

MINUTES OF THE METRO COUNCIL MEETING

October 4, 2001

Metro Council Chamber

Councilors Present: David Bragdon (Presiding Officer), Susan McLain, Rod Park, Bill Atherton, Rod Monroe, Carl Hosticka, Rex Burkholder

Presiding Officer Bragdon convened the Regular Council Meeting at 2:02 p.m.

1. INTRODUCTIONS

There were none.

2. CITIZEN COMMUNICATIONS

There were none.

3. HOUSEHOLD HAZARDOUS WASTE COMMUNITY COLLECTION UPDATE

Ms. Vicki Kolberg, Regional Environmental Management Public Affairs Program Supervisor, spoke to the Household Hazardous Waste Conference held in Portland and the goals of the Regional Environmental Management Department concerning this issue. **Ms. Lisa Heigh, Associate Public Affairs**, presented a power point presentation on 2001 Household Hazardous Waste Roundup Education and Collection Program (a copy of which may be found in the meeting record). She spoke to the program focus on social marketing, behavior changes and goals.

Councilor Atherton noted that he had a meeting about household electrical products such as televisions. The gentlemen made a strong point that by year's 2006-2007 a new type of television would come into being and old televisions would no longer be viable. They foresaw possible huge influxes into the landfills of these old televisions. He also encouraged gardening without pesticides and talked about the agricultural practices of ancient Chinese.

Councilor Park asked about the active ingredient of the collections.

Ms. Heigh said they don't keep track of this.

Councilor Park said he thought it was important to note because the general public usually didn't have products with high toxicity.

Ms. Heigh said EPA had a role in testing chemicals and a few had been taken off the market. They tried not to scare people but to education them.

Ms. Kolberg said they also recognized that licensed practitioners used products cautiously. They encouraged people to be aware and motivated to focus on the health and safety of their families, the information provided choices.

Councilor Park said the concern he had was that the majority of the chemicals that were being looked at that were available to general public were safer than table salt. He appreciated the work they were doing but expressed concern about possible misperceptions.

Councilor McLain said at both of the county fairs the natural gardening information was a hot item. She encouraged ongoing networking and appreciated the REM Department's efforts.

Councilor Burkholder asked if the roundups were planned for places away from transfer stations.

Ms. Kolberg responded that they went to sites that were under-served. They were looking at the schedule for next year's events right now.

Councilor Burkholder said neighborhoods were a good receptacle for receiving these materials.

Ms. Kolberg said she thought that neighborhood associations were good target areas.

Councilor Atherton asked about programs reducing toxicity in the streams.

Ms. Heigh said USGS handled water toxicity but there was no way this program could currently handle water toxicity. She noted the new pesticide tracking law that included a farm component and a retail component.

Councilor Park spoke to the pesticide reporting law. He said the law was currently heavy on rural and soft on urban.

4. EXECUTIVE OFFICER COMMUNICATIONS

There were none.

5. AUDITOR COMMUNICATIONS

There were none.

6. MPAC COMMUNICATIONS

Presiding Officer Bragdon announced that the next MPAC meeting would be October 10th.

7. CONSENT AGENDA

7.1 Consideration of minutes of the September 27, 2001 Regular Council Meeting.

Motion: **Councilor Burkholder** moved to adopt the meeting minutes of the September 27, 2001, Regular Council meeting.

Vote: The vote was 7 aye/ 0 nay/ 0 abstain, and the motion passed.

8. ORDINANCES - FIRST READING

8.1 **Ordinance No. 01-920**, For the Purpose of Considering the Application of Recycle America for a Metro Solid Waste Regional Transfer Station Franchise.

Presiding Officer Bragdon assigned Ordinance No. 01-920 to the Solid Waste and Recycling Committee.

8.2 **Ordinance No. 01-921**, Amending the FY 2001-02 Budget and Appropriations Schedule by Transferring Appropriations from Contingency to Operating Expenses in the Administrative Services Department within the Support Services Fund to Implement GASB 34.

Presiding Officer Bragdon assigned Ordinance No. 01-921 to the Budget and Finance Committee.

9. RESOLUTIONS - QUASI-JUDICIAL PROCEEDING

9.1 **Resolution No. 01-3108**, For the Purpose of Expressing Intent to Amend the Urban Growth Boundary for Major Amendment Case 01-3; City of Wilsonville.

Presiding Officer Bragdon asked Mr. Dan Cooper, General Counsel, to provide council with the rules of the quasi-judicial proceeding.

Mr. Cooper said the proceeding was established by the Metro Code and state law. He explained the process for the proceeding and noted that the council's decision had to be based on the evidence provided by Mr. Larry Epstein. He spoke to ex-parte contact and told the council that they must disclose if they had been contacted. He explained the rules for the proceeding.

Councilor Atherton asked about violation of rules.

Mr. Cooper responded that this could lead to future litigation.

Mr. Ray Valone, said that there were some minor changes in the staff report. He spoke to where the property was and the procedures that were followed for the public hearing. He then introduced Mr. Epstein, Hearings Officer.

Mr. Larry Epstein, Hearings Officer, presented his report, noted the standards and rules and then provided his findings, recommendations and conclusions (a copy of which may be found in the meeting record). He spoke to Mr. Darren Pennington's objections. Mr. Epstein responded to those objections and provided his conclusions.

Presiding Officer Bragdon noted the two parties who would be allowed to speak according to the rules of the quasi-judicial proceedings.

Councilor Atherton declared an ex-parte contact by participating in a tour with the City of Wilsonville's officials. He had visited the Coffee Creek facility but at no time had he discuss the Urban Growth Boundary (UGB) amendment.

Councilor McLain said she had an opportunity to visit the site as well and had seen it while it was being considered as an urban reserve site.

Councilors Hosticka, Monroe, Park and Presiding Officer Bragdon also disclosed that they were on the Wilsonville tour but had not discussed the UGB amendment.

Councilor McLain asked Mr. Epstein about his conclusion concerning urban services, how had he balanced his comments and the conclusions he came to.

Mr. Epstein said he normally did this based on the need that was established.

Mr. Darren Pennington, 10365 SW Day Road, Sherwood, OR 97140, also a member of MCCI, spoke to the exception he took to Mr. Epstein's report. The first was over the reliance on the super-siting legislation. He felt that super-siting was over. The second argument against the hearing officers' findings, and the original application, suggested that even if the prison deserved to be in the UGB, the Day Road part of the application didn't. He felt that the City of Wilsonville was not acting on behalf of the Department of Corrections, but in their own interest, as the DOC did not require expansion. The super-siting language itself stated that the existence of a public service provided complex shall not be a consideration in support of, or in opposition to, an application for a land use decision, limited decision, or expedited land division under ORS Chapter 1-97. He asked if the UGB expansion was considered a permit, a license, or a certificate necessary for construction and operation of the women's prison. He felt the answer was no as it was already to open. He said that Wilsonville was being compensated for services that the city provided for the prison. He felt that the Urban Reserve 42 area was a better choice for the City of Wilsonville to include as they had already committed to providing services to that area. Also, the area already had water and sewer under it and was a shorter distance from the City to the prison.

Councilor McLain spoke to Mr. Pennington's objections, which were basic compact form and the shorter distance of Urban Reserve 42.

Mr. Pennington responded that it was three things: urban services were there, it was surrounded by an area that the city said they would provide urban services to on both sides, and it was closer to the existing city boundary and the facility.

Councilor Atherton spoke to the cherry stem of Day Road and asked that he sight Metro Code that required that kind of connection.

Mr. Pennington said the only code was to avoid the island.

Councilor Atherton repeated it was to avoid the island, then asked if it didn't say prohibit?

Mr. Pennington said that he thought it prohibited island UGB expansion.

Presiding Officer Bragdon said that Mr. Cooper could clarify the code and asked the council to confine questions to Mr. Pennington to his exceptions.

Mr. Robert Hoffman, City Planner, City of Wilsonville, 30000 Town Center Loop East, Wilsonville, OR 97070 said this was a very unique situation and the Metro Code wasn't designed to deal with an existing situation. He said that the prison already had sewer, water, and road access provided by the City of Wilsonville. It was under a contract with the state, under the super-siting authority. The city submitted the application, DOC signed the application, and authorized the city to represent them. He said that in the city's opinion, Day Road was the appropriate connection, and they could not consider anything else because it was the major connection to I-5. He said that the first hearing that the city would have on the annexation would be on Monday night, October 8, 2001.

Mr. Michael Kohlhoff, City Attorney, City of Wilsonville, 30000 Town Center Loop East, Wilsonville, OR 97070, said that the DOC authorized the application. He felt that Mr. Epstein was a capable hearings officer who took all the steps, and was fully advised in the issues. He concurred with what Mr. Cooper had indicated about the record.

Councilor McLain asked Mr. Epstein about his conclusion about the urban services and facilities provided. She asked if he felt that they were best provided through the Day Road connection.

Mr. Epstein said they were provided, he did not specify if this was the best option or not.

Councilor McLain asked him if he was in any way saying that this was the best connection.

Mr. Epstein replied that he had not directly said that, but he had considered whether the UGB amendment, including the Day Road extension, complied with the standards. He did not consider whether some other connection with the city might be better.

Presiding Officer Bragdon said that Mr. Cox was not a party of the case, but would be allowed to request to testify.

Mr. William Cox, 0244 SW California St., Portland, OR 97219, said he was an attorney and he represented the bulk of the 345 acres that were subject of another application before the Council for an Urban Growth Boundary amendment, which was essentially the old URSA 42 plus the prison. He believed they were parties. He said that he respected Mr. Epstein, but understood that he stated that the records in both hearings would be intermingled. He said that 119 acres of the 345 parcel was the actual prison. His purpose in being there was to request that the “apple” be put back together. He felt that there should never have been a bifurcation of the two processes. He said they were running into opposition from the staff only based on the question of need.

Presiding Officer Bragdon interrupted Mr. Cox as he was getting into substance.

Mr. Cooper said Mr. Cox wanted to make the point to delay. Mr. Cooper stated that Mr. Cox was not a party. Mr. Epstein had advised Mr. Cooper that he did not consider Mr. Cox having appeared in this case because he had a separate case still pending.

Presiding Officer Bragdon asked Mr. Cooper to clarify Mr. Cox’s appearance before the council.

Mr. Cooper said that Mr. Cox was not eligible to speak on the substance of the exception before the council.

Presiding Officer Bragdon said that on that advice Mr. Cox could not speak further. He thanked him for understanding the procedures.

Councilor Atherton said that Mr. Cox had said that Mr. Epstein had stated at a public hearing that the two were intermingled. He asked Mr. Epstein if he did make that statement.

Mr. Epstein said that what Mr. Cox said was not correct. There were two cases he considered that night. The Wilsonville case was the first case and dealt with the prison site and the Day Road connection. The second case, clients that Mr. Cox represents, included old URSA 42 and the prison site. At the second hearing, when the testimony started to be repetitious about what was said during the first hearing, he said that he would include the record and all of the testimony from the first hearing in the second hearing, so that nobody had to repeat anything that was said during the first hearing. He did merge the records, but only for the second case. He did not include in the record for the first case testimony from the second case – it went only one way.

Presiding Officer Bragdon said they would now go to council discussion and said a motion could be made at that point.

Motion: **Councilor Park** moved to adopt Resolution No. 01-3108.

Seconded: **Councilor Monroe** seconded the motion.

Councilor Park said this was an interesting situation. The issues before the council were pressed upon them by the State. The recommendation appeared to meet the legal requirements. He noted the cherry stem and it being a legal tool of the Land Conservation Development Commission (LCDC), he did not see that as being a detriment to the argument.

Councilor McLain expressed her concern. In looking at the report, Mr. Epstein had to make some choices, looking at both efficiency and services. She felt comparison was necessary. She said that if she voted yes today she thought it was within her rights to suggest where the hearings officer's report should be improved.

Mr. Cooper said one choice that council had was to ask for the preparation of modified findings. That would take a majority vote of the council and a motion. If there was an amendment to the motion in front of them made, that was specific enough for Mr. Epstein or Mr. Cooper to understand the details, they might be able to do that. He cautioned that he felt Mr. Epstein had done as good a job as he could in trying to prepare the finding.

Councilor McLain said that all Mr. Epstein's report said was that services "can" be provided. Her feeling was, after hearing the exception, that there was sufficient reason to uphold an objection based on the terminology "can be provided."

Mr. Cooper said what the council was looking at was the ultimate conclusions. It was important to review the facts and findings, and the summary of his conclusions.

Councilor McLain said she had read page 9 also, so she read his description as well as the summary. She said she supported the cherry stem, and she wanted to support the best one that would truly meet the criteria. She felt that what she saw on pages 9 and 10, and the conclusion on page 15, showed that some comparisons needed to be made, otherwise how could he prove his point?

Mr. Epstein responded citing conclusions 3 and 4 to best address Councilor McLain's concerns. What he tried to do was to recite the language in the law. He spoke to Conclusion 3 and the urban services Wilsonville provided on Day Road. He said there was no reason to include the cherry stem in the Urban Growth Boundary except to make the connection to the prison, so it was the prison that was driving the decision. In regards to Conclusion 4, there was no adjacent urban land whether it was Garden Acres Road or Day Road, it was rural land on both sides, and located outside the city.

Councilor McLain said she would accept Mr. Epstein's and Mr. Cooper's wisdom on whether it matters. She noted that the City of Wilsonville chose Day Road because it was a connection to I-5.

Mr. Epstein said the City of Wilsonville started out with the super siting legislation. The City of Wilsonville said super siting required Metro to approve this request. When he got the materials and saw that, he contacted Metro staff and said that he didn't think that worked. Maybe the super

siting legislation was enough but Metro had to address their own standards. He thought this petition suffered somewhat from an early false start that relied on the super siting legislation too much and didn't rely enough on the facts that would be responsive to Metro's Code. By the time the record was closed, there were more facts in the record. There were sufficient facts in the record to make the findings that he made support the findings in the recommendation he had given the council. There weren't a lot more facts that he could rely on.

Councilor Hosticka asked Mr. Cooper if the Council had to agree with all of the conclusions of the Hearings Officer in order to vote yes or conversely by voting yes did that imply that the council agreed with all of the conclusions of the hearings officer.

Mr. Cooper said Councilor Hosticka was asking a mix of legal and political questions. The result was one that had to be defended if challenged through the appeal process. The findings and the conclusions were the ones that Mr. Epstein would recommend to the council as creating a justification for the decision that would be upheld. Politically, the council may not agree with each and every single statement therein but want to vote yes for their own independent reasons and they were permitted to do that. This was a collective decision of the Metro Council. The normal process was that the department brought the council a finished product that they thought was defensible and could be upheld in court. This was why they used professional hearings officers who had a lot of experience in this arena. The Council was free to ask for changes in the findings and conclusions to more reflect a better statement. In doing so in this case the council would have to limit their conclusions and findings to the facts in the record and that was what the hearings officer had done. The Council couldn't start voting for findings that the Council might prefer unless they were supported by the evidence that was in the record which had been looked at by the hearings officer.

Councilor Hosticka said part of the question was answered in that this was still a political process not strictly a judicial process.

Mr. Cooper responded that it was a quasi-judicial process.

Councilor Hosticka asked to enlighten them about what the super siting statutes said with regard to the UGB. He presumed that siting the facility was one thing but the decision before the Metro Council was not to site the facility, the decision before the council was to amend the UGB.

Mr. Epstein responded that the statute said nothing about UGB amendments. The statute said, "within the authority of the city, county or political subdivision, each city, county and political subdivision shall issue the appropriate permits, licenses and certificates including all necessary construction permits over public rights-of-way and enter into any intergovernmental agreements as may be necessary for the construction and operation of the complex". The question that was posed by this was whether a UGB amendment was a license, permit or certificate and whether it was necessary for the operation and construction of the complex. He was not sure that it was. If the Council wanted to delete any reference to the super siting legislation, he suggested deleting finding 22 and conclusion 8 of his recommended findings and conclusions.

Councilor Burkholder said he would like to think about this in terms of future activity regarding major amendments. What he saw here was a very unusual situation outside the urban growth boundary with a prison being sited on it. Now the council had to say what they did with it. He expressed concerns with the cherry stem issue in terms of future major amendments requests that the Council got that might be able to be used as a precedent that was set in this case and be applied in the future. He did not want the council to make a decision where in the future people

could come in and say the council had done this before. It seemed like the prison existed already without a UGB amendment. It would continue to exist into the future and eventually the orderly progression of UGB expansions would encompass it in a way that it didn't raise these troubling issues in his mind. He was leaning against supporting this recommendation.

Councilor Park asked Mr. Cooper for clarification. He spoke to Goal 14, extending urban services outside of an urban area. Since super siting didn't exactly address this particular issue and provide urban services he would assume that the Council would have to comply with other state land use laws and goals. He thought to be consistent with these laws and goals the prison would need to be brought into the UGB.

Mr. Cooper responded that this decision was confined to this record and the exception that was in front of the Council. A general discussion of Goal 14, as may be applied in other areas of the region and other facts, was not necessarily the appropriate thing to consider here. They had discussions in the past as to whether Goal 14 required a contiguous Urban Growth Boundary or whether islands could exist. The UGB currently had two separated islands. Forest Grove/Cornelius and Wilsonville were not connected to the rest of the urban growth boundary. The discussion of whether or not the council might legislatively make a third island some place else in the region in the future was one that they were continuing to look at. What was important to note was that the Metro Code said for major amendment application, islands may not be created in major amendments. That prohibition against islands did not exist in the legislative section of the Code. So the Goal 14 discussion aside, here in this major amendment application there was a prohibition against the creation of an island of urban land. The hearings officer had noted that cherry stems did exist in the region and around the state. This was why his findings on the cherry stem reflected the difference between a true island and an island with a cherry stem which was really a peninsula.

Councilor Park thanked Mr. Cooper for his clarification.

Councilor Atherton asked about the issue of the cherry stem and Wilsonville's request for economic gain. He asked if approving this established a precedent for other communities to create a cherry stem for economic gain. Did this legitimize the process?

Presiding Officer Bragdon summarized the resolution by saying that the resolution before the council was to direct findings and endorse the hearings officer's interpretation of the Code as it existed today. This was what council's conversation should be confined to. He thought policy discussions about cherry stems and criteria for major amendments was a healthy discussion to have, in fact, they were having that discussion in other forms where that discussion was appropriate but this proceeding was not the place for that policy discussion.

Mr. Cooper said the concept of precedent was how he wanted to respond. That was a concept in the legal arena, in general judges believed and practiced the following of precedence. So a judicial decision by a higher court was viewed by lower courts as a binding precedent on their decision if the judge found that it was because he thought this case was just like the case that had been decided before. In this arena UGB amendments were unique. Every single case had a different set of facts and the applications of the criteria to the facts of the application were probably distinguishable in themselves. So that no future council that didn't want to follow a previous council's decision regarding whether or not it was the cherry stem issue or any other issue that was in discussion was not going to be legally bound to do so.

Councilor Atherton thanked Mr. Cooper for answering the question.

Presiding Officer Bragdon said he thought they should pursue the policy question.

Councilor McLain said to the motion, her questions at the beginning were on the findings because she always wanted to have the finest of findings. She was going to support the resolution based on page 12. She would be voting yes. The question was the land need identified couldn't be reasonably accommodated within the current UGB. That was where she was going to go. There had been a state agency and a statewide search. This application was based on Metro's criteria, did it meet their individual Code issues? She had been assured by the hearings officer that it did. In reviewing it, he said it met the minimum and that was all the criteria asked him to question.

Presiding Officer Bragdon said he would be voting yes, the hearings officer outlined the seven factors that were at issue under the Code and outlined clearly how those factors were met in this case. The exception that was taken was addressed through the rebuttal.

Councilor Park spoke to the criteria on major amendments. The Code did address that particular part of the issue so he would be voting yes and urged council support.

Vote: The vote was 7 aye/ 0 nay/ 0 abstain, and the motion passed.

10. RESOLUTIONS

10.1 **Resolution No. 01-3109**, For the Purpose of Interpreting Metro Ordinance No. 99-809 Amending the Urban Growth Boundary.

Motion: **Councilor McLain** moved to adopt Resolution No. 01-3109.

Seconded: **Councilor Park** seconded the motion.

Councilor McLain said the purpose of this resolution was to interpret a previous ordinance and the conditions of Ordinance No. 99-809. In that ordinance they added approximately 354 acres of exception land to the UGB, known as Urban Reserve Study Area 55, in Washington County south of the City of Hillsboro. In the conditions that they made in that ordinance they asked that a particular set of planning would go along with it so that they would do a master plan. There were some conditions that had stopped the school district from going forward with some appropriate planning and building for their school system. She noted the whereas clauses which included many of the issues such as transportation systems as well as school systems and what was necessary in the present for the Council to make sure that it was OK for the school to be able to go forward with their plans. She suggested that there were school bonds that were passed by the voters and if they wanted to make sure that those school bonds could be used we needed to let the school get on with their work. She suggested that they were interpreting what the council had said in their previous ordinance in 1999. They were not stopping appropriate work by the school district, they were simply trying to make sure that the conditions that they felt were necessary for some of the planning was going to be addressed.

Presiding Officer Bragdon opened a public hearing.

Major Tom Hughes, City of Hillsboro, 2722 SE Hollyhock Court, Hillsboro, OR 07123 thanked the council for bringing this issue forward as quickly as possible.

Mr. Carlos Perez, Hillsboro School District and **Ms. Valerie Counts**, City of Hillsboro chose not to add any comments.

Presiding Officer Bragdon closed a public hearing and noted a letter from Mr. Lawrence Derr that had been placed in the record (a copy of which may be found in the meeting record).

Councilor McLain concluded by saying that what they got out of this vote today was a new school site and a connection to a road that was important to the north south connections in Hillsboro. Good public facilities would be provided with the passage of this resolution.

Councilor Atherton asked about Mr. Derr's objection.

Mr. Cooper responded that the letter from Mr. Derr on behalf of CAIG was explaining why they had opposed and appealed the Area 55 UGB amendments. Their appeal was based on the transportation deficiencies. He had stated specifically that he did not object to the resolution that was before the council today.

Presiding Officer Bragdon summarized Mr. Derr's letter.

Vote: The vote was 7 aye/ 0 nay/ 0 abstain, and the motion passed.

11. COUNCILOR COMMUNICATION

Councilor Atherton spoke to hazardous waste and tracking of waterways. He suggested an inexpensive water testing kit and the quality of it results. He would be researching this for possible future education.

Councilor Hosticka said the maps for resource areas for Goal 5 were made available in quad form that showed property ownership, if any councilor would like particular quad areas they were currently available.

Councilor Park announced that, on the basis of the compliance and extensions requests Metro had been receiving, he was scheduling a special Community Planning meeting on Tuesday, October 30th in the afternoon. He would let the council know what time. Then staff would come back to Community Planning on November 6th with their recommendations. They would have public testimony at that time. They would then have final recommendations at the Community Planning meeting on November 20th. Then they would like to have this issue scheduled for discussion at MPAC at November 28th. With the approval of Presiding Officer the recommendations could be considered at the December 6th Council meeting and a decision made on extensions, conditions and perhaps an exceptions process.

12. ADJOURN

There being no further business to come before the Metro Council, Presiding Officer Bragdon adjourned the meeting at 4:05 p.m.

Prepared by

Chris Billington
Clerk of the Council

ATTACHMENTS TO THE PUBLIC RECORD FOR THE MEETING OF OCTOBER 4, 2001

TOPIC	DOCUMENT DATE	DOCUMENT DESCRIPTION	DOCUMENT NUMBER
COUNCIL MINUTES	092701	MINUTES OF THE SEPTEMBER 27, 2001 METRO COUNCIL MEETING	100401c-01
HOUSEHOLD HAZARDOUS WASTE ROUNDUP INFORMATION	OCTOBER 1, 2001	REM'S 2001 HOUSEHOLD HAZARDOUS WASTE ROUNDUP EDUCATION AND COLLECTION PROGRAM	100401c-02
UPDATE STAFF REPORT ON RES. No 01-3108	10/4/01	STAFF REPORT FOR THE PURPOSE OF EXPRESSING COUNCIL INTENT TO AMEND THE UGB FOR MAJOR AMENDMENT CASE 01-3; CITY OF WILSONVILLE, RESOLUTION No. 01-3108	100401c-03
LETTER	10/3/01	LETTER TO METRO COUNCIL FROM LARRY DERR CONCERNING RESOLUTION No. 01-3109	100401c-04