

MINUTES OF THE METRO COUNCIL MEETING

March 11, 1999

Council Chamber

Councilors Present: Rod Monroe (Presiding Officer), Susan McLain, Ed Washington, Rod Park, Bill Atherton, David Bragdon, Jon Kvistad

Councilors Absent: None

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

1. INTRODUCTIONS

None.

2. CITIZEN COMMUNICATION

None.

3. EXECUTIVE OFFICER COMMUNICATIONS

None.

4. AUDITOR COMMUNICATIONS

Alexis Dow, Metro Auditor, presented the Financial Statement Auditor Communications, required by professional standards. The Financial Statement Auditor Communications included information presented by Ms. Dow and may be found included in the meeting record.

5. MPAC COMMUNICATION

Councilor McLain reported that the most recent Metro Policy Advisory Committee (MPAC) meeting focused on the amendments to Chapter 3 of the Metro Code. MPAC referred the amendments to the Metro Technical Advisory Committee (MTAC). The issue would return to Growth Management Committee, who would then listen to MPAC and MTAC recommendations, before it was forwarded to the full Council for a decision.

Councilor McLain said MPAC also discussed the Land Use Board of Appeals (LUBA) decision, and voted unanimously that the Council should appeal.

6. METRO LEGISLATIVE UPDATE

Jeff Stone, Chief of Staff, said he had nothing to report since the informal Council-Executive Office meeting Tuesday.

Councilor McLain said it was announced at MPAC that a bill will be printed addressing Metro's jurisdictional boundary issue. She asked for an update.

Mr. Stone said he knew the bill was being printed, but he had not yet obtained a copy. He said he would distribute copies to the Council as soon as possible.

Presiding Officer Monroe asked for an update on the prison siting.

Mr. Stone said there was nothing new to report.

7. CONSENT AGENDA

7.1 Consideration meeting minutes of the March 4, 1999, Regular Council Meeting.

Motion: **Councilor Atherton** moved to adopt the meeting minutes of March 4, 1999, Regular Council Meeting.

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

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

8. RESOLUTIONS

8.1 **Resolution No. 99-2759**, For the Purpose of Completing Appointments to the Affordable Housing Technical Advisory Committee; and Confirming the Chair and Vice Chair.

Motion: **Councilor Bragdon** moved to adopt Resolution No. 99-2759.

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

Councilor Bragdon presented Resolution No. 99-2759. A staff report to the resolution included information presented by Councilor Bragdon and may be found included in the meeting record. An updated version of Attachment B was also included in the meeting record.

Councilor Atherton asked if Commissioner Diane Linn, Multnomah County, was nominated for chair by the Affordable Housing Technical Advisory Committee (H-TAC). He asked if Jeffrey Condit chose not to continue as chair.

Councilor Bragdon said Resolution No. 99-2759 also appointed Mr. Condit as vice chair, and Commissioner Erik Sten as the representative for City of Portland.

Councilor Atherton said Mr. Condit was not an elected official, and that it could be valuable for the chair of an advisory committee to not be an elected official. He said Mr. Condit was well known for staying on process and not being part of the task at hand.

Councilor Washington noted the misspelling of Margaret Van Vliet's name on item 27 of Attachment B to the resolution. He asked Larry Shaw, Assistant Legal Counsel, if the resolution needed to reflect that a Metro Councilor served as an *ex-officio* member of H-TAC.

Councilor Bragdon said Councilor Washington designation was Council liaison to H-TAC.

Presiding Officer Monroe said it was an appointed position by the presiding officer, and Councilor Washington had been appointed. He said the position did not need to be listed in the resolution.

Councilor Kvistad asked if the City of Portland was not represented on H-TAC, as stated in the fifth paragraph of the resolution.

Councilor Bragdon said he believed the appointment was changed when Portland changed the portfolios at city hall and Commissioner Sten became responsible for that bureau. Councilor Bragdon said H-TAC had formed two subcommittees under Commissioner Linn's leadership, one to look at production of affordable housing and the other to mathematical matters with regard to fair share.

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

9. EXECUTIVE SESSION HELD PURSUANT TO ORS 192.660(1)(h), TO CONSULT WITH LEGAL COUNSEL CONCERNING THE LEGAL RIGHTS AND DUTIES OF A PUBLIC BODY WITH REGARD TO CURRENT LITIGATION.

Presiding Officer Monroe opened an executive session, pursuant to ORS 192.660(1)(h) to discuss Resolution No. 99-2768.

Present: Presiding Officer Monroe, Councilor McLain, Councilor Park, Councilor Atherton, Councilor Kvistad, Councilor Washington, Councilor Bragdon, Mark Turpel, Growth Management Services, Mike Burton, Metro Executive Officer, Alexis Dow, Metro Auditor, and members of her department, Karen Blauer, Executive Office, Ray Valone, Growth Management Services, members of the media

Presiding Officer Monroe closed the executive session.

8.2 **Resolution No. 99-2768**, For the Purpose of Authorizing an Appeal of the Decision of the Land Use Board of Appeals regarding the Metro Designation of Urban Reserves.

Motion: Councilor McLain moved to adopt Resolution No. 99-2768.

Seconded: Councilor Kvistad seconded the motion.

Councilor McLain presented Resolution No. 99-2768. Resolution No. 99-2768 was passed out of Growth Management Committee on March 9, 1999, by a 3-0 vote. The purpose of the resolution was to gather needed information. The Council needed broad clarity on the meaning of the urban reserve ruling. This was the first time such a case had gone before LUBA, and there were many questions, and the 152-page LUBA ruling left many questions. She said Metro would benefit from answers to the following questions: 1) what did the 2040 Growth Concept and the Regional Urban Goals and Objectives (RUGGO) mean as they relate to the urban reserve rule, 2) what kind of finding would LUBA consider adequate, 3) how far could the key concepts in the 2040 Growth Concept and RUGGO be carried as they relate to the urban reserve rule, 4) what exactly was LUBA's findings on the issue of severability. She said there appeared to be internal inconsistencies within LUBA's findings, in which LUBA supported both sides of the issue without answering how it would solve the issue, such as the criteria of exception applications. She said two people reviewed Metro's urban reserve decision, which was the result of many years of work by many people. She said it would be irresponsible of the Council not to receive more clarity on LUBA's decision.

Motion to

Amend: Councilor Park moved to amend Resolution No. 99-2768 as follows:

NOW THEREFORE,

The Metro Council Resolves as follows:

The Office of General Counsel is authorized to appeal the LUBA decision regarding Ordinance No. 96-655E to the Oregon Court of Appeals in support of consistency with Metro's acknowledged RUGGO's and 2040 Growth Concept, with regard to the nature of and extent of required findings and in support of Metro's position on severability.

Seconded: Councilor Bragdon seconded the amendment.

A copy of Councilor Park's amendment was included in the meeting record.

Councilor Park said a number of policy decisions were intertwined in the appeals. He said it was appropriate to appeal parts of the LUBA decision because it would a prudent use of Metro's limited resources, in order to find out the quickest way to clarify the technical portions, including the question of RUGGO's status, the amount of findings necessary, and the issue of severability. He said he did not agree with the logic of taking farmland to protect farmland, and he believed it was inappropriate to appeal that portion of LUBA's decision.

Presiding Officer Monroe opened a public hearing on Resolution No. 99-2768 and the amendment on the table.

Executive Officer Burton submitted a written statement, "Urban Reserve Appeal Statement before the Metro Council," into the meeting record. Executive Officer Burton read his statement to the Council. He urged the Council to proceed with an appeal.

Presiding Officer Monroe asked Executive Officer Burton for his position on Councilor Park's amendment.

Executive Officer Burton responded that he personally had no problem with Councilor Parks' amendment. He said to some extent there was a legal matter that must go forward, and a lot of the matters would be appealed by other parties and some of the clarification would come out of that. He said he believed legal counsel should be given the flexibility to deal with these issues as they came up. On the other hand, he said it was important for each of the Councilors as policy makers, to clarify on the record his or her position.

Councilor Atherton asked Executive Officer Burton if he believed that simply because land was designated as an urban reserve that it would be brought into the urban growth boundary (UGB).

Executive Officer Burton said his understanding of the concept of urban reserves was to designate an area around the UGB, which after careful consideration and projections, would potentially be urbanized at some point. He said the intent was to protect the land and to restrict the type of development that would occur if it was not designated as an urban reserve, which would result in rural sprawl. He said it was also intended to assure people who own resource lands outside of urban reserves that their land would be protected for a considerable period time.

Councilor Atherton said the Council could still designate as urban reserves a much larger area than it would expect to take into the UGB, in order to protect the land. He said the intent of the urban reserve rule was to protect large areas from parcelization and other infrastructure improvements that would frustrate the potential for future urbanization.

Executive Officer Burton said the intent of state law was not to designate far more land than needed in order to enact tighter limitations, but the policy issue could be raised. He said if the Council decided that nothing would be developed, there was still within law the ability to do some limited development on areas that were not designated high farm use in certain farm areas.

Councilor Atherton said the question for the Council then became, was this an issue it believed the courts could adequately resolve. He said if the Council allowed that part of the LUBA decision to stand, then the Council would have to address the question of how much was enough. He said the Council would do that, and explain its decision in the future. He said it would be unwise to leave the decision to the courts.

Executive Officer Burton said based on his limited experience, he believed that if the Council chose not to appeal LUBA's decision, at some point somebody would appeal it and there would have to be a response from the courts. He recommended that the Council proceed to get as much clarification as possible.

Presiding Officer Monroe closed the public hearing. He asked for Council discussion on the amendment.

Councilor McLain said she found both Mr. Shaw's and Executive Officer Burton's comments helpful as she reviewed the amendment. She said she would vote no on the amendment because the amendment only covered 60 percent of all the important questions that the Council needed to ask. She said Mr. Burton indicated in his written statement that it was extremely important for Metro to receive clarification

on the interpretation of key urban reserve rule requirements. She said this was not included in the amendment. She said it was time for Metro to receive clarity on the broad land use planning issues that were raised by the LUBA decision.

Councilor Kvistad echoed Councilor McLain's comments. He said Metro needed clarification on the entire LUBA opinion, and to limit the ability to appeal the decision in total would be a mistake. He said he would vote no on the amendment.

Councilor Atherton said he was much more in favor of a limited appeal and would support Councilor Park's amendment. He said he would prefer that the Metro Council addressed the internal inconsistencies in LUBA's decision. He said it was inappropriate to allow the courts to make these land use decisions.

Councilor Bragdon said he would support the amendment for three reasons. First, he argued that it was appropriate for the Council to instruct legal counsel in the appeal of LUBA's findings. Second, he said it was important to clarify for the public that LUBA's decision could result in a larger UGB than Metro's decision. Third, he said the items he wanted to see appealed were covered by Councilor Park's amendment. LUBA's decision appeared to undermine Metro's RUGGO and 2040 Growth Concept, both of which were acknowledged by LCDC. Page 36 of Metro's Regional Framework Plan stated that state land use planning goals were equally important and represented competing and sometimes conflicting policy interests which needed to be balanced. He said it was important to balance these factors in a logical, fair, transparent way with the confidence of the public. He said the final point to appeal was that Metro needed a workable urban reserve rule because predictability and stability were the great strengths of Oregon's system. He said he was not interested in appealing everything in LUBA's remand.

Councilor Washington asked Mr. Shaw to review what would happen after the Council vote.

Mr. Shaw responded that the vote on either the amendment or the resolution will direct legal counsel to go forward on some kind of appeal. The notice of appeal is due on Thursday, March 18, and the initial briefs are due two weeks after notice is filed. An initial petition will be due about April 1, 1999, and then Metro will have two weeks to respond to petitioners' briefs. He said the Court of Appeals does not allow reply briefs in land use cases. The Court of Appeals should then schedule oral arguments within four weeks. Following the oral arguments, Metro will wait for the Court of Appeals to complete its review and make a decision. He said his best estimate for the entire process is one year.

Councilor Washington summarized that if the amendment passes, Metro will face a shorter appeal. He asked about the ramifications to the Council and to legal counsel of the short appeal versus the long appeal.

Mr. Shaw said legal counsel's job was to prepare an appeal. In executive session, he explained the areas which legal counsel planned to appeal for the purpose of receiving further clarification. He said if the amendment passes, it would remove about half of the issues which would otherwise be appealed. Under this scenario, the Court of Appeals would not receive new arguments from Metro on some issues, and would rule based on Metro and LUBA's first opinions on those issues. He anticipated that on several of those issues, the Court of Appeals would not rule in favor of Metro or LUBA, but would come up with a new version. He said with a limited appeal, the Council would have fewer areas in which it would know what the Court of Appeals would say about the difference between what the Council originally said and what LUBA said, which were in areas of first impression in the law. He said the Court of Appeals' word was stronger than LUBA's word, particularly as LUBA would be composed of different cases in the future.

Councilor Washington asked Mr. Shaw if there would be less to deal with on the amended motion.

Mr. Shaw responded that about half of the issues raised to the Court of Appeals in Metro's brief.

Councilor Washington asked how the Council would receive further information under a limited appeal. He asked if it could be appealed again.

Mr. Shaw said yes, that could happen in any case. He said the appeal was going forward, whether it was on a limited basis or not, so the same amount of time would go by regardless. Assuming the Council chose a limited appeal, and one year later it had answers from the Court of Appeals on the issues they gave us answers on, there was the possibility that Metro would do it again, because there undoubtedly would be appeals. He said the issue was whether or not the subsequent appeals would contain issues on which Metro did not receive answers in the Court of Appeals the first time.

Councilor Washington asked if the Council chose the broad approach, would it receive all the clarification it needed, or would it still be in a position where its decision could be appealed again.

Mr. Shaw said Metro could still be appealed, but the hope was that by doing a broader appeal, the Court of Appeals would give answers on more issues, so that if Metro was appealed in the future, there would be fewer issues that were wide open for LUBA and the Court of Appeals to address the second time.

Councilor Washington asked Mr. Shaw to respond to the fact that policy was intertwined in the process.

Mr. Shaw said he agreed with the Executive Officer that it was appropriate for elected officials to state their positions on the record. He said he agreed with Councilor Bragdon that it was appropriate for the Council to consider whether or not it wanted to instruct its legal counsel in an appeal of this kind. He said Office of General Counsel's policy was that it was difficult to write legal briefs when there was a lack of flexibility. In a case like this, there were differences of opinion on not only what the different policy answers may be, but on which things were policy and which things were interpretations of rules. He said legal counsel tried to be very forthcoming in executive session about the assignments of error it anticipated and how it intended to handle those assignments, to try to give the Council the comfort level to allow flexibility. He said it was up to the Council, and legal counsel would follow the Council's instructions.

Councilor Washington asked if it was possible for the decision to be appealed to the Supreme Court, or if a final determination would be made at the Court of Appeals. He also asked if there was any way that this issue could find its way back into the legislative process to be resolved, in which case Metro started all over again.

Mr. Shaw said he could give his best estimation. The process was clear, the Supreme Court could be petitioned on any Court of Appeals case and be asked to take the appeal. The Supreme Court had complete discretion whether to take the appeal, and statistically, less than 5 percent of petitions were taken. He said it was unlikely that the Supreme Court would take the appeal, and the decision would depend on the action taken by the Court of Appeals and on how the issue was framed by the petitioner. He said LCDC may decide to simplify and clarify its rules at some point, after looking at the outcome of the Court of Appeals decision.

Presiding Officer Monroe asked whether approval of Councilor Park's amendment would shorten the appeal process.

Mr. Shaw said no, it would not.

Presiding Officer Monroe asked whether approval of the amendment would save the agency money.

Mr. Shaw said no, it would not.

Presiding Officer Monroe said he did not view LUBA's remand as a situation of winners and losers. He said Metro was making completely new law, and needed clarification as to what the law said. He said the purpose of the appeal was to receive clarification; to actually make law. He said courts made law by interpreting the intent of legislators and by interpreting whether the Metro Council followed those laws.

He said he wanted to receive the greatest degree of clarity possible as to what the law required of Metro, so that the Council could move forward with some certainty. He said therefore he supported the appeal. He said he did not think it was appropriate to hinder lawyers, therefore he would not support the amendment. He said he wanted to allow legal counsel the maximum ability to receive clarification as to what the law meant so that the Council could move forward in a rational way.

Councilor Park closed by saying that there was a diversity of opinions in the Council. He said this amendment was a very important statement to make at this time in terms of limiting what the Council believed, or did not believe, in terms of policy. The purpose of the amendment was to exclude those areas in which, as a matter of policy, he believed that state land use policy was correct. He said he supported taking exception land first. He said he would not try to block growth. He believed growth would occur, and it needed to be planned wisely. He said it was incorrect to give legal counsel a *carte blanche* to go after some of the other areas, and it sent a wrong message to the public. He said at the same time, the Council did need to receive clarification on some areas. He said the reason for the urban reserve rule was to primarily protect exception areas from future parcelization that would make it difficult to urbanize in the future, and to give certainty where future development will go for those special districts that needed to plan long in advance for infrastructure needed such as water, sewage, and roads. He said he would like to see the appeal stay on topic, and the Council accept that development was supposed to go on exception areas, and to get back to the technical questions such as how much findings were enough, how much weight did RUGGO carry, and could non-controversial areas be severed.

Presiding Officer Monroe adjourned for a five-minute recess.

Presiding Officer Monroe reconvened the meeting.

**Vote on
Motion to**

Amend: The vote was 3 aye/ 4 nay/ 0 abstain. The motion failed with Councilors McLain, Washington, Kvistad and Presiding Officer Monroe voting no.

Councilor Park said given that the amendment failed, he was unclear on the message the Council was sending. He said concerns had been voiced about tying the attorneys' hands versus the Council's policy decision. He asked if, as a policy, was the Council saying it agreed with the LUBA decision in part or very little, and on which parts in general. He said as the resolution was currently written, it gave legal counsel a blank check, and he was concerned about the areas in which the Council would be going into as the process moved forward. This was a policy decision, parts of which the Council agreed or did not agree with, and the current urban reserve decision did lay it out as to exception areas first. If the Council was going to refute that part of the LUBA decision, that was a decision of the Council.

Councilor Atherton pointed out that the legal profession blossomed when dueling was outlawed. He said the Council's purpose was to reduce conflict and provide clarity. He said he was continually reminded that all of this confusion was taking place because someone was trying to force a square peg in a round hole. The State was trying to mandate places for growth which did not want to grow. The Council would have to find other ways to resolve this conflict, and this would not be resolved in this appeal.

Councilor Bragdon clarified that he respected Mr. Shaw as a professional, and as a non-attorney, he did not mean to get into the business of telling him how to conduct his job. He said in executive session they talked about the scope of the appeal, and he clarified that the scope was more limited than what was described in the resolution. He said with that understanding, he would support Resolution No. 99-2768.

Presiding Officer Monroe said the Council would have opportunities throughout the appeal process to speak with Mr. Cooper and Mr. Shaw and given further instruction.

Councilor Kvistad said he was appalled by the LUBA remand; it was convoluted and poorly written. He said two of the three members of LUBA were leaving shortly, and this was the last piece of paper they

threw out the door on their way out. He said Metro spent millions of dollars and seven years making this land use decision. He said LUBA delayed review of the urban reserve decision for a year and a half, then finally tossed out a piece of trash. As legal counsel said, LUBA agreed that Metro did each step correctly, but they did not like the final result, so they decided that part was incorrect. He said there were other parts of the remand where LUBA made a ruling on items that were not appealed. He said it was wrong to have appointed bureaucrats making these decisions, and it was time to entirely revamp LUBA and make it more like the tax court with a judge whose job was to adjudicate matters. He said if every land use decision made by every government body must go through this process, the state may as well quit planning for an urban edge. He said an appeal was necessary, and the Council should go after it as hard and as fast as possible. He said Metro's positions were fair, honest, and balanced. He found LUBA's decision that Metro must take more land unbelievable. He said Councilor McLain was kind to say that LUBA's opinion contained internal inconsistencies. He said he would support Resolution No. 99-2768.

Councilor Park said he refuted everything Councilor Kvistad said.

Councilor McLain closed her presentation by answering Councilor Bragdon and Councilor Park's question about the message Metro was sending with the appeal. She said the message was that Metro needed more information because there were areas in the LUBA decision which were not clear enough for the Council to apply. The information the Council was requesting should give more information by which the Council could make policy decisions in 1999. A vote for Resolution No. 99-2768 was a vote to get as much information as possible about state law, Goal 14, the seemingly inconsistent issues in the LUBA report, and to get answers on three questions: 1) what was the application of the 2040 Growth Vision to urban reserves, 2) what was the relationship between the urban reserve findings and the comprehensive plans, and 3) what was the interpretation of the key urban reserve rule requirements.

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

10. COUNCILOR COMMUNICATION

Presiding Officer Monroe announced that at the request of Councilor Bragdon, the Metro Council meeting on May 20, 1999, will be held at 2:00 P.M. at the Milwaukie City Chamber. He said the Council may have additional meetings around the region at the request of Councilors. He said the Council may meet in Hillsboro in September.

11. ADJOURN

There being no further business to come before the Metro Council, Presiding Officer Monroe adjourned the meeting at 4:02 p.m.

Prepared by,

Chris Billington
Clerk of the Council

Document Number	Document Date	Document Title	TO/FROM	RES/ORD
031199c-01	3/4/99	Minutes of the Metro Council Meeting, March 4, 1999	TO Metro Council/ FROM Chris Billington	

031199c-02	3/1/99	Financial Statement Auditor Communications	TO Metro Council and Executive Officer /FROM Alexis Dow	
031199c-03	3/11/99	Resolution No. 99-2759 Attachment B		Res. 99-2759
031199c-04	3/11/99	Councilor Park Amendment 1 to Resolution No. 99-2768	TO Metro Council/FROM Rod Park	Res. 99-2768
031199c-05	3/11/99	Urban Reserve Appeal Statement before the Metro Council	TO Metro Council / FROM Mike Burton	Res. 99-2768