

MINUTES OF THE METRO COUNCIL MEETING

May 9, 1996

Council Chamber

Councilors Present: Jon Kvistad (Presiding Officer), Susan McLain (Deputy Presiding Officer), Patricia McCaig, Ruth McFarland, Don Morissette, Rod Monroe, Ed Washington

Councilors Absent: None

Presiding Officer Jon Kvistad called the meeting to order at 2:10 p.m.

1. INTRODUCTIONS

Presiding Officer Jon Kvistad noted the presence of Commissioner Ed Lindquist of Clackamas County.

2. CITIZEN COMMUNICATIONS

None.

3. EXECUTIVE OFFICER COMMUNICATIONS

None.

4. CONSENT AGENDA

4.1 Consideration of the Minutes for the May 2, 1996 Metro Council Meeting.

Councilor Ed Washington made a motion for the acceptance of the Minutes of the May 2, 1996 Metro Council Meeting. Deputy Presiding Officer Susan McLain seconded the motion.

Vote: The vote was 7/0 in favor of accepting the minutes for the May 2, 1996 Metro Council Meeting. Presiding Officer Jon Kvistad declared the minutes accepted on a unanimous vote.

5. MEMORIAL

Presiding Officer Jon Kvistad noted the death of Bill Naito (1925-1996). The Presiding Officer asked that all those in the Council Chamber stand and observe a moment of silence in remembrance of Mr. Naito.

6. ORDINANCES - SECOND READING

6.1 **Ordinance No. 96-642A**, For the Purpose of Establishing a Temporary Decrease in the Rate of the Metro Excise Tax.

Motion: Councilor Rod Monroe moved for approval of Ordinance No. 96-642A.

Second: Councilor Washington seconded the motion.

Discussion: Councilor Monroe noted that Ordinance No. 96-642A changes the language in the Code so that Metro Council may lower the rate of the Excise Tax.

Public Hearing: No members of the public wished to testify.

Vote: The vote was 7/0 Aye. Presiding Officer Jon Kvistad declared the ordinance passed unanimously.

7. RESOLUTIONS

7.1 **Resolution No. 96-2317**, To Waive the Metro Urban Growth Boundary Annual Petition Filing Deadline for Clackamas County for the Proposed Major Amendment at 147th Avenue and Sunnyside Road.

Motion: Councilor Morissette moved for approval of Resolution No. 96-2317.

Second: Councilor McLain seconded the motion.

Discussion: Councilor Morissette stated that this is a situation where, at some point in the future, an adjustment can be made in the boundary to enable the provision of for much-needed improvement to 147th Avenue.

Public Hearing: Commissioner Ed Lindquist of Clackamas County addressed the motion and stated his support of Resolution No. 96-2317. He asserted that, if this is added, the transit center will be made the center of the community.

Vote: The vote was 7/0 Aye. Presiding Officer Jon Kvistad declared the resolution passed unanimously.

7.2 **Resolution No. 96-2318**, To Waive the Metro Urban Growth Boundary Annual Petition Filing Deadline for the City of West Linn on Behalf of the West Linn-Wilsonville School District for a Locational Adjustment.

Motion: Deputy Presiding Officer Susan McLain moved for approval of Resolution No. 96-2318.

Second: Councilor Morissette seconded the motion.

Discussion: Deputy Presiding Officer Susan McLain stated that the West Linn-Wilsonville School District prepared a local adjustment petition of 19.9 acres near Rosemont and Day Roads in Clackamas County. The petition was submitted before the filing deadline and made the date of March 15, 1996. It was, however, lacking the formal written statement expressing a position by the governing body which, in this case, would be Clackamas County. This resolution would allow an extension so that the missing requirement might be fulfilled.

Public Hearing: "John Gibbon, Attorney at Law. I represent that landowners in this case, Mr. Kent Seida and his sister, Ms. Burnette. Mr. Seida is with me today and also has some testimony. My address, for the record, is 13425 SW 72nd Avenue, Tigard OR 97223."

Kent Seida, 17510 SE Forest Hill Drive, Clackamas OR 97015 testified: "I am currently the owner of a 100-year-old farm in West Linn, Oregon. The address there is 21895 S Day Road. It is a fourth-generation farm and we currently have it as an active cattle farm and hay operation. I feel that you should not support this issue. We would like to give you just a little bit of history as to what my family has done for schools in this area and for the community generally. My grandfather designed, furnished the lumber and built Tualatin High School in 1900. My other grandfather donated land to the West Linn School District that now is currently the site of the West Linn School Administration offices. It was the Stafford Grade School. My family are pioneers, having established an early mill here. The early teachers were housed in my grandparent's house. My mother's graduating class was the first graduating class at West Linn High School. I myself have been on the agricultural advisory board at Sam Barlowe High School for nearly twenty years. We have done innumerable things such as transporting school teams and so on to support the community and the school. From the very site that my grandfather donated to help the West Linn School District and all the schools in the area is where they are making the decisions to come out and condemn the last of my grandfather's farm outside the Urban Growth Boundary and it is a terrible site. There are lots of reasons that I don't need to belabor you with as to why they are doing this to help developers infrastructure for the city and so on. An issue that I want to confine myself to is that I don't think that they should be given any special favors. I understand that West Linn needs a school. They passed a bond in 1992. It is now 1996. They currently own two sites inside the Urban Growth Boundary which would be very adequate for the school but for reasons they have not chosen to go that way. They prefer to come out and take our property, hoping that they can steal by suing us for ten cents on the dollar in condemnation and jury averaging to get it cheap and force it outside the Urban Growth Boundary to get cheap land at our expense. It is my understanding that Metro 2040 people, basically, your primary objective and goal is to preserve and protect farm and urban lands against encroachment such as this. I understand that the we are part of the consideration to expand the Urban Growth Boundary. There is a 160-acre request coming in there and I support that wholeheartedly. The thing that I disagree with is that I think that you should bring in our entire 60-acre parcel rather than taking a line across the middle of it. Also, in that particular thing, there are 13 pieces of property in that 160 acres of where you are crossing the boundaries rather than following property lines and I think that that just sets it up for a whole lot of problems in litigation about 'Gee, Am I two foot over what maybe was intended on the map and so on' and I would urge you to bring in all of those properties at their boundary lines that are contiguous there, just for the sake of making life easier for everybody. In our subject case, at this particular time, we are outside the Urban Growth Boundary and it is contrary to what your principle should be, to allow schools to come out there when we were told that they looked at 18 different sites. They own two inside the Urban Growth Boundary and have several others far superior to ours. But, as I say, for reasons of developing and so on is why they are there. I don't think that you should also go along with this, give them an unfair advantage me in this condemnation case. Rather than try to deal with us on a fair and honorable basis, they have tried these shenanigans to try to go behind our backs and steal our property. They went to Clackamas County asking the commissioners to change their codes to make it possible that a public condemner, in possession, could assume the rights of ownership whereby they could then go ahead and make it really the most liberal county in the state and take away owner's rights so that any water district, fire district, sewer district whatever could go ahead and say we are going to change the zoning and you might be zoned for apartment houses and they would say we will zone it for parks and pay accordingly. Thank goodness the Clackamas County Commissioners unanimously saw through this sham and resoundingly turned it down. Commissioner Lindquist made a comment in the minutes that I think stands up, 'Don't ask us to Solomon - go out and buy the land if you need to buy it - you have what appears to be a willing seller and if you need the land, go out and deal with him. Don't come down here and ask us to be Solomon.' That is what I am asking you folks not to give an unfair advantage to these people by letting them squeak in under the last minute so that they can lay back and they press for an early trial and condemnation in an effort to steal our property ahead of when you are to make your

decisions because they can get it cheaper. The other thing that is upsetting to me is that you have indicated, in your 160-acre line that you intend to bring approximately half of our property - 30 acres - they have indicated that they only want twenty acres and, in fact, tried to hurt us further by telling you and testifying in their application that you should not consider the additional part of our property because it is unworthy to come in which is the same acres as their acres only we are higher and can drain through the drainage. So this thing is totally self-serving for their own interests and they are asking you to cuddle up to them and hurt me and I think that is just totally inappropriate on their part to do such a thing and for you to go along with this, I don't think is the fair deal based on your facts of your primary purpose is to preserve and protect people like us and to keep the rural lands intact. If you decide that this should come in properly, like any other place in your 2040 plan, I think you should do it. This is an absolutely terrible site for a school. I don't think that it is good for residential and so on. Pardon me for being emotional. I have to tell you we have been there for four generations. The house that they just say they want to squash is where my grandfather died, my mother has died. Everybody is talking about all this and wanting to steal it and the only people agonizing over it are my family who has been there 100 years and so if you will give me a little slack for that, of saying things that I wished I wouldn't have said and when I am done, I am sure that I will wish I'd said more but I ask - only thing you are doing here is if you go along with this, is purely aiding them and trying to hurt us and I don't think that is what you should be here about. Thank you so much."

John Gibbon, Attorney at Law testified: "I represent that landowners in this case, Mr. Kent Seida and his sister, Ms. Burnette. My address, for the record, is 13425 SW 72nd Avenue, Tigard OR 97223. "I hope will bear with me because this is litigation and because there is a land use case involved. I have given you a written statement. I will have to stick fairly close to it in making my presentation today to make sure I get things on the record. They just get more complicated than they should be sometimes but that's the way it works. As I say in my statement, I'm an attorney and I represent Kent Seida and Joyce Burnette who own the property that is the subject of this request. This application for a waiver of the filing deadline is being made to prevent their property to be taken through condemnation by the West Linn-Wilsonville School District. Granting this waiver would be a bad decision for Metro for two reasons. I first say in my testimony that it is really a bad approach for purposes of comprehensive planning. Why we are there is basically because the West Linn - Wilsonville School District couldn't get a site approved inside the City of West Linn on which to build a school. They didn't come to Mr. Seida's property until they had been turned down by the city on a site in the Willamette Neighborhood and basically, this is a situation problem. These are the kinds of schools that are going to have to be sited if we hold the Urban Growth Boundary where it is, inside. There is going to be infill activity and this is an attempt to avoid the problems that they have to deal with infill. I don't want to go too far into this - so if you support keeping the Urban Growth Boundary where it is, you must ask yourselves are you going to give a school district and a city a pass on making the tough decisions that are going to be necessary if you hold the Urban Growth Boundary line. If you support a reasonable expansion of the Urban Growth Boundary line, I guess that I would say to you that there is the same fundamental flaws with this site. The systems aren't there, this is a situation where when they've got a problem they go up and they try to find the path of least resistance. Over the years, when I have represented a developer and I have represented several of the years, if we could have done that, then every time we ran into a problem on getting a site improved in the City of Beaverton or wherever else, I could have gone out into Washington County and found a site and said, 'Well, let's move it inside the Urban Growth Boundary and we will solve all our problems.' I think you know where we'd be. That hasn't happened and all of a sudden they are asking you to do this. It is not a good situation. It is not good policy from either side. We're not systematically expanding the Urban Growth Boundary and we are not dealing with the in fill. So for policy reasons, I'd urge you to go against it. Now, the other side of this issue. This is the important part of it and again, I ask you to bear with me. We have to take the position that this is a quasi-judicial act on your part, even today and we would say that we respectfully request the disclosures

that come with a quasi-judicial decision, if you make it today. I know you have to rely on your counsel's advice on that. I make that statement first. Second of all, the reason that we're doing this is because this matter, the application of a city to bring this before you is now a LUBA case. The fact of the matter is the application was submitted on March 15, 1996 to you and it wasn't until March 25th that the City of West Linn, without notice to my client, decided to support this application. So there is a LUBA appeal going on and we want to make you aware of that and, quite frankly, I told LUBA that your decision could be despositive of this issue and I would hope that it would be because if you don't give them the waiver, then this thing goes away and everybody's docket gets a lot simpler. The last point I want to make is that this decision to grant this waiver could really be fundamentally unfair to the Seidas in the condemnation suit. There are two reasons for that. Oregon law now requires condemning agencies to have some ability to acquire the land use approvals that they need to fulfill their public purpose. We've got a defense filed in our answer to the condemnation suit that right now Clackamas County doesn't allow the School District to apply for this property in this way. This waiver is being requested so that they at least have an argument that they can get the approval somehow, some way. That shifts the rules of the game. It is not going to be despositive on this but it is shifting the rules of the game after they started. The second reason that it is fundamentally unfair is that there is a concept in condemnation suits that talks about severance damages. I really fear that if you put this property in a special category, that it is hanging out there for a waiver and in this case, it is tried before you make the decisions about the Urban Reserve Study Areas and those kinds of things, that both for legal reasons and for reasons of addressing a jury, it is going to be complicated and a jury is going to think that that property that is subject to this waiver that they can get inside the Urban Growth Boundary more quickly is more valuable for some reason and they are going to discount the value of the rest of Mr. Seida's property and cost him money when we make our claims on severance damages. I think those are all good reasons why you can exercise your discretion in this matter and say no to this waiver. I thank you for your time."

Presiding Officer Jon Kvistad asked for an opinion of Dan Cooper, General Counsel. Since this was referred to as being of a quasi-judicial nature, are the members of Metro Council bound by the disclosure requirement in terms of this discussion because of the characteristics of this decision.

Chief Counsel Cooper replied that he did not consider this matter to have the characteristics of a quasi-judicial decision. Metro Council has discretion in this matter, as Mr. Gibbon himself stated in his testimony. No established criteria are being applied in the effort to determine whether or not the waiver will be granted. It is completely discretionary on the part of Metro Council. Mr. Cooper advised the Councilors that if they had participated any conversations regarding this matter, there is certainly no harm in putting them in the record if desired although, in his opinion, this was not a requirement in this contingency.

Councilor Don Morissette stated that he had been informed that Mr. Seida had stopped by his office but that he had not engaged in a conversation with him. Presiding Officer Jon Kvistad stated that since Councilor Morissette had disclosed this to Metro Council, that would take disclosure in this instance.

Keith Liden of McKeever - Morris 722 SW Second, Portland OR 97204 testified: "I am here on behalf of the City of West Linn and the West Linn - Wilsonville School District. In your packet, you have a letter from the Clackamas County Board of Commissioners supporting the waiver. I think that the information you have is pretty clear. I would like to make a couple points. First of all, as far as the hearing is concerned with the county, you get that comment from the governing body that that is scheduled now for May 15, 1996. It says that in the letter you got from the board. Next, condemnation. We think that as it has been explained, we are in a condemnation process with the Seidas and that issue should be appropriately decided in court and we have a tentative court date set for July. We feel that's the appropriate forum to make these decisions on the appropriateness of

the condemnation and whether it should happen at all and what kind of compensation Mr. Seida and his sister should get. The application is appropriate. In Section 3.01.33d of your code, it does allow for a city, with planning jurisdiction affecting a property that is adjacent to an area of its planning jurisdiction to make an application. In this case, the City of West Linn is the applicant. At the growth management committee meeting, Councilor Kvistad apparently had some concern about the fact that this property was in the Stafford area and that is a controversial area, as we all know. I feel that the waiver that we are requesting to submit the application a little bit later and then also proposing the same arrangement that is similar to the one for the county that you just approved which would be to hear the case after the council has made the Urban Growth Boundary decision that we would hear this case after that. We feel that should take care of some of the controversy in the Stafford area because you will be making the major decision first instead of trying to look at this one before you have made that decision. Finally, the City of West Linn and the West Linn - Wilsonville School District have been trying hard for a number of years to find some good school sites. The City and the School District have signed an intergovernmental agreement and are working together to try to do that. One of the problems in West Linn is that there are really not many sites available. Secondly, the site that we are talking about was identified in the Tanner Basin Master Plan as being a potential middle school site. The School District and the City have no intention of trying to side-step or do an end run around any kind of land use requirements. In fact, just the opposite. We are going to make sure that we comply with everything. What we are trying to do is avoid unnecessary procedural delays because, quite frankly, we do want to just get a decision on where we stand with this property acquisition and land use approval. If we can't get either the property acquisition or land use approval, obviously the School District needs to move along quickly to try to find some other site for a middle school. That concludes my comments."

Deputy Presiding Officer Susan McLain pointed out, as a matter of clarification, that Metro Council is not voting on this being an Urban Growth Boundary amendment or locational adjustment. The only thing Metro Council is voting on today, according to Deputy Presiding Officer McLain is if there should be an extension on the filing deadline.

Councilor Don Morissette asked of Chief Council Dan Cooper, "What does a boundary study have to do with this property? The people who don't want their property brought in say that it gives a financial advantage one way or another to somebody."

Mr. Cooper's rejoinder was to explain that the annual deadline was put in place so that the governing agency charged with the responsibility of making the ultimate decision will be afforded the opportunity to know all of the applications that have been received to adjust the Urban Growth Boundary in any one year so that they can be handled in an equitable manner and so that the same kind of standards might be applied to all requests. The reason for the staff recommendation to wait until after the Urban Reserve Study Areas are set by Metro Council is to give a second check point before proceeding with this obviously major decision.

Councilor Morissette stated that the land owner is worried that if Metro Council decides to study his property, comments were made about the value of the property and if one decision is made over the other, I thought that condemnation was based on value. I couldn't connect the two between whether it was inside or outside the boundary. Obviously, if it is outside the boundary, it is probably less valuable than if it is inside the boundary. I don't know where the connection to that came. Is there a connection to value as we go through this? Is there an end run out there like the person was talking about?

Mr. Cooper replied that he did not want to speculate on whether or not Mr. Gibbon is going to try his condemnation case or what the rulings are with the issues that are there. The rendered by Chief

Counsel Cooper to Metro Council is to look at this matter as an Urban Growth Boundary decision and let the court in the condemnation case deal with those issues.

Councilor Morissette continued that the whole condemnation process is designed so that citizens won't lose their property at a lower value than it is worth.

Mr. Cooper stated that this is a correct assumption on Councilor Morissette's part. Fair market value is a moving target and the courts tend to allow the property owner to pick the time at which the fair market value was the highest in order to capture that or at least have an opportunity to tell the jury that that is what they ought to be given.

Councilor Morissette stated that there was a dispute whether or not someone here might not want to sell their property and the school wants it. That is one potential dispute and then there is the dispute about the value of the property and whether Metro's actions relating to the Urban Growth Boundary affect it.

Presiding Officer Jon Kvistad clarified the point that Metro's decision today is on whether or not to grant the waiver. In terms of the value of the property in question, a parcel currently outside the Urban Growth Boundary is valued at less than a parcel inside the Urban Growth Boundary.

Councilor Morissette pointed out that in testimony, it was brought to the Council's attention that because of their action today, the value of a parcel could be hurt.

Mr. Cooper stated that in an increasing number of condemnation cases, the ability of the condemning government to do the condemnation at all is questionable. There might be issues that reflect that. The decision today or the status of whether or not the parcel is inside the Urban Growth Boundary or outside, reflect on whether the condemnation proceeding can go forward at this time. Mr. Cooper advised the Council that the most appropriate thing for them to be looking would be the reasons for granting the waiver based on Metro's own policies. Is there some error, excusable neglect or inadvertence on the part of the petitioner, that Metro will allow the said petitioner to cure by giving them a later time or not.

Deputy Presiding Officer Susan McLain stated that her response would be the same instructions that Presiding Officer Jon Kvistad just gave: All members of Metro Council have their own personal logical thinking processes and what one considers to be valid may not be what some other member of the Council considered to be valid. There are two points that have been made today by staff and in the staff report that are to be considered in the voting. First, when asked about the Clackamas County process to obtain this waiver, the staff indicated that no hearing was required and staff customarily responds to these requests. This corresponded with the understanding that a governing body could delegate commenting responsibility to the staff. What is being voted on today is if Council feels that that is a legitimate comment, a legitimate position and if Council should be giving a filing extension because of that misunderstanding.

Presiding Officer Jon Kvistad clarified that the information just given by Deputy Presiding Officer Susan McLain was actually from a McKeever - Morris document and not a staff report.

Presiding Officer Jon Kvistad stated that he would continue his opposition to this matter. He stated that he did not believe that it was a misinterpretation. In terms of where he is on this particular item, he stated that there is definitely a power difference between a single individual taking on a government agency. Metro is a government agency that has in its power to make these determinations. He stated that he would rather err on the side of the individual than he would on the side of the government.

Vote: The vote was aye 5 and no 2 with Councilors McCaig and Kvistad voting no. Presiding Officer Jon Kvistad declared the item passed and the waiver granted.

8. COUNCILOR COMMUNICATIONS

None.

9. ADJOURN

With no further business to come before the Metro Council on this date, Presiding Officer Jon Kvistad adjourned the meeting at

Prepared by

David Aeschliman
Acting as
Clerk of the Council
L:\MINUTES\1996\MAY\050996C.DOC