MINUTES OF THE METRO COUNCIL MEETING

October 1, 1998

Council Chamber

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

Councilors Absent:

Presiding Officer Kvistad convened the Regular Council Meeting at 2:03 p.m.

1. INTRODUCTIONS

Presiding Officer Kvistad, said that Metro had just celebrated the opening of the west side light rail. The Metro Council thanked the Transportation staff for all of the work they had done on this project. He asked Andy Cotugno and Richard Brandman to come forward and be recognized.

Councilor Washington presented the award thanking the Transportation staff for their hard work and dedication to the project.

Mr. Andy Cotugno, Transportation Planning Director, appreciated the recognition and the support of the Council and noted many of the transportation staff that should be recognized for their efforts on light rail.

Councilor Washington reiterated Mr. Brandman's great work on the light rail.

2. CITIZEN COMMUNICATION

Art Lewellan, 3205 SE 3205 SE 8th, #9, Portland, OR, appreciated the west side light rail but was in disagreement with the south north light rail line. He supported the Central City streetcar and the airport extension and supported the light rail remaining on the east side. He felt the south north line had severe impacts to trees, sidewalks and public artworks as well as housing. He noted his latest work, incorporating the streetcar through the PSU Urban Center and left a copy of his plans with Council. He believed south north campaign would fail.

3. EXECUTIVE OFFICER COMMUNICATIONS

None.

4. AUDITOR COMMUNICATIONS

Alexis Dow, Metro Auditor presented two reports, the Review of General Information System Controls and Metro's Financial Trends 1993-1997. The General Information System Controls audit reviewed adequacy of staffing, security of information, disaster recovery planning and help desk management. The Executive Officer concurred with the audit completed by Deloitte and Touche and had submitted an action plan addressing these issues which was part of the report. She said it was important to recognize that the staff that had been implementing the InfoLink modules had been working intensely over the last year. She said the new system placed increased

demands on the staff and was different than the old system. She said the more detailed InfoLink report was underway and she expected it to be ready in November.

The second report was the Financial Trends which was an evaluation of Metro's financial condition. She said financial condition was a measure of an organization's ability to provide services on an ongoing basis. She said the evaluation showed that Metro was very well managed financially and it was her intention to do an update every other year. She commented that "very well managed" did not mean flush with cash, it meant they were doing a good job with the resources Metro had. She noted that in recent years they had been operating in a very strong economy and the indicators showed strong performance. She said they would need to evaluate the indicators because if there was a downturn in the economy there might also be a downturn in the demand for Metro's services. She showed several graphs showing restricted operating revenue and elastic revenue. She also showed graphs indicating expenses, debts and fund balances and capital assets. She urged the council to take the time to look at all 31 graphs.

5. MPAC COMMUNICATION

Councilor McLain said the council had received a letter from Commissioner Judie Hammerstad, MPAC Chair, recommending that Council hold to 32,000 dwelling units in their urban growth boundary amendment process.

6. CONSENT AGENDA

6.1 Consideration meeting minutes of the September 24, 1998 Regular Council Meeting.

Motion: **Councilor Washington** moved to adopt the meeting minutes of September 24, 1998 Regular Council Meeting.

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

Vote: The vote was 6 aye/ 0 nay/ 1 abstain. The motion passed with Councilor Morissette abstaining as he was not present at that meeting.

7. ORDINANCES - SECOND READING - QUASI-JUDICIAL PROCEEDINGS

7.1 **Ordinance No. 98-774,** Approving Urban Growth Boundary Locational Adjustment Case 98-5; Valley View, and Adopting Hearing Officer's Report Including Findings and Conclusions.

Presiding Officer Kvistad asked that Mr. Cooper review the requirements for this quasi-judicial proceedings.

Dan Cooper, General Counsel, said this was a continuation of the matter heard before Council last week. He reviewed the quasi judicial proceedings for councilors who were unable to attend that meeting. He said in this case the hearings officer had recommended to Council that the application be approved. He reported that Councilor McLain had noted evidence she was aware of based on a Washington County Board of Commissioners action that occurred after the hearing was concluded and the hearings officer closed the record. He said that evidence could not be used now as a basis for denying the application contrary to the recommendation. He said if they felt the evidence was relevant they must return the matter to the hearings officer to be reopened so the applicant could have an opportunity to rebut the evidence. He said if council wanted to deny the

application they would need to state reasons for the record why the majority of them wanted to deny the matter and he or the hearings officer would have to prepare revised findings to make the denial. He reported some differences in the next matter and wanted to repeat some of this discussion later for clarity.

Presiding Officer Kvistad reviewed that the next two items were quasi-judicial dealing with boundary expansion and presentations. He asked Mr. Valone for a brief overview of the Valley View locational adjustment that had been presented at the last meeting.

Ray Valone reviewed Case No. 98-5, Valley View Mobile Home Court, 15.27 acres just east of Cornelius and north of TV Highway. He noted the proposed ordinance was included in council's packet along with staff report, map attachments and the hearings officer's report. He said a public hearing had been held in Cornelius and asked Mr. Epstein to report on that hearing.

Larry Epstein, 209 SW Oak St. Portland, OR, Hearings Officer, said he had prepared a recommendation to approve the locational adjustment and there had been no exceptions filed to that recommendation. He reported that the community septic system which served the 63 mobile homes in the park had failed and was now a health hazard. He summarized that the City of Cornelius had opposed the petition because they felt the cost of extending services to the property would exceed any tax benefit to the city. Washington County made no recommendation although their sheriff supported the petition. Hillsboro's water department, the Cornelius Fire Department, ODOT and Tri-Met all took neutral positions. The Hillsboro School District took an essentially neutral position saying they did not have enough information to respond, USA said they could service the property with sewer service. He concluded that the proposed locational adjustment did comply with the applicable standards and the adjoining contiguous properties were not similarly situated.

Presiding Officer Kvistad reviewed the site's northern boundary was the Oregon Electric Rail Line, the eastern boundary was the line between the mobile home park and the farm lots, the southern boundary was against the urban growth boundary and the western boundary abutted the Cornelius city limits and was a wetland area.

Councilor McLain presented reasons she felt council should have legal staff revise the findings for denial of the hearings officer's report. She spoke only to the information in the report and not to her exparte knowledge of the changed circumstance. She said the first issue was efficiency. Mr. Epstein had said the efficiency was "not great" but he went forward with his decisions because of past decisions made by Council indicating they would give a lower standard to a developed or partially developed site versus an undeveloped site. She noted his 3 page handout (a copy of which can be found in the permanent record of this meeting) and said she could not find the efficiency level that would make her want to go forward with the hearings officer's report. She pointed out that the City of Cornelius was opposed and had efficiency and service issues, and the City of Hillsboro felt the petition would not improve the efficiency of service. The USA agency was unable to formulate an opinion regarding relative efficiency or economic impact to the land inside the UGB below the TV highway. The Cornelius police department was opposed and the Hillsboro School District made reference to the fact that there would be no impact to the efficiency as long as the 65 trailers were still there. Her second issue was with "similarly situated". She referenced the map and said contrary to the hearings officer's report, there were contiguous and similarly situated elements. She took issue with the report saying they would have a superior urban growth boundary with this decision. She did not believe there were enough findings in the report to support that. She cited testimony and letters in the record indicating it would not be a superior urban growth boundary because it was a piecemeal approach to changing

the boundary. She felt that was legitimate and needed to be reviewed. She asked for other concerns and questions regarding this.

Councilor Morissette said he believed it met the criteria for approval and said when the opportunity arose he would move it for approval.

Councilor Washington asked if the failure of the septic system was the purpose of this locational adjustment.

Mr. Epstein said it was his understanding that was what initiated the interest.

Councilor Washington asked what was happening to the sewage at this time. He asked if anyone knew if it was going into the wetland.

Mr. Epstein said he did not know, it was not in the record of this case.

Councilor McLain said the record contained documentation from the petitioner indicating that there were septic tanks on site for the mobile homes and they believed the tanks were not efficient. There was information indicating this was not the only reason, the other reason was efficiency for the land.

Mr. Valone said there was a letter in the record that stated it was an identifiable health hazard.

Councilor Washington asked how long the septic problem had been happening.

Mr. Valone recalled they had been working on a fix for a couple of years.

Councilor Washington clarified the area with Mr. Valone and asked how many miles separated the two areas.

Councilor McLain thought it was about three miles.

Councilor Washington asked if there was supposed to be a buffer between those two cities.

Presiding Officer Kvistad said the 2040 concept had areas defined as the open area between cities.

Councilor Washington asked if that buffer should be there.

Mr. Valone said the policy about maintaining separation was in RUGGOs but the criteria for locational adjustment did not address that directly.

Councilor Washington commented that if this adjustment was made, it would decrease the present buffer.

Councilor Morissette said to Councilor Washington's point, it was developed so they would not be bringing the cities closer together.

Councilor Monroe asked if this area was within the urban reserve or was it considered for inclusion and rejected by previous decisions.

Presiding Officer Kvistad said he recalled the parcel was in the consideration of the urban reserves.

Mr. Cooper said the question of the urban reserve status of this property was not in the record and the locational adjustment criteria were not drawn to deal with urban reserve status questions.

Councilor Monroe asked why this area was allowed to be urbanized outside the UGB.

Mr. Cooper said there was some evidence in the record regarding land use applications made to Washington County to expand the park after the UGB was drawn. He said it appeared from that evidence that this park predated the creation of the UGB.

Councilor Monroe said the primary reason for the application appeared to be so it could be sewered and asked if that was possible without it being included in the UGB.

Mr. Epstein said yes, that was part of the discussion during the hearing and it was in the record.

Mr. Cooper said that was the public record information he referred to when he said if that was a question council thought relevant to this evidence regarding its ability to be sewered without being added needed to be brought to the hearings officer's attention after the council remanded it to him. He would then have an opportunity to consider any and all relevant evidence to that issue and apply the criteria and make a new recommendation to council.

Mr. Epstein said before the record closed the only information they had was that there was a possibility sewer service could be provided to the property without the UGB amendment. As of the date the record closed there was no alternative but the UGB amendment.

Councilor Washington asked if the cities could do anything they wanted to within the buffer if this were not approved.

Mr. Epstein responded that the property in question was zoned AF5 which required 5 acre minimum lot sizes. That meant this mobile home park was a non-conforming use and by state law expansion and alteration was subject to substantial review.

Mr. Cooper pointed out that the land being referred to was not included in either the city limits of Hillsboro or Cornelius so the land use planning jurisdiction was Washington County in this area and not either of those two cities.

Councilor Monroe clarified that if the Council did not approve this land coming into the UGB then the current use of the land for a mobile home park could continue as a non-conforming use but no other development other than what was allowed under the zoning would be accepted.

Mr. Epstein said the under non-conforming use law, the mobile home park could continue as long as they solved their sewage problem. He explained that a non-conforming use could be changed but it would be subject to a discretionary review process, by the county in this case. He said there was no certainty regarding what the property could be used for other than the existing or permitted uses.

Councilor Monroe asked Mr. Cooper if the evidence of whether or not this property could be sewered without inclusion in the UGB was a part of the record.

Mr. Cooper said it was not a part of the record.

Councilor Monroe clarified that since the record was closed, evidence had come forth regarding whether or not it might be possible to be sewered without inclusion in the UGB.

Mr. Cooper said that an action taken by the Washington County Board of Commissioners had come to Councilor McLain attention and she had questioned the hearings officer about whether it might make a difference. He thought it might but there was no certainty about that. Mr. Cooper said one of the requirements of the process was that any new evidence must be brought into the record, considered, and everybody involved in the case had to have an opportunity to introduce other evidence that could be relevant to the weight of the first evidence. He cautioned the council that the discussion of alternative ways of getting sewer to this property without bringing it into the UGB were not on the record and they could not use that evidence in making their decision.

Councilor Monroe reviewed that if the Council believed that the new evidence should be considered then the appropriate action would be to send it back to the hearings officer.

Councilor McLain reiterated her earlier comments that she believed the hearings officer had not given enough information to convince her there was enough documentation or findings to prove maximum efficiency with this locational adjustment. She indicated a number of reasons why she disagreed with the hearings officer including that the City of Cornelius had opposed it and the City of Hillsboro and Washington County had both agreed they had no interest and had given a neutral recommendation. She also indicated service providers had opposed it and indicated bringing this land inside the UGB would not provide efficiency of service. She noted she had issues with the report's indication that a very low standard was used to develop the similarly situated recommendation regarding the uniqueness of this piece of property. Her opinion was that it should be denied but if council was uncomfortable with that or had not had enough time for review she had other motions to provide if Councilor Morissette's motion would be for approval. She said she also had an amendment asking for additional information to be put in the record indicating there were no similarly situated pieces there and this was the edge of Cornelius.

Councilor Morissette believed the hearings officer's recommendation had a better chance to solve the problems that initiated this process by being inside the UGB. He felt they had met the rules and he believed this to be an appropriate action for council to take. He urged support.

Motion: **Councilor Morissette** moved to adopt Ordinance No. 98-774.

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

Councilor Monroe asked for a procedural explanation from Mr. Cooper. He wanted to know if council believed this should be sent back to the hearings officer for new evidence, did they move to amend, vote no and make another motion, or, if this motion passed as presented, was the matter finished.

Mr. Cooper said if the council voted yes, they were done with it. He said the Robert's Rules of Order did not deal with quasi-judicial hearings so the better procedure would be to take a vote. Then if the motion passed it was done, or if it was defeated, council could decide whether to send it back to the hearings officer or direct general counsel to prepare findings for something different.

Presiding Officer Kvistad said the process would be to take a vote on the motion. If the motion failed, the floor would be open for another motion, either for additional discussion or to approve or to move it forward.

Councilor McLain suggested that before they voted they have an opportunity to comment after the public testimony.

Presiding Officer Kvistad said the usual process was that prior to voting they would have public testimony and time for discussion.

Mr. Cooper said while the normal rules on ordinances second reading allowed public hearings, this was a quasi-judicial hearing and the public portion had already been held and the record closed. He noted that at the meeting in Hillsboro council had given courtesy to individuals wanting to speak on the hearings officer's recommendation even though they had lost standing to appeal the decision because they hadn't filed an exception to the report. He said it would be important to remember anything heard today would not be evidence but argument.

Presiding Officer Kvistad opened a public hearing on Ordinance No. 98-774.

Greg Hathaway, Davis Wright Tremaine, 1300 SW 5th Ave., Portland, OR 97201, spoke for the applicant. He thought it was significant that there was a positive staff recommendation from Metro to the hearings officer indicating that based on facts this locational adjustment should be approved because it satisfied all of the legal requirements. He said the hearings officer recommendations were that all the criteria for a locational adjustment had been satisfied and there had been no exceptions filed objecting to those recommendations. He felt that was enough reason for council to approve the locational adjustment. Regarding issues raised at this meeting, he said there was clearly a strong efficiency because approximately 10 acres south of this property in commercial zoning inside the City of Cornelius could not get sewer unless it was provided through his client's property, thus it could not develop. He said they had received a letter from the City of Cornelius that morning stating they would support this locational adjustment if their proposed language was added strengthening the hearings officer's report regarding similarly situated. Then this locational adjustment could be dealt with individually and not create a precedent for other properties to come in at some later date. He said if council thought it appropriate to consider the City of Cornelius' request, his client supported the recommended language. He said they felt very strongly that the record was clear in this case and there were good reasons to approve it. He urged council to support their staff and hearings officer and approve this locational adjustment.

Councilor McLain responded that it was in the record that USA had indicated they did not have enough information to decide efficiency at this location and there were other ways to get sewer south of TV highway. Secondly, she pointed out that the letter from the City of Cornelius was information that went to a motion she would make if council decided not to pass this out. She said the City of Cornelius had indicated they were not interested in annexing this location to the city for service. She asked for a copy of the letter.

Presiding Officer Kvistad she was making argument on the motion which would come later. He said he was not sure the letter could be accepted because it came after the record was closed.

Mr. Cooper said when staff received the letter from the City of Cornelius, he had advised them not to share it with council in part to protect the position of the petitioner who was entitled to a

fair hearing. If the petitioner himself through his attorney wanted to give them a copy of the letter, there was nobody who could object to that.

Mr. Hathaway said he would like to submit the letter which he did not believe was new evidence but a recommendation by the city with which they concurred.

Presiding Officer Kvistad closed the public hearing.

Councilor McLain beseeched the Council saying this locational adjustment had implications she believed did not hold the high bar to efficiency or similarly situated. She said their hearings officer had indicated that was a choice council had to interpret from his recommendations. She said they should at least want the record to be complete and true if they were going to pass this resolution. She noted there were two areas where it was not complete and true. The location had a sewer service application completed through Washington County since July 14, 1998. She said that information should be in the record. She said there had been an indication from the City of Cornelius that they opposed this property in the hearings because of the similarly situated portion of the report. She agreed that there needed to be strong language and believed it was appropriate to indicate they would hold the hearings officer to the description he had given as to why this was unique and there was no similarly situated land if it passed. She felt otherwise they were not going to have comprehensive or appropriate planning and Cornelius would have to go through another locational adjustment coming piecemeal and that would not be appropriate. She said they had sewer, let's put it in the record. She wanted to make sure the hearings officer beefed up his report regarding being uniquely situated. She hoped council would vote no on Councilor Morissette's motion so at least they could make sure their findings were correct if they did not want to deny the adjustment.

Councilor Monroe said it sounded like that there was an area outside the UGB that was already urbanized and now it was discovered there was already sewer. He said if an area was already urbanized and had sewer, it should probably be inside the UGB.

Councilor Morissette said he believed that they followed the rules they had when the hearings officer made the recommendation. He urged council's support.

Vote: The vote was 5 aye/ 2 nay/ 0 abstain. The motion passed with Councilors McLain and McFarland voting no.

Councilor McLain commented that her no vote was not to sewer service or to say there should not be valuable improved urban service to anyone who lived in that area. Her no vote was because she believed the hearings officer's report was not substantial and had not proved the areas of efficiency and uniquely similarly situated. She believed that would cause trouble in the future and she wanted to go on record with two options she would put forward. One was to put all the locational adjustments on hold as soon as they could until they made sure they had integrated the legislative urban growth boundary amendment process and the locational adjustment process. She believed this locational adjustment process was not fulfilling the need of the overall planning for the 2040 growth concept any longer. Her second option was to make sure the hearings officer understood the higher efficiency the council's Functional Plan called for inside the UGB and that council believed in infill and redevelopment.

Councilor Washington expressed curiosity about how all of the locational adjustments could be put on hold.

Mr. Cooper answered that they would need to pass an ordinance amending the Metro Code to change the locational adjustment process criteria standards. He said they had fairly broad discretion to do that but the current code provided the current rules.

8. RESOLUTIONS - QUASI JUDICIAL PROCEEDINGS

8.1 Resolution No. 98-2706, Denying Urban Growth Boundary Locational Adjustment Case 98-2: Dennis Derby, Double D Development, Inc., and Adopting Hearing Officers report including Findings and Conclusions.

Mr. Cooper repeated his quasi-judicial hearing explanation and added that this was different because it was a recommendation to deny the application. He said the applicant had filed an exception to the hearings officer's report and recommendation and he was therefore entitled to give an explanation as to why the hearings officer's report and recommendation should be rejected. He said it was appropriate for council to take testimony from him and anyone else interested in speaking on whether the hearings officer's report and recommendation was correct or whether the exceptions filed by the applicant should be considered. He said if they believed the applicant had a case for reversing the hearings officer's recommendation, the appropriate procedure would be to pass a motion agreeing with the exceptions and then return the matter to general counsel for preparation of an ordinance that would have findings and conclusions supporting approval of the UGB application. It would then have to be returned to council for first and second reading before it could be adopted. He reiterated the record was closed and the evidence was what was in the record. He said they would be hearing the report from the hearings officer as to why he made the recommendation he did and from the applicant as to why they disagreed with that recommendation and why they reached a different conclusion.

Carol Krigger, Growth Management Department, noted that the proposal before Council was case No. 98-2, Dennis Derby, who had requested the addition of 14.84 acres into the UGB for the purpose of developing the site for single family residential homes. She also noted the packet they distributed included the resolution with map, the hearings officer's report and recommendations, the proposed findings and conclusions and the final order and staff report. She said the property was located southwest of the intersection of Stafford and Rosemont Roads in Clackamas County south of Lake Oswego. She said a public hearing had been held on June 24 at the Lake Oswego City Hall and was conducted by Mr. Epstein.

Mr. Epstein said this was a proposal to enlarge the Urban Growth Boundary by 14.84 acres and described the property in question using a graphic. He noted the map also showed a plan for how the property could be developed and how the sewer service could work. He said the property was in an exception area to the statewide planning goals and designated rural farm and forest in Clackamas County. He said it was zoned RRFF-5 and a first tier property. He said it was located in urban reserve number 33. He described the topography of the land and the access to the property. He noted there was one single family home on the property. He said they had comments from Lake Oswego in support and Clackamas County had no objection. He said the petitioner had filed his report in a timely manner. He explained the locational adjustment approval criteria from a graphic. Based on the comments from the City of Lake Oswego the property can be served with all urban services but there was a dispute about the efficiency and economy with which the site can be served by sewer. Petitioners argued that it was efficient and economic to serve the site as proposed. He concluded that gravity service was available for a portion of the site as indicated earlier but homes built below that elevation would have to have their affluent pumped to the city sewer system. The use of a pump was not as efficient and economical as the use of gravity and all of the site could be served by gravity flow if tax lot 700 was included in the Urban Growth

Boundary and the sewer system in St. Clair Drive was extended south through tax lot 700. This was not correct. After having reviewed the record further there would still need to be a pump station whether tax lot 700 was included or not. The difference would be instead of having two separate pump stations, there would be one pump station at the end of St. Clair. That pump station would have to be enlarged to accommodate the flow from any portion of the site as well as from development on tax lot 700. So although you could provide sewer service, it was more efficient to have one pump station than two. This was a difficult case, and that was a difficult issue to resolve, whether that was an economic and efficient means of providing service when a marginally more efficient means could exist.

The petition raised the issue of whether the locational adjust must result in the maximum efficiency of services or merely any service. If any service was good enough, then the petition met the standard. If only the maximum efficiency was good enough, then including the adjoining property so there could be only one pump station arguably was more efficient.

Presiding Officer Kvistad asked Mr. Epstein to repeat his last statement.

Mr. Epstein said that the evidence showed that the petitioner's argued, and there was evidence in the record to support that Lake Oswego could provide sewer service to the property. If that was all that was required by this criterion 301035C1, then the application complied. If by the terms "orderly and economic provision of public facilities and services" Metro Council believed more than just any service was necessary, that it must be the most economical or most efficient service possible, then it could be argued that including tax lot 700 would result in greater efficiencies because only one pump station would be needed rather than two separate ones.

The Urban Growth Boundary locational adjustment must facilitate needed development on adjacent existing urban land. In this case the locational adjustment would allow development of tax lot 900. Without including this property in the Urban Growth Boundary, and uniquely this property, tax lot 900 could not be served. Tax lot 900 was a curious creature. The property to the west was subdivided. Tax lot 900 was part of lot 14 of that subdivision, which was an oversized lot. At the time the subdivision was divided, the city required a right of way through the south end of that property. At some time in the future, and it was not clear from the record, that lot 14 was divided, creating tax lot 900. Tax lot 900 was a land-locked parcel--it had no street access and no access to any services. If the applicant's property was included in the Urban Growth Boundary, then all the services could be provided to tax lot 900. Including this property in the boundary would provide service to land already in the boundary. Therefore, the conclusion was that the locational adjustment did comply with 301035C2.

The Metro staff also argued that the locational adjustment must result in the maximum efficiency of land use. He disagreed. Mr. Epstein went through the relevant precedents for locational adjustment decisions. He never found one where the Council created a separate standard based on the title of the criterion, so he found contrary to the staff's recommendation that a locational adjustment was not required to result in the maximum efficiency of land uses.

Returning for a moment to 301035C1, as he had indicated at last week's hearing on Valley View, the Metro rules didn't define how to calculate the net efficiency of urban services. In practice, one went through a two-tiered burden of proof. For an undeveloped property or a substantially undeveloped property, the council held them to a higher standard than developed properties. The conclusion was that including this property in the Urban Growth Boundary would result in greater water efficiencies, because there would be a loop created that didn't now exist, that it would result in greater efficiency in the transportation system, because Meadow Lark Lane could be

extended to Stafford Road, which would improve connectivity and reduce out of direction travel. It would also allow vehicle access to tax 900 and through that low to an undeveloped area of Cook Park in the city of Lake Oswego.

With regard to storm and surface water utilities, parks and open space, fire and police protection or land already in the Urban Growth Boundary, the conclusion was that the petition was neutral or a de minimus increase in efficiency. But there was no increase in sewer service efficiencies if the property was included in the Urban Growth Boundary. Again, although it was true that including this property in the Urban Growth Boundary allowed service to tax lot 900, he argued that that was not a sufficient enhancement in urban service efficiencies to warrant approval or to find that the proposal complies with 301035C1. The conclusions was that there was no net improvement in sewer service, storm drainage, parks, or police and fire services, and therefore the petition failed to sustain the burden of proof on that issue.

Criterion 301035C3 required that the locational adjust have a positive impact on the regional transit corridors. There wasn't one here, so that was irrelevant. It required that the locational adjustment must address any hazards or natural resources on the site. There was testimony about a high water table on the site, and there were steep slopes on the site. But the conclusion was that these measures could be addressed by development regulations of the city. The conclusion was that the application complied with that standard.

Criterion 301035 C4 and C5 deal with farmland and farm uses. The first required retention of farmland. Because this was in an exception area, it was not farm land, so that criterion was not applicable. After considering uses in the area, the conclusions was that urban use of this area would not adversely affect farm or forest uses in the area, so the application complied with that standard.

Regarding the issue of whether the proposed Urban Growth Boundary was superior to the existing boundary, which was 301035F2, the conclusion was that it was not superior. Based on the factors in 301035C, it did correspond to any natural or man-made features. There was nothing to distinguish it from the surrounding non-urban land. You couldn't tell where this piece ends and the adjoining properties began except for one driveway. It would not result in a net improvement of service efficiencies commensurate with the impact of including another 14-1/2 acres in the Urban Growth Boundary. It would reduce the area of the tier 1 properties, therefore it would reduce efficiencies that could be realized by planning for the whole tier 1 area as a unit. It would reduce the incentive for planning for the remainder of the tier 1 area.

Under 301035F3, the petition must include all similarly situated contiguous land that could be appropriately included within the Urban Growth Boundary as an addition based on the factors above without violating the 20-acre limit. The conclusion was that surrounding properties were contiguous, because they shared common property lines. Nothing on the ground physically distinguished the property for surrounding non-urban land. There was a 10-foot-wide paved driveway which served existing homes. The conclusion was that that was not a sufficiently significant barrier in this case to render the lots non-contiguous, which was one of the arguments the petitioners made.

The relationship of this site to tax lot 900 was unique in that no other contiguous property outside the Urban Growth Boundary could provide service to tax lot 900. Only this site could do so, and that distinguished it from all other contiguous non-urban land. But the conclusion was that that distinction alone was not enough to render all other contiguous non-urban properties dissimilar from the subject property base on all the factors in Metro Code 301035. The conclusion was that

other contiguous non-urban properties were so similar in terms of their physical conditions, their access to sewer, water, and road needs, that on balance, the belief was that it was appropriate to consider them for inclusion in the Urban Growth Boundary at the same time as the consideration of the inclusion of the petitioner's property.

The petitioner filed exceptions. Mr. Epstein offered to respond to those exceptions.

Presiding Officer Kvistad noted that the petition would be following up with a presentation. He said he wanted to make certain he allowed the applicant due consideration. He asked Mr. Cooper whether it would be appropriate for Mr. Epstein to address the exception before the petitioner's presentation.

Mr. Cooper answered that the applicant would have the opportunity to talk about the exceptions and answer questions. He said that if Mr. Epstein were asked questions now, then the applicant would not have had the opportunity to hear that question and answer and be able to respond to something that they were not aware of. In previous cases like this where there were two distinct sides, both parties might end up answering questions.

Mr. Epstein said that the petitioner was well-represented by able legal counsel, who had expounded why she believed his recommendation was incorrect. He said he would not respond to all the issues, but would hit the high points. He said one concern legal counsel for the petitioner raised was that it would be improper for the hearings officer to rely on prior Metro decisions regarding other Urban Growth Boundary amendments or locational adjustments. He said that was the case, then he had been proceeding incorrectly for the past 10 years. He said he had always relied on prior decisions. He said he had always taken official notice of Council decisions. The approval criteria was inherently subjective. Rather than make things up on the spot, he said he had always tried to gain from the Council's experience with other cases. He assumed that was what he was supposed to do and he did not see that as improper to consider prior Council decisions on locational adjustments. He said those decisions were part of the record and not unseen and unknown, as suggested by the petitioner. He said they were readily available. He said that the petitioner had sited staff reports and another hearings officer's decision in their case. He said the petitioner was aware that decisions had been made. Mr. Epstein said it was true that he did not go into great length in discussing those decisions during a hearing. In this case there was substantial new information presented at the hearing. He took objection the petitioner's criticism of his reliance on prior Metro cases and his failure to raise those decisions at the hearing.

He said it would be impossible to anticipate what conditions would be raised at a hearing and to come prepared, therefore, to discuss relevant prior decisions at length. He said there was discussion at the prior hearing of other cases, all of the recommendations he made relied on prior decisions. He asked the Council to acknowledge that it was permissible to consider prior decisions.

Mr. Epstein said he had no contact with any people nor any discussions with anybody. All of his recommendations came out of his reading of the Council's prior decisions.

The petitioner argued that it was improper to state in finding 4A of the recommendations that use of pumps and a step system was not as efficient as a gravity flow service, because there was no evidence in the record to that effect. Mr. Epstein said there was discussion of this issue at the hearing and it has been the subject of the Council's deliberation in prior locational adjustment cases. He said it was not improper to characterize his analysis; to the contrary, he felt obligated

to explain his conclusions. He said he did not understand the petitioner's disputing of the substance of the finding in that the petitioner offered new evidence to rebut the finding. He said in his view it was acceptable to conclude that the use of a pump and steps system was not as efficient as a gravity flow system.

Mr. Epstein said the petitioner sited two other petitions as support for their case or as a basis for rejecting his recommendations. One argument was that the recommendation was inconsistent with the hearings officer's recommendation in the West Linn School petition approved last year, and inconsistent with staff recommendations on another petitioner named Tsugawa. Mr. Epstein said he thought it was inappropriate to rely on a staff report as precedent. Until the Council made a decision, the staff report was not precedent for anything. He said therefore the Tsugawa staff report had no evidentiary value. He said in the case of the West Linn School petition, he said he felt a distinction could be drawn between the circumstances of this case and those. He said the school's petition resulted in a substantial net improvement in efficiency of public education and public recreation facilities necessary to facilitate development of surrounding urban development of the area, and not just one lot as was the case here with tax lot 900. He said he believed the relative impact was relevant under the broad standards of the locational adjustment approval criteria.

The fact that the Council recognized that the development needs of the petitioner in that case when deciding whether contiguous lands was similarly situated was somewhat problematic. He said that the Council decided that even though the surrounding lands were similar, because the school district did not need them for their school, they weren't similarly situated. He said that was a problematic finding. He said that implied that whenever the applicants decide they did not need any more land for what they wanted to do, no other land was similarly situated. While that might have made sense to do that in the West Linn case, it was creating a problem in this case, because the applicant was now saying that they did not need any more than to have their acreage to be included in the Urban Growth Boundary to meet their needs for urban services and that that was consistent with the West Linn case. Mr. Epstein said that was correct. But in his view there were still distinctions between this case and that case and given that each case was unique, the Council was not bound by its decision regarding West Linn. He said the petitioner cited a case involving Cannon Beach where local governments in quasi-judicial matters were not supposed to take radically different views when interpreting the same tradition and applying it to different properties. But in this case, the Council would not be taking a radically different view. He said he believed there was distinctions between the West Linn case and this case and came to a different conclusion on the similarly situated lands issue.

Mr. Epstein said the petitioner argued that it was inconsistent with the plain meaning of the words in the locational standard 301035C, to find that any improvement in efficiency was not enough to meet the standard. But in past cases the Council had found that a de minimus improvement in efficiency was not enough, and it was largely in reliance on that precedent that the conclusion was made in this case that although including this locational adjustment in the UGB would have marginal efficiencies, that they were not enough. That was what made this case so difficult. There were some efficiencies. But were they enough to warrant amending the UGB?

Mr. Epstein said that the Council's most recent decision that dealt with this issue was the Knox Ridge decision from 1997. In that case there were some enhanced efficiencies, but the Council concluded they were insufficient to comply with the standard.

Mr. Epstein said the petitioner argued that he had added a standard that tier 1 lands could not be included in the UGB unless all the tier was included. That was not what was stated in the

decision, even though the petitioner might believe that could be inferred from the decision. Mr. Epstein said he did not intend to create a new standard and he did not believe he had. He said the fact that the site was in tier 1 and that contiguous properties were in tier 1 was relevant to whether the proposed UGB was superior to the existing boundary and to whether granting the petition would result in greater service efficiencies and whether other properties in the tier should be treated as part of the UGB amendment because they were similarly situated. In his view, the finding was relevant and not determinative, and nothing in the decision said it was determinative.

Mr. Epstein said the petitioner argued that the recommendation violated several standards that were not relevant: the Metro Charter, MPAC bylaws, the Functional Plan, Statewide Planning Goals, Administrative Rules, state and federal constitutions. The only relevant standards were those in 301035.

The petitioner argued that the Council should take a liberal view when considering locational adjustments and that it should freely approve locational adjustments so that the Council could meet its statutory requirement of enlarging the UGB. Again, that was irrelevant to the locational adjustment standards. That standard was not part of the review process or the review standards for a locational adjustment.

The petitioner argued that denial of the locational adjustment required that Lake Oswego and Clackamas County amend their plans. However, nothing in the laws compelled any such action. The denial of the locational adjustment did not preclude future urbanization of the site or inclusion of the UGB; rather, it was a quasi-judicial decision, not a legislative one. It compelled other jurisdictions to do nothing.

The petitioner argued that the hearings officer determined that land uses were irrelevant to whether property was similarly situation. That was not what the decision said. To the contrary, it held that land uses were specifically relevant as to whether property was similarly situation.

The petitioner argued that a 10-foot-wide driveway sufficiently separated properties and made them non-contiguous. That, however, was inconsistent with other UGB decisions. A 10-foot-wide dead-end driveway serving three homes was not the same as a 50 or 60 foot wide arterial right of way. Nothing in the West Linn case said anything to the contrary.

The petitioner disagreed with the analysis of the benefits to the UGB and similarly situation property. She constructed a syllogism in which she said this was what she had argued: only similarly situated property may be included in the UGB. All real property was unique and therefore alike. Therefore all real property was similarly situated. Mr. Epstein said that was a false syllogism. He said the petitioners would have the Council reason that all land was unique, therefore no land was similarly situated, therefore any land could be included in the UGB because it was never similarly situated. He said if that was how one reads the locational adjustment rules, then the rules were meaningless with regard to similarly situated properties.

Mr. Epstein said this was a tough decision and the Council must make a couple of close calls. The recommendation could be amended to go the other way. He said he had identified seven amendments that would need to be made to approve this UGB locational adjustment. He said that although he welcomed Mr. Cooper and others of Metro's legal staff, he was willing to amend his recommendation to provide findings that were affirmative if the Council chose to approve this adjustment.

Presiding Officer Kvistad opened a public hearing.

Mr. Dennis Derby, 1875 Atherton Drive, Lake Oswego, OR. Mr. Atherton said he lived on the subject property. He said he was a builder and developer and had been in the area for the past 20 years. He said Double D Development, his current company, was not the applicant here. He said he was the applicant personally. He said he was paying for the process personally. He said he personally owned the land involved. He said he wanted that clear, as he was sensitive to the fact that most people would agree that a development company owning land anywhere on the edge or immediately outside the UGB was a bad combination. He said neither he nor his company was trying to develop land outside the UGB. He said he supported the boundary as a planning tool.

Mr. Derby briefly explained the history of this parcel. He said his previous building company in 1987 was party to an application for an UGB amendment that was approved by the Metro Council. He said that application was supported by the city of Lake Oswego. He said he was involved with the property owner. He said the decision to approve the amendment at that time was appealed. He said he purchased the property after it was approved for inclusion in the UGB, but during the appeal process, which took almost three years, went to the Supreme Court and was remanded, and another Metro Council reversed the earlier decision. Out of that process he said he ended up with property that he stills owned and lived on. He developed it as a flex plat in Clackamas County in the early 1990 and sold three two-acre sites, which left 14.84 acres.

Mr. Derby said he felt it was time last November to file for a locational adjustment because there was no real evidence that the legislative process would bring the land in, in the near future. With that in mind, he went through the preapplication process and submitted this parcel for a locational adjustment. Everything he could determine indicated that it met all the criteria for a locational adjustment. A discussion with the city of Lake Oswego indicated it would support this application. He said he personally submitted the application. He said he had submitted a letter with his exceptions and comments about the Hearings Officer's decision, and he said he would be brief, but wanted to be sure the Council understood the core issues.

One issue concerned the availability of gravity sewer and whether gravity sewer was a distinction unique to this property. He said it was. He pointed out on a map where the gravity sewer line that would serve the property lay. He said OTAK had prepared this, and it included a boundary that identified all the land available for gravity sewer. He pointed out a band of land along a particular contour where pump systems might be required for daylight basement use, not for main level or for use at the road grade for the road and sewer line that would come around there. So what was important was that if you took an engineering look at this, a little over six acres could be served by gravity and nine acres could be served by gravity and individual pump systems in houses that had daylight basements. Those pump systems would be required only for the lower levels of those homes. In other words, on the perimeter of this property, homes with this sewer system and homes at the main level or above would be gravity systems. That was a completely different type of system, which was not unique but which was found all over the metropolitan area where there were daylight basements with levels below the main line in the street. That was a different type of solution than the one that would take this land or the other land where these homes were now sited on two-acre sites with septic systems and wells, or tax lot 700, which had an existing home with a septic system and well, taking all this to a pump system that was in place at the end of St. Clair drive. All of that would then be pumped, and as the letter from OTAK indicated, would require rebuilding that pump station there because that pump station was only sized to serve the existing urban development on St. Clair Drive.

In essence, this parcel had gravity service, whereas none of the other contiguous or adjoining parcels had gravity sanitary service. For the most part, when you took out the 1.8 acres that this drive took for access to Rosemont, which was a private drive right now, and took out the 2 acres that would be needed to leave the house Mr. Derby now occupied, with the septic system and well that served it, and took out the 20% open space requirement that Lake Oswego had, the 14.8 acres was reduced to approximately 8.5 or 9 acres of developable area. Mr. Derby said he was proposing that the 8.9 to 9 acres would be that part of the property that was served by gravity sewer and/or pumps in the basements of the homes that would be built. Mr. Derby said in his view that was a very efficient system and that was how that property would develop with or without the inclusion of the other properties that were contiguous to it, including tax lot 700.

Mr. Derby said that on the other issues, the Council had heard the testimony. He said he recalled that the city of Lake Oswego commented that it could efficiently serve this property with respect to all urban services--sanitary, water, police, fire--all of them. Mr. Derby said he still believed that this created a superior UGB, and that there were natural features that contributed to that. The topography lines--and the original UGB were created by following contours or grades and topography lines around the region, creating drainage areas. He said that by following the topography lines from the existing UGB, it would naturally take in the parcel for which the application had been made. He said natural contours and grades and drainages supported the application.

Finally, on the matter of similarly situated land, it was his understanding from the point of view of a layman, from having gone through this process twice, that that criterion required a review of the other criteria to evaluate and find whether this land was similar or different from the parcels under consideration. If that was the case--and this one was different--this one was not similarly situated. The other contiguous lands did not provide for urban services to land already inside the UGB; they did not have gravity sanitary service available, which meant they could not be as efficient in providing that particular utility.

He added that if a mainline were to go through tax lot 700 to the pump station currently there at the end of St. Clair Drive, the mainline would bisect the tax lot, and more than half of tax lot 700 would need to be pumped up to that main line. He said if all of tax lot 700 were brought in, not all of it could be served by one pump. He said what would happen was that a non-gravity system would feed up to another main that would then go to another non-gravity pump station. He said all of tax lot 700 could not be served by the pump station at the end of St. Clair Drive.

Councilor Monroe asked Mr. Derby about his comment that the legislative process might take 5 to 10 years or more. He wondered how Mr. Derby had reached that conclusion, when this area was included in urban reserve 33, meaning that it was under serious and possibly immediate consideration for inclusion in the UGB.

Mr. Derby said that was because last winter there were appeals of those decisions that were going forward, and there had been a lot of political debate out in the area about the Stafford pieces of the urban reserves. Also, if this property would ever be included in a UGB decision with those other properties, it would likely be appealed and would take years for all of those appeals to be decided.

Ms. Wendie Kellington, attorney representing the applicant, Schwabe Williamson and Wyatt, 1211 SW 5th Ave #1700 Portland OR 97035**,** took exception to Mr. Epstein's comments on her exceptions. She said in her view, this should be a fair process. She said she played by the rules. She said before she went forward with her hearing, a case came down from the Court of

Appeals called Nicholson vs. Clatsop County. Nicholson vs. Clatsop County said that a local ordinance that was not raised to the applicant's attention could not be thrown at the applicant after the record closed and relied on as the basis for denial, because that would not be fair. She said that was what she believed had happened here. She said that the hearings officer could rely on prior decisions, but those decisions must be in the record. She said she defied anyone to look up all the locational adjustments that had been made. She said that she did know of two: Tsugawa, and West Linn/Wilsonville. She said she knew that those were current and relevant to the first tier urban reserves environment. That was why they seemed relevant. She said she was not trying to mislead anyone. She said the denial decision was based on previous decisions that no one talked about, no one put in the record, and neither the hearings officer nor Metro asked that the record remain open for seven days.

She said the first time she heard about any precedents was in reading the hearings officer's report. She did not feel that was right, fair, or even legal.

She said she had tried to delineate the standards that applied in a manner that was succinct and relevant. She said when people talked about the similarly situated standard or the maximum efficiency standard or the net improvement standard, those were highly legalistic and they needed to be read in context. She said in context, the standards that created the most difficulty were the similarly situated standard and the net improvement standard. She said they were not applied the way the hearings officer applied them in this case. She said that, with regard to similarly situated, the standard said that similarly situated contiguous land which could also be appropriately included in the UGB as an addition based on the factors above. She said this was not a subjective nor arbitrary process. She said she was offended by the suggestion that the process was, because if that was so, then everyone was in trouble. She said this was a quasi-judicial process based on real standards, and the above constrained the determination about similarly situated. She said the factors above were the factors above. She said they had to do with locational adjustments being limited to 20 acres; a net improvement--not the absolute maximum improvement possible within the UGB. The net improvement did not refer to that piece of land, but to that piece of land within the UGB.

She said that maximum efficiency meant what the adjustment did for needed development, needed with regard to the comprehensive plan and applicable land use regional plans. She said the comprehensive plan included a buildable lands inventory and everybody knew what a buildable lands inventory was. She said the concept had been acknowledged by the DLCD, and it was Lake Oswego's effort to say what it was going to do, this was where it would build, and this was what existed in residential development. She said the property in question was located on the city's buildable lands inventory. She said this information had been presented at the hearing at which the city was present. The city furnished the map of the buildable lands inventory that it had relied on for the functional plan table one. She said when discussing needed development, that was what was meant. It was not subject to somebody's idea of what might be good enough. She said that could not be said without amending the comprehensive plan of the city of Lake Oswego and without amending the table one numbers. That was what her exception referred to when she said that unless the functional plan table one was amended, then it could not be said that the net improvement was not important because only one parcel of the buildable lands inventory was being improved.

Ms. Kellington said that everyone agreed the application met the next standards. She pointed out all the standards that the application did meet. She said that only the superior UGB, based on the factors of being similarly situated and that improvement, based on what was going on inside the UBG. She said when niceties were addressed in the hearing, people said the only thing that

would really matter for purposes of similarly situated was a physical barrier, for example Tsugawa. She said it was in the record. She said the staff report said "a geometrically correct UGB was enough to make this parcel dissimilar from a parcel across the street. She said the imposition of a street would be enough to make it dissimilar. She said that the street on the property was a street in her view. She said in her view, a street was a street regardless of how wide it was. She said that was playing by the rules in her view.

She said that whatever Tsugawa was, it was not this property. This property provided an undisputed benefit to the UGB. What did it do? That was important here. She said that this parcel was supported by the city of Lake Oswego. The city wanted it. The city said one dissenting Council member didn't like it and didn't want it, but the rest told Metro that it would increase the city's ability to provide police and fire services to an area of the city in which it has a problem. She said that area included a park, called Cook's Butte Park. She pointed out where the property in question was with respect to Cook's Butte Park.

She said that this would have enhanced services only if the subject parcel was included within the UGB. She pointed out a dedicated right of way on tax lot 900 that provided access to Cook's Butte Park, so people could enjoy that park. That would provide a connection to Stafford residences, the property the city recently purchased with park money, also outside the UGB, called the Rassehk property. Without some way of crossing the Derby parcel and without some way for the Rassehk Parcel to cross the Derby property, those parks would never develop.

She said the city expressed a desire to provide fire and police service to that area, and therefore asked Metro to approve the adjustment.

Ms. Kellington said the city also made it clear that it would increase efficiencies in terms of a looped water system, the sewer system would be more efficient. She said if a superior UGB was based solely on the factors above, and the factors above were met, then how could it not be a superior UGB? She said it would be logically impossible to deny that. She said this was not similarly situated to other properties. There was no other parcel that provided the connection to Cook's Butte Park, provided the ability to have water and sewer service to tax lot 900, that allowed the looped water system to be provided in this area, and that provided the street connectivity to the Rassehk property--the new park. So this property was not similarly situated to any other parcel, because no other parcel could do that for the UGB. It was what you do for the UGB that mattered.

She said in summary that in her view, this met all the standards and her lawyer friends thought it was hilarious that she lost this one. She said it was frustrating because she watched others go by, but they didn't meet the standards like this one met the standards. She said this one met all of them. She said what she was trying to do was say that the first tier somehow stood in the way of a locational adjustment. She reminded the Council of what the first tier was defined to say: "those urban reserves to be first urbanized because they can be cost effectively provided with urban services by affected cities and special districts as mapped by Metro." She said she did not think that could be collaterally attacked here. She said that decision had been made and the service could already be provided.

Councilor Morissette said he would like to make a motion at the appropriate time. He said he knew the meeting was not there yet. He said he wanted to be careful in how he asked his question, because he was not certain whether it was in the record or not, but this property had a long history. It was going to be developed to a higher, better use. A past Metro Council approved bringing this property into the boundary, LUBA remanded this decision back to the Council, then

the portion of the property was parceled into five-acre 'McMansions'. There was still a balance of the property that could potentially be parceled into five acre parcels. Councilor Morissette said he was afraid this could happen to the rest of the property if it was not brought into the boundary and saw the potential for that type of development if theCouncil did not act on this now. He said he did not want to ask Mr. Derby what his intentions for the property were, without proper approval. He asked whether that history was in the record so it was all right to discuss it.

Mr. Cooper said no, but a discussion has occurred between the applicant and the hearings officer as to why he did consider prior decisions. He said one of those prior decisions was the case to which he referred. Mr. Epstein used prior decisions. The applicant objected to that. Mr. Cooper said the procedures required the Council to adopt findings to support whatever decision it made. The findings needed to be based on the evidence that was in the record. Whatever that decision was must be based on those findings.

Councilor McFarland corrected Councilor Morissette. She said traditionally the term was "two-martini horse farms," not "McMansions." McMansions were something different.

Councilor Monroe asked about the map counsel showed of the city of Lake Oswego's development plans. He asked it to be brought forward again. He asked that the area under question be pointed out. He asked if the parcel that was in Lake Oswego's development plans but out side the UGB included more than the property in question here.

Ms. Kellington said the parcel was not inside the UGB and in the city's buildable lands inventory. It was inside the city limits right now. It was simply land-locked unless this locational adjustment was approved. That was one of the reasons the city supported it.

Councilor Monroe asked that someone point out on the map where the affected property was. He said it looked like it was outside the city of Lake Oswego's development plan.

Mr. Epstein said yes. He said it was bordered on the west and the north by Lake Oswego.

Councilor Monroe said he thought perhaps he had misunderstood counsel. He thought he heard counsel say that this affected property was within Lake Oswego's development plan.

Mr. Epstein said Tax lot 900 was, but not the parcel in question.

Councilor McLain said the applicant had suggested there was efficiency here because they helped serve property inside the UGB. She said that they had testified they wanted to bring in 14.5 acres. She asked how much acreage was inside the UGB that would then get served through this 14.8 acres.

Mr. Derby responded that when you deduct for the road, about 1.8 acres, deduct 2 acres for the existing house and drainfield, that left you with 13.8 acres. When you applied the 20% rule, that left about 9 acres. Those 9 acres could all be served by the sewer main that was below Meadowlark. That main as it came around would also serve tax lot 900 completely. The one exception was that on the downhill side of the street, when that main went in, there would be some homes with daylight basements that would have to have pump systems for the lower level of their homes.

Councilor McLain asked how large tax lot 900 was.

Mr. Derby said 2 acres.

Ms. Kellington said that was on sewer. She said there would be a huge population of the city that would benefit from a new looped water system that would otherwise be impossible to do without this property. There were currently 37,000 people who currently live in the city of Lake Oswego who would be able to benefit from Cooks Butte Park being opened up with the transportation connectivity, policy and fire protection that would be able to be served as well as the Rassekh property. There were disparate benefits to the public, depending on which service is being considered. But this was a big one. She said she did not know how much more a person could ask from a 20-acre maximum locational adjustment process than what this parcel gave the region.

Mr. Derby added that when the city of Lake Oswego approved the Ridgepoint subdivision, which was the one next to tax lot 900, they reserved an easement across tax lot 900-a 50- or 60-foot easement for future access to Cook's Butte Park. What we would provide was access to the easement they reserved that got them to Cook's Butte Park.

Ms. Kellington added that otherwise access could not happen.

Mr. Kelly Ross, Homebuilders' Association of Metropolitan Portland, said it was extremely rare that they come before any governmental body to comment on any quasi-judicial decision. They simply didn't involve themselves with individual property owners and tended to discuss public policies only. He said he was coming before the Council today because the Homebuilders' Association believed this situation involved very important public policies. He said that as the Metro Council in its quasi-judicial capacity was about to set some very important case law that would significantly impact other locational adjustments coming before them this year and in years to come. He said he wanted to discuss two of the standards that were coming into play and were the main ones that had been used to justify denial of the application. He wanted to urge the Council to consider them carefully. He said the hearings officer said this was a very close call. Mr. Ross argued that if the Council tipped toward denying the application, it would set very important precedents for future applications.

Mr. Ross said that the first standard addressed was that of net improvement in the efficiency of public facilities and services. He agreed with the arguments Mr. Derby and Ms. Kellington made on this. However, he pointed out the one criticism of this application in terms of net efficiency that would rely in part on pumps rather than gravity flow to provide sanitary service was an important point. As you consider other urban reserve areas and other locational adjustments, you would be increasingly looking at topographically challenged lands. If you wanted to avoid the farmland and the flatland, you would have slopes and you would need pumps to serve them. He said that was the most economic and efficient way to serve that land. It might be less efficient than gravity flows, but it was the most efficient and economically able way to serve those types of lands, and that was a point that should be considered.

The second involved the matter of including all contiguously similarly situated lands. It was important to look at the words that follow that: "...which could also appropriately be included." This was a tier 1 property. There were other contiguous tier 1 properties. However, it would be completely inappropriate to include those other tier 1 properties at this time for the simple reason that you would have a 20-acre limitation on locational adjustments, and those other properties constitute 43 acres. It was almost a bizarre set of reasoning here to say that it would be appropriate to consider those so we couldn't approve this application because if you did include those by some stretch of Mr. Derby's ability to purchase them or control them, he couldn't make

a locational adjustment. This resolution applied a policy that if applied throughout the metropolitan region would make it very difficult to hold the UGB line to the modest amount that we all seemed to be going in that direction for. This proposal presented an unusual situation where a parcel located outside the UGB could provide a particular and unique benefit to land within the UGB. Including this parcel in the UGB made it possible for the city not only to make it a parcel on the buildable land inventory and functional plan table one developable, but it also allowed the city to develop two city parks, which were otherwise lacking access. It was very hard to imagine what more the region could ask from a single locational adjustment. He urged the Council to reject the resolution and direct that alternate findings be prepared to support approving the adjustment.

Presiding Officer Kvistad closed the public hearing.

Motion: **Councilor Morissette** moved to refer the application to the Office of General Counsel for the preparation of and Ordinance and findings to approve the petition.

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

Councilor Morissette said in support of his motion that this property was in his district and he knew a fair amount about it. He said he had had no exparte communication. Mr. Derby did not contact him specifically about this. He said this was what he believed was bad about the planning process. The property was designed to be a reasonable use, a past Metro Council approved bringing the property into the UGB, it was appealed to LUBA and when remanded, came back to Council. The Council decided not to bring the property inside the UGB so it was partially developed into five acre panels. He said he thought as we move forward the Council needed to be cognizant of that. He said he also believed it was important that as the Council moved forward he had not found too many of his cities supporting too much moving into the UGB--nothing he had found short of a school district west of the river. He said he was shocked they were able to accomplish local support for putting this in, specifically the city. He said he was concerned about what the alternative with this property might be, and that needed to be born in his reason for putting this together. He said as far as pumps, the point was made. He did not see the issue of pumps as either efficient or inefficient, but he understood from talking with Mr. Cooper why Mr. Epstein made those points, because they were in our Code. But, he said, in his business which was building homes, he found it was becoming more and more difficult to find service to property and pumps were the alternative for USA and other sewer providers were finding that as well. But he said he did understand why that was an issue for inefficiency. He said it seemed like a weak one, but he understood why. He said if it was inefficient or costly, it would be born by the people who developed the property and the homes, so it was not a service that would negatively impacted the local community. That was another reason he believed the city was in support.

Regarding similar property applying to come in, he was not certain there was a similar situation, because he understood this property and what was going on over there. He said he thought this was an opportunity for the Metro Council to do something a little better for some property that had quite a bit of history. He said the city wouldn't allow land to be land-locked. He couldn't imagine that it would. He said he had worked in the city of Lake Oswego for years, so he had been in many situations where they did their best to make sure that did not happen. So he did not see the negative impacts put together, and there again the gray area was probably where all these decisions were made supporting you in the last one and not seeing eye to eye on this one. He said he understood the difference of opinion. Short of what had already been brought forward he urged rejection of the resolution in favor of sending it back to Mr. Cooper for finding of approval.

Councilor Monroe said he did not have any concern about this land coming into the UGB. What he did have a concern about was whether this was the most efficient way to do it, because he thought the lands to the north and to the west of Stafford Road to the north of this property and to the west of Stafford Road up to Lake Oswego were likely to come in as well as part of our UGB expansion, and probably appropriately so. He said he hated to see this parcel developed first in a way that ended up being rather inefficient if the other portions came in shortly thereafter. That was the only part of this situation that he found troubling.

Councilor Morissette responded that unless you were a martini farmer, that was what the history had been in the history of this property. So efficiency/not efficiency, those were some alternatives. Knowing the property reasonably well, he believed that, contrary to what the hearings officer had brought forward, he did not believe that to be a substantive problem, nor did the city that was in support of this locational adjustment.

Councilor Monroe asked if the city of Lake Oswego was in support of this addition.

Presiding Officer Kvistad said yes. He added that this was the first time he had heard a hearings officer say that he could make findings either way on this. He said that in terms of listening to where he was, he said he did not know the property well. He had been through it. If the decision was that close, that was a compelling argument. Having the city of Lake Oswego on board was a big step. He said that told him more than any of the rest of it. He agreed that this should be sent back. He said if it was not totally disruptive, and he did not believe it was, the findings would not be that difficult. He said he would support Councilor Morissette's motion.

Vote: The vote was 7 aye/ 0 nay/ 0 abstain. The motion passed unanimously.

The council approved a motion to refer the application to the Office of General Counsel for the preparation of an Ordinance and Findings to approve the petition.

9. RESOLUTIONS

9.1 **Resolution No. 98-2676,** For the Purpose of Establishing Policy Basis and Funding Strategy for Transportation Management Association (TMAs) for the MTIP/STIP Development Process.

Motion: **Councilor Washington** moved to adopt Resolution No. 98-2676.

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

Discussion: None.

Vote: The vote was 7 aye /0 nay/0 abstain. The motion passed unanimously.

Councilor Morissette asked to be excused from the remainder of the meeting. His wife was about to have a baby.

9.2 **Resolution No. 98-2688,** For the Purpose of Approving an Intergovernmental Agreement with the City of Portland for Management of the Terwilliger-Marquam Woods Property.

Motion: **Councilor McCaig** moved to adopt Resolution No. 98-2688.

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

Discussion: **Councilor McCaig** said this was a housekeeping measure. She said this was something the Council conveyed in January of 1996, and Metro simply needed to sign on the dotted line.

Vote: The vote was 6 aye/0 nay/0 abstain. The motion passed with Councilor Morissette absent from the vote.

9.3 **Resolution No. 98-2699,** For the Purpose of Authorizing with the City of Portland to Manage the Whitaker Ponds Master Plan Area Properties.

Motion: **Councilor Washington** moved to adopt Resolution No. 98-2699.

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

Discussion: **Councilor Washington** asked for representatives from Metro's staff and the city of Portland to come forward.

Heather Nelson-Kent, Metro Parks and Greenspaces, introduced Dave Yomashita from the city of Portland Parks Department and Susan Barthell from the city's Bureau of Environmental Services. She said they would be happy to answer questions. She said the city had been a great partner in this Whitaker Ponds project.

Dave Yomashita, Portland Parks and Recreation, 11 20 SW 5th Avenue, said the city was excited about managing the property and looked forward to implementing the master plan that Metro prepared. He said the city was on board with everything that was in the plan. He said the city would also like to move forward with developing the Environmental Learning Center that was in the plan, so that would be the focus of the work for the next five years. He said he wanted to draw attention to the work that Ed Washington started. He said what Whitaker Ponds offered was the result of Ed's work eight or nine years ago bringing Whitaker Ponds to the attention of everybody in the region. It was because of his efforts that things were where they were today.

Councilor Washington said this project had gone through several phases over the past several years. He said this was the culmination of Metro and the city working together. He thanked the councilors who had supported this project.

Susan Barthell, Portland Bureau of Environmental Services, thanked Metro for making this site available. She said the city had been happy to contribute time and money to the effort. Thousands of school children were anxious to use the site, some of whom had already been there. She said it was the focus of watershed education. She said the city looked forward to future development out there.

Vote: The vote was 6 aye/0 nay/0 abstain. The motion passed with Councilor Morissette absent from the vote.

9.4 **Resolution No. 98-2701,** For the Purpose of Authorizing an Intergovernmental Agreement with the City of Portland for Management of Property in the East Buttes/Boring Lava Domes Target Area.

Motion: **Councilor Monroe** moved to adopt Resolution No. 98-2701.

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

Discussion: **Councilor Monroe** said this property was in Councilor McFarland's district. It was beside the Springwater Trail just southeast of Powell Butte. It was about 15 acres. This was an intergovernmental agreement between the City of Portland, which would pay for about 29% of the cost, and Metro, which would pay for 71% of the cost. The City of Portland would dig a nice big hole that would be used for flood control on Johnson Creek, which was the method of flood mitigation currently being used along the creek. He urged support.

Vote: The vote was 6 aye/0 nay/0 abstain. The motion passed with Councilor Morissette absent from the vote.

Presiding Officer Kvistad recessed the Metro Council and convened the Contract Review Board.

10. CONTRACT REVIEW BOARD

10.1 **Resolution No. 98-2697,** For the Purpose of Amending the Contract between Metro and Performance Abatement Services, Inc. for Hazardous Material Abatement Associated with the Development of a Capital Project at the Oregon Zoo.

Motion: **Councilor Monroe** moved to adopt Resolution No. 98-2697.

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

Discussion: **Councilor Monroe** said that Performance Abatement Services won a contract to tear up the feline facility at the zoo. They found some asbestos. They said it would cost an additional $75,000 to $97,000. The zoo said that was too much. They sent it to an independent arbiter. The arbiter recommended $23,500 additional for the asbestos abatement. Metro agreed that was a good price. He urged an aye vote.

Vote: The vote was 6 aye/0 nay/0 abstain. The motion passed with Councilor Morissette absent from the vote.

11. COUNCILOR COMMUNICATION

Presiding Officer Kvistad said this Saturday at 11:30 AM would be the dedication for the Peninsula Crossing Trail. He said there should be a map either in the mailbox or available from staff. He urged Councilors to attend. He said this was a great win for Metro and a great kickoff. He said he and Councilor Washington would be there and he encouraged everyone to attend. He also reminded Councilors to recheck their schedules to be certain all the public hearings were on there for the land use issues. He said there were quite a few, and he did not want anyone to miss them because they did not know what the dates and times were.

Mr. Cooper said next week there would be an executive session in what otherwise would be a light agenda. The purpose of the executive session would be to introduce the Council to the outside legal counsel hired to help deal with the waste management contract dispute over whether Metro had the right to terminate that contract. Also, at that session counsel would bring everyone up to date on the status of negotiations and provide a report on the request received to mediate the Title 3 appeal and seek to obtain policy direction on that.

12. ADJOURN

There being no further business to come before the Metro Council, Presiding Officer Kvistad adjourned the meeting at 5:10 p.m.

Prepared by,

Chris Billington
Clerk of the Council

Document Number	Document Date	Document Title	TO/FROM	RES/ORD
100198c-01	10/1/98	LOTI Design of the Eastbank Alignment for the South North Light Rail	TO: Metro Council FROM: Art Lewellan	
100198c-02	September 1998	Metro Administrative Services Department Review of General Information System Controls, A report by Deloitte and Touche LLP	TO: Metro Council FROM: The Office of the Auditor	
100198c-03	September 1998	Metro Financial Trends 1993-1997	TO: Metro Council FROM: The Office of the Auditor	
100198c-04	10/1/98	Hard copy of slides used in the Auditors presentation of Metro Financial Trends 1993-1997	TO: Metro Council FROM: The Office of the Auditor	
100198c-05	9/25/98	Letter re: UGB Contested Case 98-5 (Valley View Mobile Court)	TO: Metro Council FROM: Larry Epstein Hearings Officer	Ordinance No. 98-774
100198c-06	10/1/98	Fax concerning Contested case 98-5, Valley View Mobile Court	TO: Greg Hathaway FROM: Ryan O'Brien	Ordinance No. 98-774
100198c-07	10/1/98	Map of Derby Site	TO: Metro Council FROM: Mr. Derby	Resolution No. 98-2706