring land within the UGB by pump station
27 and alternative gravity flow service, while possible, is not practicable due to topographic
28 and intervening property ownership hindrances. The petition would not result in a
29 decrease of efficiency of storm water services to properties currently in the UGB. See
30 Exhibits 1 and 7.

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

1 vi. The Washington County Sheriff's Office commented that it
2 could provide economical and efficient services to the subject property, and that approval
3 of the petition would improve efficiency of service delivery in the UGB. See Exhibit 3C
4 to the petition, Exhibit 3.

5
6 vii. The Tualatin Hills Parks and Recreation District ("THPRD")
7 commented that it has sufficient capacity to serve the subject property if it is annexed into
8 the park district. See Exhibit 10. THPRD's comment letter indicated that including the
9 property within the UGB would result in an orderly and economic provision of park and
10 recreation services and will result in a net improvement in efficiency of its operations in
11 the area.

12
13 viii. Tri-Met did not comment on this petition.

14
15 ix. Northwest Natural Gas stated that it has adequate capacity
16 to serve the site and that including the property in the UGB would enhance its ability to
17 serve any new development beyond this project. See Exhibit 3-F of the petition.

18
19 2. Metro staff mailed notices of a hearing to consider the petition by certified
20 mail to the owners of property within 500 feet of the subject property, to the petitioners,
21 to Washington County, the Department of Land Conservation and Development
22 ("DLCD"), service providers, the local Citizen Planning Organization (CPO-7) and
23 persons, agencies and organizations who requested notice. See Exhibits 15, 19 and 28. A
24 notice of the hearing also was published in *The Oregonian* at least 10 days before the
25 hearing.

26
27 3. On May 24, 1999, Metro hearings officer Larry Epstein (the "hearings officer")
28 held a public hearing at the Washington County Public Services Building Auditorium to
29 consider the petition. All exhibits and records of testimony have been filed with the
30 Growth Management Division of Metro. The hearings officer announced at the
31 beginning of the hearing the rights of persons with an interest in the matter, including the
32 right to request that the hearings officer continue the hearing or hold open the public
33 record, the duty of those persons to testify and to raise all issues to preserve appeal rights,
34 the manner in which the hearing will be conducted, and the applicable approval
35 standards. The hearings officer disclaimed any *ex parte* contacts, bias or conflicts of
36 interest. Eleven witnesses testified in person.

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

6
7 i. He noted that the approval of the petition would result in a net
8 improvement in efficiency of sewer, water, park and police services, will have no impact
9 on fire and transportation services and will reduce efficiency of school services.

10
11 ii. He noted that approval of the petition will facilitate needed
12 development of the abutting property east of the site that is located within the existing
13 UGB (the Malinowski property).

14
15 iii. He corrected two minor errors in the Staff Report. The
16 THPRD letter referenced on page 6 of the Staff Report was dated September 25, 1998.
17 On page 7 the Staff Report should include storm water in the list of services with which
18 the subject property can be served in an orderly and economic fashion.

19
20 b. Eric Eisemann, Ryan O'Brien and Michael Jenkins appeared on behalf
21 of the petitioners, Michael Jenkins and Sang Kim.

22
23 i. Mr. Eisemann noted that the subject property was previously
24 included in the UGB. The property was removed in 1982 because neither the owner nor
25 Metro expected the surrounding property to develop with urban services in the near
26 future. Circumstances have changed since that time.

27
28 (1) He testified that there are no "similarly situated"
29 nearby properties based on the soils classifications on the site and the ability to provide
30 services to land within the existing UGB. He introduced a service provider "matrix"
31 summarizing the service provider statements submitted in response to the petition.
32 Exhibit 27. Petitioners also pointed to the fact that the subject property is the only
33 portion of the petitioner's property located within Washington County and that all
34 neighboring property to the south, east and west of the site are also within Washington
35 County. They noted that the proposed adjustment will remove the inconsistencies
36 between Multnomah County and Washington County codes. They pointed out that

1 County lines have consistently been used as UGB boundaries pointing to the history of
2 the UGB. The information submitted regarding CRAG findings in January 1979 indicate
3 that commonly accepted legal features such as city limits and property lines are
4 appropriate for delineating the UGB and that the UGB was intended to coincide with
5 existing administrative and political boundary as well as natural features and man made
6 buffers.

7
8 (2) He testified that this petition allows maximum
9 efficiency of land use by providing access around the Dogwood Park Area of Special
10 Concern (“ASC”), permitting properties to the east to develop at urban densities.

11
12 (3) He testified that “on-balance,” retention of this site as
13 agricultural land would make the provision of urban services to adjacent areas inside the
14 UGB impracticable. Although there are alternative means of providing services, they are
15 not practicable due to cost, environmental impacts, timing and lack of willing buyers and
16 sellers. He testified that urban services are “needed” to serve abutting properties based
17 on their urban designation in the County’s Comprehensive Plan. The current plans of the
18 property owners are not relevant.

19
20 (4) He testified that the site plan is only intended to show
21 that the property can be developed consistent with the County’s minimum density
22 standards. The petition responded to the Goal 5 issues based on the Goal 5 resources
23 identified in the Washington County inventory. The petitioners delineated the wetlands
24 on the site. Development on this site may impact wetlands to some extent but such
25 impacts are permitted subject to mitigation. The petitioners’ traffic study considered all
26 intersections identified as intersections of concern by Washington County. He testified
27 that the site can be developed around the natural gas pipeline.

28
29 (5) He testified that alleged comments by opponents
30 regarding the feasibility of alternative sewer extensions are not accurate, are not in the
31 record and therefore are not substantial evidence.

32
33 (6) He testified that the petition is consistent with the
34 Dogwood Park ASC and the Bethany Community Plan. Adding this site to the UGB will
35 allow development while minimizing impacts on the ASC.

1 ii. Mr. O'Brien argued that inclusion of this property in the UGB
2 is necessary to provide urban services to properties within the existing UGB. It is
3 unlikely that urban services will be provided to the abutting properties through alternative
4 means within a relevant time period. Therefore retention of the subject property as
5 agricultural land will make it impracticable to provide urban services to properties within
6 the existing UGB.

7
8 (1) He noted that, although the wetlands on the subject
9 property limit development, it is feasible to develop this site. Development on this
10 property will provide an opportunity for enhancement of the existing wetlands. State law
11 prohibits development on this site from causing flooding on adjacent properties.

12
13 (2) He argued that the land within the powerline right of
14 way south of the subject property is entirely wetlands. The Oregon Division of State
15 Lands ("DSL") and the Army Corps of Engineers (the "Corps") do not want sewers
16 located in wetlands. The electrical utilities do not want other public services located
17 within the right of way due to concerns about equipment near the powerlines. In
18 addition, the Greenwood Hills development was not required to extend sewer stubs to the
19 north and east boundaries of that site.

20
21 (3) Sewers could be extended in the low areas within
22 Dogwood Park, but that would require easements across several private properties. USA
23 prefers that sewers be located in public streets. Public services are unlikely to be
24 extended through Dogwood Park in the near future.

25
26 iii. Dr. Jenkins argued that development on this site will not
27 impact the farm operation on his property north of the site. He currently leases the
28 property for grass seed production, but different farmers have planted it with a variety of
29 crops during the 19 years he has owned the property. The owners of adjacent properties
30 have never complained about impacts from farm practices. He argued that the
31 Malinowskis are not aggressively farming their property east of the subject site. They use
32 it for limited grazing. They do not harvest hay. Most of their pastures are further north,
33 in Multnomah County and separated from the subject property by intervening properties
34 which are not zoned EFU but rather are the location of homes on parcels for which an
35 exception had been taken.

1 (1) He summarized the development potential in the area.

2 He argued that the areas southeast of the site will develop in the near future as sanitary
3 sewer service is extended. Development on the subject property will assist development
4 in the area by enhancing east-west circulation around the Dogwood Park ASC. He
5 argued that the Teufel letter (exhibit 20) demonstrates that, unless this petition is
6 approved, the Malinowski property will remain isolated for many years. Road and sewer
7 access through this site will be lost, because the abutting property south of the site (the
8 Bosa North subdivision) will be developed.

9
10 (2) He argued that development on this site will extend
11 sanitary sewers within public streets rather than in private easements, consistent with
12 USA's preferences. He testified that Don Scholander, the owner of the Greenwood Hill
13 subdivision, will not grant an easement to allow sanitary sewer extension to the
14 Malinowski property. He opined that sanitary sewers are unlikely to be extended through
15 the Dogwood Park ASC, because it would removal of numerous trees.

16
17 c. Chris Warren testified on behalf of Lexington Homes, the owner of the
18 Bosa North subdivision south of the site, in support of the petition. He testified the
19 petition needs to be approved to enhance cross circulation in the area. If this petition is
20 denied Lexington Homes will develop the proposed street stubs south of the subject
21 property as residential lots within one year.

22
23 d. Greg and Richard Malinowski, the owners of the property east of the
24 site, testified in opposition to the petition.

25
26 i. Greg Malinowski summarized his written testimony (Exhibit
27 21).

28
29 (1) He testified that they are farming their property. They
30 have no plans to develop it. Development on the subject property would threaten the
31 continued operation of their farm. He argued that the subject property should be retained
32 in agricultural use and as a natural wetland. He summarized their farm operations. He
33 testified that they are seeking to "trade" their property out of the UGB. Approval of this
34 petition could eliminate that option.

1 (2) He argued that the property north of the site (outlined
2 in blue on the aerial photo attached to exhibit 21) is similarly situated and owned by
3 petitioner Jenkins. If this petition is approved, petitioner Jenkins will argue that the
4 abutting property is too small to farm and therefore should also be included in the UGB.
5

6 (3) He argued that the majority of the subject site is
7 wetland based on Metro's "flood prone soils" maps. This site (and their property to the
8 east) is wet for three months of the year. He introduced photographs showing standing
9 water on the site, exhibits 25a and b. He expressed concern that development on this site
10 will increase flooding on their property east of the site. They cut hay on their property
11 and graze cattle during the summer and fall.
12

13 (4) He argued that approval of this petition is not required
14 to provide sanitary sewer service to their property. Equally efficient alternatives are
15 available. Sanitary sewers can be extended to their property within the powerline right of
16 way south of the site, within the existing UGB. The petitioners do not own the right of
17 way, and it is not part of the subject property. There are no trees or slopes that might
18 interfere with extension of sanitary sewer lines. Allen Lindell, the owner of the property
19 southeast of the site, is willing to grant an easement allowing extension of sanitary sewers
20 across his property. A sewer line in this location would also serve future redevelopment
21 of Mr. Lindell's property. Sewer lines in the Greenwood Hills development would be too
22 high to serve future development on lands east of Greenwood Hills.
23

24 (5) He testified that issues regarding public services and
25 access to their property were addressed when the subject property was removed from the
26 UGB in 1982. The subject property would not have been removed at that time if it would
27 have prevented extension of services to their property.
28

29 ii. Richard Malinowski argued that approval of this petition will
30 have an adverse impact on their active farm operations due to increasing conflicts with
31 urban uses. He testified that they frequently run their equipment in the early mornings
32 and late evenings during the summer. They have received complaints and threats from
33 neighbors regarding noise and dust under existing conditions. He expressed concern that
34 urban residents will use their fields for playgrounds; leaving debris which could damage
35 harvesting equipment, knocking down crops and opening gates allowing animals to
36 escape. In the past people have cut their fences in order to ride motorcycles and four-

1 wheel drive vehicles on their fields. These impacts will increase with increasing
2 development on abutting properties. Mr. Malinowski did not respond to the testimony
3 that he was not intensively farming the land adjacent to the subject property.
4

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

24 f. April Debolt argued that the wetlands on this site are an important
25 natural resource, and they form a natural boundary on this site. Red-legged frogs and
26 western pond turtles, listed as endangered or threatened species in Oregon, live in the
27 wetlands on the site. She opined that livestock grazing on the site, during the right time
28 of year, can enhance the complexity of the wetland ecosystem. She argued that
29 development on this site is inefficient. It is located several hundred feet from existing
30 urban development and it abuts existing agricultural uses. Access to this site through
31 Bosa North will impact the open space/wetlands areas preserved on that site. She argued
32 that the applicant ignored the existing 16-inch high-pressure natural gas line that crosses
33 this site. She argued that sewer lines could be extended within the open space on the
34 north edge of the Bosa North development without removing any trees.
35

1 g. Tom Hamann argued that the subject property should remain rural.
2 Development on this site will put pressure on other lands outside the UGB to convert to
3 urban uses.

4
5 h. Ted Nelson expressed concerns that development on this site could
6 impact his property to the north. His property is roughly 100 feet higher in elevation, and
7 it is very wet during the winter. Development on this site may block natural storm water
8 flows and cause increased flooding on his property.

9
10 i. George and Susan Teufel submitted written testimony in opposition to
11 the petition. Exhibit 20.

12
13 j. Mary Kyle McCurdy submitted written testimony in opposition to the
14 petition on behalf of 1000 Friends of Oregon. Exhibit 23.

15
16 k. The hearings officer held the record open for 1 week to allow the
17 petitioners an opportunity to submit a closing statement. The record in this case closed at
18 5:00 pm on June 1, 1999.

19
20 5. On July 1, 1999, the hearings officer filed with the Council a report,
21 recommendation, and draft final order denying the petition for the reasons provided
22 therein. Copies of the report and recommendation were timely mailed to parties of record
23 together with an explanation of rights to file exceptions thereto and notice of the Council
24 hearing to consider the matter.

25
26 6. On September 16, 1999 the Council held a duly noticed public hearing to
27 consider testimony and timely exceptions to the report and recommendation. After
28 considering the testimony and discussion, the Council voted to deny the petition for
29 Contested Case No. 98-7 (Jenkins/Kim). In a subsequent action later that day, the Council
30 voted to reconsider its decision and set a date for further deliberation. The parties were
31 notified of the reconsideration vote.

32
33 **II. APPLICABLE APPROVAL STANDARDS AND RESPONSIVE FINDINGS**

34
35 1. Metro Code section 3.01.035(b) and (c) contains approval criteria for all
36 locational adjustments. Metro Code section 3.01.035(f) contains additional approval

1 criteria for locational adjustments to add land to the UGB. The relevant criteria from
2 those sections are reprinted below in italic font. Following each criterion are findings
3 explaining how the petition does or does not comply with that criterion.
4

5 The relevant goals, rules and statutes are implemented by the procedures in
6 Chapter 3.01. Metro Code section 3.01.005.
7

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

11 Metro Code section 3.01.035(b)
12

13 2. No locational adjustments or administrative adjustments have been
14 approved in 1999. Therefore not more than 100 acres has been added to the UGB
15 this year. The petition in this case proposes to add 18.85 acres to the UGB, which
16 is less than 20 acres. Therefore, as proposed, the petition complies with Metro
17 Code section 3.01.035(b).
18

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

25 Metro Code section 3.01.035(c)(1)
26

27 3. The Council finds that the subject property can be served in an orderly and
28 economic manner by the public facilities and services specified in this Code section,
29 including water, sewerage, storm drainage, transportation, parks, transit and emergency
30 services, based on the comments in the record from the service providers.
31

32 a. Service agency letters and expert testimony establish that urban
33 services can be efficiently provided to the property. The expert opinion of Metro staff
34 supports this testimony. This aspect of the case is not the major focus of the debate
35 between the parties.

1 b. USA testified that it was against agency policy to allow pump stations
2 to serve the neighboring UGB property. Without the pump station petitioner's land is the
3 most efficient way to serve the neighboring property within the UGB due to
4 topographical and ownership constraints hindering alternative access to gravity sewer
5 services. The developer would be required to pay for any necessary upgrades to the
6 capacity of collection system and treatment facilities. Therefore the Council finds that
7 adequate sewer capacity can be provided to serve this property.

8
9 c. The Beaverton School District testified that it would address school
10 capacity issues through the Comprehensive Plan Amendment process after the locational
11 adjustment is made. The evidence indicates there are presently existing or planned
12 schools for elementary and middle school aged children in the immediate vicinity of the
13 subject property.

14
15 i. Schools are not expressly included in the list of services in this
16 criteria. While the Council finds that school capacity is a matter to be considered in
17 general in evaluating whether this Code provision has been met, actual individual
18 building capacity figures are premature for consideration due the fact that capacity figures
19 are variables solely within the control of independent special districts and their varying
20 policies on class size. We do not interpret the standard to require immediate availability
21 of classroom space. Instead, we consider whether the land is within a school district with
22 proven ability to provide service in an orderly and sufficient manner. This is the case in
23 this application.

24
25 Building capacity variables are not in the control of the applicant
26 or Metro and will be addressed upon actual subdivision application. Furthermore, failure
27 of the school district to take a definitive position on the application should not be
28 construed as a negative response to a locational adjustment proposal. We find that the
29 property can be provided with school services in an orderly and efficient manner based on
30 the proximity of existing and planned schools in the immediate vicinity.

31
32 4. The major dispute among the parties deals with whether the adjustment will
33 result in a net improvement in the efficiency of public facilities and services. Metro
34 rules do not define how to calculate net efficiency of urban services. In the absence of
35 such rules, the Council must construe the words in practice. It does so consistent with the
36 manner in which it has construed those words in past locational adjustments. The record

1 supports the conclusion of Metro staff that approval of the petition would result in a net
2 improvement in efficiency of sewer, water, park and police services, will have no impact
3 on fire and transportation services and will reduce efficiency of school services. On
4 balance, we find this results in a net improvement in efficiency of public facilities and
5 services. The Council concludes that the locational adjustment proposed in this case
6 results in a net improvement in the efficiency of services sufficient to comply with Metro
7 Code section 3.01.035(c)(1):

8
9 a. Including the subject property in the UGB increases the net efficiency
10 of sewer service, because it enables the petitioners to serve properties east of the subject
11 property (the Malinowski properties) with a gravity flow sewer line. Unified Sewerage
12 Agency (USA) rules prohibit use of a pump station to serve land in the UGB if the sewer
13 is within 5000 feet, which it is in this case.

14
15 i. Alternative routes for gravity flow sewer service are not
16 practicable or available. It was alleged that sewers could be extended to the Malinowski
17 properties through the powerline right of way south of the subject property within the
18 existing UGB. However sewer lines do not extend to the powerline right of way now.
19 Sewer lines serving the Greenwood Hill subdivision were stubbed in NW Greenwood
20 Drive south of the site. Gravity sewers could be extended to the Malinowski properties
21 from this stub ("Option 2" identified by the applicant in Attachment C of the Staff
22 Report, Exhibit 18). However there is no legal right for a sewer to cross all intervening
23 properties at this time, and topography between Greenwood Drive and the western
24 portion of the Malinowski property may impede gravity flow service to that area even if a
25 line is extended from Greenwood Drive. Therefore the gravity flow line from Greenwood
26 Drive, while possible is not sufficiently timely or certain to be practicable and available.

27
28 b. The Council finds that including the subject property in the UGB
29 increases the net efficiency of park and open space services and facilities. The April 12,
30 1999 letter from the THPRD states that approval of this petition results in increased
31 efficiency of park and open space services.

32
33 i. Certain wetland areas of the site are proposed to be set aside for
34 preservation. Approval of the petition would increase the amount of open space within
35 the Park District because the wetland areas of the subject property would be available for
36 dedication to the THPRD when the subject property is developed. The area proposed to

1 be dedicated is adjacent to the existing open space within the Kaiser Woods subdivision
2 to the west.² Therefore approval of this petition will expand the amount of contiguous
3 open space area in the Park District. Increasing the area of open space increases the
4 efficiency of open space services for purposes of this section.

5
6 ii. Existing zoning of the subject property is so constrained that it
7 is reasonably likely to remain undeveloped if it is not included within the UGB. Including
8 the subject property in the UGB is likely to reduce the undeveloped area of the site. But,
9 under MC 3.01.035(c)(1), the only parks and open spaces that are relevant are “public”
10 parks and open spaces, i.e., land owned or used by the public for park or open space
11 purposes. Therefore the loss of undeveloped land as a result of the locational adjustment
12 petition is not relevant.

13
14 c. Council finds that including the subject property in the UGB increases
15 the net efficiency of transportation services for land already in the UGB. This contributes
16 to our finding that petitioner has sustained its burden of proof that a net improvement in
17 service efficiency will result from approval. The Council finds that including the subject
18 property in the UGB has a net increase in transportation efficiency.

19
20 i. The Council finds that development on the subject property
21 would create an opportunity for additional cross-circulation in the area by extending a
22 stub street that could serve the Malinowski properties within the UGB.

23
24 ii. The Council further finds that east-west cross-circulation may
25 be provided through the Dogwood Park ASC by the extension of NW Greenwood Drive
26 at some future date. However, the Bethany Community Plan requires future expansion of
27 essential urban services into the Dogwood Park ACS must protect the unique character of
28 Dogwood Park. Consequently, NW Greenwood Drive is currently barricaded to prevent
29 the creation of additional adverse traffic impacts in the Dogwood Park ASC.

30
31 iii. The evidence includes materials from the Washington County
32 Department of Land Use and Transportation staff that finds that the petitioner's proposed
33 connection to the Malinowski property is appropriate and consistent with the purposes to
34 be achieved by the concept of connectivity. Ultimately, whether including the subject

² 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 property in the UGB will result in increased transportation efficiency depends on whether
2 the Malinowski property is developed before the barriers, both physical and political are
3 removed to allow Greenwood Drive to extended to the east. There is no certainty when
4 the adjoining land in the UGB will develop or when the barriers in Greenwood Drive will
5 be removed. On balance, Council finds that providing additional potential for access and
6 cross-circulation in the area is sufficient to show that including the subject site in the
7 UGB results in a net improvement in transportation services to land already in the UGB.

8
9 d. The Council concludes that the petitioners demonstrated that approval
10 of this petition will increase efficiency of emergency services. As discussed above,
11 approval of this petition will enhance east-west circulation opportunities in the area. Such
12 enhancement would benefit emergency service access to land already in the UGB.

13
14 e. The petition submittal does not include comments from Tri-Met
15 however the Council takes notice that Tri-Met provides services in the general area, as
16 stated in the petition. In the long run, the enhancement of east-west circulation
17 opportunities will benefit public transit.

18
19 f. The Council concludes that the petitioners proved that this locational
20 adjustment will result in a net improvement in the efficiency of water services in the
21 adjoining area already in the UGB. TVWD testified that this locational adjustment would
22 allow the creation of a looped water-system through the site and provide for future
23 extension to properties to the east within the existing UGB.

24
25 g. Including the subject property in the UGB will increase the net
26 efficiency of surface water management/storm drainage, natural gas, electricity and fire
27 protection for land already in the UGB by providing improved access for those services to
28 that UGB land and incrementally spreading cost of providing such services over a larger
29 population base thus making them more economical to residents of land already in the
30 UGB.

31
32 h. Our factual conclusions demonstrate that there will be an improvement
33 in efficiency of the provision of most urban facilities and services if this land is included
34 in the UGB. Under these circumstances, Council finds that including the subject property
35 in the UGB results in a net increase in the efficiency of providing public facilities and

1 services available to land within the UGB. Council concludes the petitioners sustained
2 their burden of proof that the petition complies with Metro section 3.01.035(c)(1).

3
4 *Maximum efficiency of land uses. The amendment shall facilitate needed*
5 *development on adjacent existing urban land. Needed development, for*
6 *the purposes of this section, shall mean consistent with the local*
7 *comprehensive plan and/or applicable regional plans.*
8 Metro Code section 3.01.035(c)(2)

9
10 5. Including the subject property in the UGB facilitates needed development on
11 adjacent existing urban land, (i.e., the Malinowski properties), because it makes it
12 possible to serve that property with a gravity flow sewer and in accord with adopted USA
13 policy. This adjacent land is inside the current UGB and is needed for residential
14 development as indicated in the Washington County Comprehensive Plan.

15
16 a. The Malinowskis' stated lack of desire to develop their property is
17 irrelevant to this criteria. We interpret the criteria to require our analysis to be based
18 upon the adopted plan, not on the preference of the current owners. The Malinowski
19 properties are designated for urban residential development in the Washington County
20 Comprehensive Plan. Sewer service must be provided to the Malinowski properties if
21 they are to be developed consistent with the comprehensive plan. Therefore the Council
22 finds that including the subject property in the UGB facilitates needed development on
23 adjacent existing urban land.

24
25 b. The Council acknowledges that it is not absolutely necessary to include
26 the subject property in the UGB to provide sewer services. The Malinowski properties
27 could theoretically be served by extending a sewer line from the southwest, from the
28 existing stub in Greenwood Drive or from the south up 137th Avenue. Expert testimony
29 established that this is not a realistic solution. Based on the topography in the area and
30 the statement from USA, such alternative routes for sewer lines would require extensive
31 topographical adjustments and the consent of intervening property owners. There is no
32 legal right for a sewer to cross all intervening properties at this time. The evidence also
33 indicates that existing residential development and vegetation, including trees, would be
34 disturbed thus making such alternatives impracticable and uncertain.

1 c. Given the importance of the efficiency of service delivery in section
2 3.01.035(c)(1), the Council finds that the availability of a less efficient means of sewer
3 service does not preclude and is not inconsistent with a finding that the locational
4 adjustment in this case facilitates development on the Malinowski properties by enabling
5 it to be served with a more efficient sewer system in a more certain and timely manner.
6 This is consistent with and similar to the Council's action in the matter of UGB Case 88-
7 04 (Bean) and UGB Case 94-01 (Starr/Richards).

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

13
14 6. Council finds including the subject property in the UGB would not have
15 any impact on regional transit corridor development, because the nearest regional corridor
16 is more than one-quarter mile from the site. Council further finds that the subject
17 property is not subject to hazards identified by Washington County.

18
19 The petitioner asserts, and we agree, that an ESEE analysis is not required under
20 our ordinance, however, the petition contains an ESEE analysis which would suffice if it
21 were required.

22
23 The facts of the record establish that the application petition includes a
24 professional delineation of on-site wetlands. The presence of wetlands can be addressed
25 through compliance with state laws. Although development on this site is likely to
26 impact these wetlands, such impacts are not prohibited so long as adequate mitigation is
27 provided. This has been shown to be feasible. The petition contains an analysis of the
28 feasibility of development given the wetland constraints. The analysis concludes that it is
29 possible, with the implementation of approved mitigation measures, to protect the
30 wetland and riparian areas to the extent required under current Washington County
31 regulations or Metro's Title III requirements.

32
33 *Retention of agricultural land. When a petitioners includes land with*
34 *Agricultural Class I-IV soils designated in the applicable comprehensive*
35 *plan for farm or forest use, the petition shall not be approved unless it is*
36 *factually demonstrated that:*

1
2 (A) *Retention of any agricultural land would preclude*
3 *urbanization of an adjacent area already inside the UGB, or*

4
5 (B) *Retention of the agricultural land would make the provision of*
6 *urban services to an adjacent area inside the UGB impracticable.*
7 Metro Code section 3.03.035(c)(4)

8
9 7. The subject property contains Class III and IV soils, and it is designated
10 and zoned EFU. Therefore Council finds this criterion does apply. We conclude that the
11 applicant demonstrated that both tests are met, even though only one is required.

12
13 a. The Council finds that retaining the subject property as agricultural
14 land will preclude urbanization of adjacent lands. Specifically, sewer will not be
15 available to the Malinowski land if the property is retained as agricultural. Public gravity
16 flow sewer services and facilities cannot be provided practicably to the Malinowski
17 properties through lands within the existing UGB. The USA, a special district whose
18 policies must be accommodated per Metro's statutory mandates, will not allow other than
19 gravity flow sewerage to the Malinowski property.

20
21 b. The Council further finds that retaining the subject property as
22 agricultural land will make the provision of urban services to adjacent properties inside
23 the UGB impracticable. Sewer service cannot be provided to the Malinowski properties
24 by means of a pump station or other practicable alternative.

25
26 ***Compatibility of proposed urban uses with nearby agricultural activities.***
27 *When a proposed adjustment would allow an urban use in proximity to*
28 *existing agricultural activities, the justification in terms of this subsection*
29 *must clearly outweigh the adverse impact of any incompatibility. Metro*
30 Code section 3.01.035(c)(5)

31
32 8. Petitioners have argued that this provision is ambiguous in that it does not
33 distinguish between agricultural uses taking place on land within the UGB that are in
34 proximity to the subject property from agricultural uses taking place on land outside the
35 UGB which are also in proximity to the subject property. Petitioners point out that it is
36 presumed that all areas within UGB's are by definition "Urban Areas", citing to

1 definitions made by CRAG and Metro under the Land Use Framework Element of the
2 Crag Regional Plan dated November 1978, with revisions dated December 1977. The
3 Council agrees with petitioners that ambiguity exists in that it would be inconsistent with
4 the concepts of agricultural uses and urban zoning to allow agricultural uses within the
5 UGB to dictate whether other lands should be included within the UGB. Therefore, the
6 Council will address its findings to agricultural uses within the UGB separately from
7 findings regarding agricultural uses taking place outside the UGB.

8
9 The Council finds that in interpreting and applying Metro Code section
10 3.01.035(c)(5) agricultural activities on property which is within the existing
11 UGB are irrelevant in application of this criterion because the locational
12 adjustment rules assume urban development of all land within the UGB, and that
13 protection of agricultural uses on land already within the UGB should not be the
14 basis upon which to measure impacts of proposed urban development on the
15 subject property. Metro interprets the phrase "existing agricultural activities" to
16 mean agricultural activities occurring outside of the UGB. Even if the rule
17 requires consideration of agricultural lands within the UGB and adjacent to the
18 site, in this case the Council finds that the Malinowski activity on adjacent land in
19 the UGB is of sufficiently low incidence that the locational adjustment would not
20 significantly impact those limited agricultural activities.

21
22 With regard to the agricultural uses on land within proximity of the subject
23 property but outside the UGB the Council finds the subject property is surrounded
24 on three sides by land within the UGB. The only area in proximity of petitioner's
25 property that is in agricultural use is directly to the North. That land has been
26 discussed elsewhere when applying the similarly situated test and is owned by
27 petitioners. Adjacent to the Northeast of the subject property is land for which an
28 exception has apparently been taken because it is zoned other than EFU. Those
29 adjacent parcels contain housing and rural residential development. They separate
30 EFU land further to the Northeast from the petitioners land and there is no
31 evidence that agricultural activities are taking place on them. The evidence
32 introduced by the opponents primarily relates to the Malinowski property that is
33 adjacent to and in proximity to the petitioners and within the UGB. The
34 Malinowski property outside the UGB is separated from petitioners by the
35 aforementioned non-EFU parcels.
36

1 The Council finds that the proposed adjustment will not be incompatible with
2 ongoing agricultural activities on the Malinowski properties or other properties located
3 outside the UGB. Service efficiencies such as water looping and sanitary sewer
4 extension achieved by including subject property in the UGB) clearly outweigh any
5 adverse impacts of its urban development on existing agricultural activities.
6

7 a. The Malinowskis' agricultural activities outside of the UGB are
8 separated from the subject site by a sufficient distance that potential adverse impacts of
9 urban development on the subject site will dissipate to insignificant levels before
10 reaching the agricultural activities and vice versa.
11

12 b. The Malinowski property outside the UGB is largely buffered from
13 urban development under existing conditions. The powerline right of way along the
14 south boundary of their property provides a buffer between their property and abutting
15 urban lands. Properties to the immediate northeast of the subject property are designated
16 for rural development in the Multnomah County Comprehensive Plan.
17

18 c. Even if we consider existing agricultural activities within the UGB, our
19 conclusion would be unchanged. There is sufficient testimony in the record to
20 demonstrate that the Malinowski's grazing of land within the UGB is intermittent and not
21 intensive, and that the lack of complaints from other urban landowners regarding these
22 activities demonstrates that the Malinowski agricultural use of land inside the UGB is not
23 incompatible with urban lands.
24

25 ***Superiority.*** [T]he proposed UGB must be superior to the UGB as
26 presently located based on a consideration of the factors in subsection (c)
27 of this section. Metro Code section 3.01.035(f)(2)
28

29 9. Based on the evidence in the record and our previous findings, Council finds
30 that the proposed UGB is superior to the existing UGB, because:
31

32 a. There is evidence that public services can be provided to the subject
33 property in an orderly and economic fashion;
34

1 b. The proposed UGB would result in a net increase in service and land
2 use efficiencies for the public commensurate with the size and nature of the locational
3 adjustment;

4
5 c. Retention of the subject property as agricultural land would preclude
6 urbanization of adjacent land already inside the UGB or make the provision of urban
7 services on that adjacent urban land impracticable;

8
9 d. The benefits of including the subject property in the UGB clearly
10 outweigh impacts on existing agricultural uses; and

11
12 e. It includes all similarly situated land.

13
14 *Similarly situated land. The proposed UGB amendment must include all*
15 *similarly situated contiguous land which could also be appropriately*
16 *included within the UGB as an addition based on the factors above.*

17 Metro Code section 3.01.035(f)(3)

18
19 10. Council finds the evidence in the record shows sufficient difference between
20 the subject site and the adjoining land to the north to conclude that such lands are not
21 similarly situated.

22
23 a. Based on aerial photographs of the subject property and surrounding
24 areas, soils reports and testimony of witnesses, the southern portion of the abutting
25 property is not being actively farmed because its surfaces have been rendered
26 unproductive due to placement of extensive subsoil spoils on the surface. TVWD built a
27 water reservoir on land adjacent to the subject site to the north. The record shows in the
28 testimony of TVWD, Eric Eisemann, Ryan O'Brien and findings of the Oregon Tax
29 Court in case #91-1610 that this land has been rendered unproductive. Moderate slopes
30 exist on the adjoining property, not on the subject property. The Tax Court found that the
31 spoils were used to recontour the acreage near the reservoir leaving a depth of up to 15-20
32 feet of unsuitable soil. Even though petitioner Jenkins unsuccessfully attempted to rectify
33 the problem by bringing in new topsoil, the soils are not similar. The subject property
34 contains class III and IV soils while the property to the north to be retained as EFU zoned
35 in the Multnomah County contains, or will contain when reclaimed, class I and II soils.

1 b. The subject property is not similar because it contains extensive
2 wetlands on the southern portion
3

4 c. An existing urban use, i.e. a water district reservoir that serves urban
5 development differentiates the adjoining land to the north from the subject property. The
6 reservoir itself and its excavation spoils impact much of this adjoining land. The subsoil
7 spoils consisting of clay soils and rocky shale from the excavation for the reservoir are
8 spread over several acres. Testimony of Mr. Schaff indicates that farming on this land
9 was abandoned because of its poor productivity since the reservoir was constructed. The
10 Council finds that the total impact of this man-made physical feature affects the adjoining
11 land to the north sufficiently to make it dissimilar.
12

13 d. Adjoining land to the north is not similar because that land is not
14 necessary to extend urban services to the adjoining land already in the UGB (i.e., the
15 Malinowski property).
16

17 e. The adjoining land to the north is not similar because that land is in a
18 different county and is subject to different code provisions. In addition, the present UGB
19 does not surround the land to the north on three sides.
20

21 We interpret the term "similarly situated" to include consideration of
22 governmental jurisdictional boundaries. We make this interpretation in order to be
23 consistent with the considerations in the findings by CRAG supporting the original UGB.
24 The record contains references to those findings and they establish that jurisdictional
25 boundaries were used to distinguish lands for purposes of inclusion or exclusion from the
26 UGB. This factor is therefore an important consideration in weighing whether lands are
27 similarly situated for purposes of UGB adjustments.
28

29 f. Other nearby lands do not have a history of inclusion within the UGB
30 as does this land. This is another indication that they are not similarly situated.
31

32 g. Therefore the Council concludes the petition does include all similarly
33 situated land.

III. CONCLUSIONS

1
2
3 Based on the foregoing findings, the Council adopts the following conclusions.
4

5 1. Public services and facilities, including water, sanitary sewer, storm drainage,
6 transportation, and police and fire protection, can be provided to the subject property in
7 an orderly and economical fashion.
8

9 2. School services exist or are planned for areas adjacent to the subject property.
10

11 3. On balance, Council concludes the petition complies with MC section
12 3.01.035(c)(1), because the petitioners carried the burden of proof that including all of the
13 subject site in the UGB will result in a net improvement in the efficiency of public
14 services and facilities.
15

16 4. The petitioners showed that the proposed addition will facilitate needed
17 development on adjacent existing urban land. Therefore Council concludes the petition
18 does comply with MC section 3.01.035(c)(2).
19

20 5. The petitioners showed that including the subject property in the UGB will not
21 affect regional transit corridor development and that limitations imposed by the presence
22 of wetlands and a natural gas transmission pipeline can be addressed. Therefore Council
23 concludes the petition does comply with MC section 3.01.035(c)(3).
24

25 6. The petitioners carried the burden of proof that retention of the subject
26 property as agricultural land would preclude urbanization of an adjacent area already
27 inside the UGB and will make the provision of urban services to an adjacent area inside
28 the UGB impracticable. Thus the petition complies with MC section 3.03.035(c)(4).
29

30 7. The petitioners carried the burden of proof that efficiencies created by
31 including the subject property in the UGB clearly outweigh the adverse impact of any
32 incompatibility with existing agricultural activities. Thus the petition complies with MC
33 section 3.01.035(c)(5).
34

35 8. The petitioners have shown that the proposed addition will result in a superior
36 UGB. Thus the petition complies with MC section 3.01.035(f)(2)

1
2
3
4
5
6
7
8
9
10
11

9. The petition includes all similarly situated contiguous land outside the UGB.

IV. DECISION

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

DATED: _____