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BEFORE THE LAND USE BOARD OF APPEALS
OF THE STATE OF OREGON

CITY OF ASHLAND,)
)
Petitioner,)
)
v.)
)
BEAR CREEK VALLEY)
SANITARY AUTHORITY,)
)
Respondent.)

LUBA No. 81-008

FINAL OPINION
(ORDER OF DISMISSAL)

JACKSON COUNTY, OREGON,)
)
Petitioner,)
)
v.)
)
BEAR CREEK VALLEY)
SANITARY AUTHORITY,)
)
Respondent.)

LUBA NO. 81-010

Appeal from Bear Creek Valley Sanitary Authority.

Mark Greenfield, Portland, filed a brief and argued the cause for Petitioner City of Ashland.

John L. Dubay, Medford, filed a brief and argued the cause for Petitioner Jackson County.

Manville Heisel, Medford, filed a brief and argued the cause for Respondent Bear Creek Valley Sanitary Authority.

Bagg, Referee; Reynolds, Chief Referee; Cox, Referee; participated in the decision.

DISMISSED

5/12/81

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec 6(a).

1 BAGG, Referee.

2 This matter is before the Board on the motion of Respondent
3 Bear Creek Valley Sanitary Authority for an order of dismissal
4 in each of the above entitled proceedings. The cases have been
5 consolidated by agreement of the parties. The motion is made
6 on the ground that Ordinance 80-14, the ordinance under review,
7 is not a land use decision within the meaning of Oregon Laws
8 1979, ch 772, sec 3. Ordinance 80-14 declares a health hazard
9 to exist in an area of the county known as the North Ashland
10 Interchange Area. The ordinance authorizes construction of
11 sanitary sewers to correct the health hazard.

12 For the reasons expressed herein, we find Ordinance 80-14
13 to be beyond our review.

14 In pertinent part, Oregon Laws 1979, ch 772, sec 3 provides
15 as follows:

16 "(1) 'Land use decision' means:

17 "(a) A final decision or determination made
18 by a city, county or special district governing
19 body that concerns the adoption, amendment or
20 application of:

21 "(A) The state-wide planning goals;

22 "(B) A comprehensive plan provision; or

23 "(C) A zoning, subdivision or other
24 ordinance that implements a comprehensive
25 plan; or

26 "(b) A final decision or determination of a
state agency other than the Land Conservation and
Development Commission, with respect to which the
agency is required to apply the state-wide
planning goals."

1 Respondent urges there is no authority for the Land
2 Conservation and Development Commission to adopt goals that
3 will limit or prohibit a special district from providing a
4 service to protect public health and safety. Respondent cites
5 West Side Sanitary District v. LCDC 289 Or 393, 614 P2d 1141
6 (1980) for this proposition and concludes that neither LCDC nor
7 the Land Use Board of Appeals has the power to question the
8 district's determination that a health hazard exists and that a
9 sanitary system is needed to alleviate the hazard. In this
10 particular case, respondent district found that "there is a
11 violation or threatened violation of the water quality
12 standards established by OAR 340-41-365" The district
13 also found that the construction of the sewer as planned was
14 "necessary to protect the public health, safety and welfare" of
15 the residents of the area. The "area" is already within the
16 district boundaries. The district found that the project as
17 planned was the "only financially feasible alternative in
18 solving the violation problems in the area." The district
19 claims to be the expert body to make such a determination, not
20 LCDC or the Land Use Board of Appeals.

21 Petitioners argue that the district is mistaken when it
22 views West Side Sanitary District v. LCDC, supra, as being
23 applicable in this case. In that case, argue petitioners, the
24 Supreme Court identified an exception to the controlling
25 influence of the statewide goals in cases where a health hazard
26 has been declared to exist under ORS 222.860 to ORS 222.915.

1 Here, according to petitioners, no such health hazard has been
2 declared by the agency responsible for such declarations, the
3 Health Division of The Department of Human Resources. The
4 special district's declaration of health hazard is not
5 sufficient to take an action out of the control of the
6 statewide goals, petitioners conclude.

7 We have considered the meaning of "land use decision"
8 before. This is the first time, however, we have had to
9 consider directly whether the extension of sewer services to a
10 particular area is a land use decision within the meaning of
11 Oregon Laws 1979, ch 772, sec 3. In Bettis v. Roseburg, 1 Or
12 LUBA 174 (1980), we viewed a resolution controlling standards
13 for construction of certain kinds of streets within the City of
14 Roseburg to be a land use decision. Our belief was based, in
15 large part, on our view that the contested resolution
16 established control over street improvements that in turn
17 significantly affected land use activities in the city.
18 Development of streets and rights of way "may well open up or
19 restrict housing and other land use activities within
20 individual portions of the city that together add up to a
21 significant impact on city development." 1 Or LUBA at 178.
22 See Peterson v Klamath Falls, 279 Or 249, 566 P2d 1193 (1977)
23 and Jurgenson v. Union County Court, 42 Or App 505, 600 P2d
24 1241 (1979).

25 We view the extension of sewer services generally to be a
26 similar action that can affect the development of land within

1 Jackson County. In this case, however, the action is beyond
2 our review. The Supreme Court in West Side Sanitary District v
3 LCDC, supra, had occasion to decide whether declaration of a
4 health hazard by the State Health Division was subject to
5 review by LCDC for compliance with statewide goals. The court
6 stated that a finding of the existence of a danger to public
7 health was not an action "'with respect to programs affecting
8 land use' to which the legislature intended ORS 197.180(1) to
9 apply" 289 Or at 398.¹ In the West Side case, the "health
10 hazard" determination was made by the Health Division of the
11 Department of Human Resources. Here, the determination was
12 made by the local sanitary district. We believe the impact of
13 the determination to be the same: the decision a health hazard
14 existed "was not made with regard to land use planning for
15 future growth or development, but it was made with regard to
16 the fundamental concern for public safety and public health."
17 West Side Sanitary District v LCDC, 289 Or at 398.²

18 After it found the hazard to exist, the BCVSA acted in the
19 same way as a city would act under ORS 222.850 to ORS 222.915:
20 it drew up a plan to alleviate the problem. In a companion
21 case, to the one cited above, the Supreme Court found that a
22 city plan drawn to alleviate a health hazard and reviewed by
23 the Environmental Quality Commission is similarly not dependent
24 upon statewide land use planning goals and was not an action
25 affecting land use. West Side v LCDC, 289 Or 409, 414 ___
26 P2d ___ (1980). Here, the plan to alleviate the hazard was

1 made by the district, but it nonetheless was made to remedy the
2 health hazard. As such, it was undertaken for public health
3 and safety purposes and not land use planning purposes.³

4 Arguably, although not subject to scrutiny under statewide
5 land use planning goals, these acts would fall under a
6 comprehensive plan provision controlling sewers and be
7 reviewable under Oregon Laws 1979, ch 772, sec 3(1)(a)(B).
8 However, a "comprehensive plan" as defined in ORS 197.015(5) is
9 a "land use map and policy statement." As such, it is a
10 document "affecting land use." Because the Supreme Court has
11 said declarations of health hazards and plans to remedy health
12 hazards are not acts "affecting land use," we do not believe
13 they fall within or are controlled by the provisions of a
14 "comprehensive plan" under ORS 197.015(5). As these acts are
15 outside comprehensive plans, they are not reviewable under
16 Oregon Laws 1979, ch 772, sec 3(1)(a)(B).

17 We believe, then, that Ordinance 80-14 is beyond our
18 jurisdiction, as it is not a "land use decision" within the
19 meaning of Oregon Laws 1979, ch 772.⁴

20 The motion to dismiss is granted, and this matter is
21 dismissed.

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1 FOOTNOTES

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4 "State agencies shall carry out their planning duties,
5 powers and responsibilities and take actions that are
6 authorized by law with respect to programs affecting land use
7 in accordance with statewide planning goals approved pursuant
8 to ORS 197.005 to 197.430 and 469.350." ORS 197.180(1).

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11 Presumably, the district's finding of a health hazard is
12 reviewable by Writ of Review or declaratory judgment.

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15 The district has authority under ORS 450.815, 830 and 845
16 to construct sewers where "necessary or expedient." We do not
17 express an opinion as to our power to review a decision to
18 extend sewer services where the district is not doing what it
19 has found to be necessary to correct a health hazard.

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22 We recognize that we concluded that the West Side case was
23 not applicable in our opinion in Ashland v Bear Creek Valley
24 Sanitary Authority, 2 Or LUBA 121 (LUBA No. 80-094, 1980)
25 (footnote 1). In that case, however, the ordinance did not
26 recite the existence of a health hazard as the basis for
proceeding with the sewer project. Here, the finding of a
health hazard was included in the ordinance and was made the
basis of enactment of the ordinance.

Respondent urges two additional grounds for dismissal:

(1) The Bear Creek Valley Sanitary Authority provides both
public facilities, in the form of equipment and sewage plants,
and public services in the form of sewage collection and
processing. The Authority claims extension of sewer services
as provided in Ordinance 80-14 is a public service and not the
construction of a public facility. To support its argument,
the district mentions several examples of different kinds of
service districts and distinguishes the physical facilities of
the districts' from the services they provide. The respondent
says although it is difficult to conceive activities that do
not relate to land use, it was not the intent of Senate Bill
100 to control all human endeavor including giving service.
Public services that are developed to provide for the public
health, safety and welfare are not to be guided by the same

1 land use goals adopted to regulate the development of land
2 uses, according to respondent.

3 (2) Respondent also argues that its decision establishes
4 fiscal and budgetary policies concerning the construction of
5 the project. Citing Housing Council v. City of Lake Oswego, 48
6 Or App 525, 617 P2d 655 (1980), respondent urges the decision
7 as to how the project is to be financed is not one that comes
8 within the purview of the Statewide Land Use Planning Goals.

9 We reject these grounds for dismissal. We view the
10 construction of sewer lines generally to provide service to be
11 an act that could affect land development. Also, we do not
12 view Ordinance 80-14 authorizing construction and a method of
13 financing to be a fiscal decision only as in the Housing
14 Council case, supra.