

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3 FRIENDS OF BENTON COUNTY, )

4 Petitioner, )

5 vs. )

6 BENTON COUNTY and )  
7 CENTRAL MOUNTAIN ENTERPRISES, )

8 Respondents. )

LUBA No. 81-054

FINAL OPINION  
AND ORDER

9 Appeal from Benton County.

10 Richard C. Stein, Salem, filed the Petition for Review and  
11 argued the cause on behalf of Petitioner. With him on the  
brief were Ramsay, Stein, Feibleman and Myers.

12 Richard T. Ligon, Corvallis, filed the brief and argued the  
13 cause on behalf of Respondent Benton County.

14 Donald M. Kelley, Silverton, filed the brief and argued the  
15 cause on behalf of Respondent Central Mountain Enterprises.  
With him on the brief were Kelley and Kelley.

16 Robert S. Gardner, Corvallis, filed the brief and argued  
17 the cause on behalf of Intervenor City of Philomath. With him  
on the brief were Ringo, Walton, Eves & Gardner, P.C.

18 REYNOLDS, Chief Referee; COX, Referee; BAGG, Referee;  
participated in this decision.

19 REMANDED

10/06/81

20  
21 You are entitled to judicial review of this Order.  
22 Judicial review is governed by the provisions of Oregon Laws  
1979, ch 772, sec 6(a).

1 REYNOLDS, Chief Referee.

2 INTRODUCTION

3 Petitioner appeals a decision of the City of Philomath  
4 approving a subdivision of 74 acres into 18 lots of two to ten  
5 acres each. The land is located outside the city limits for  
6 the City of Philomath and within the city's adopted but as yet  
7 unacknowledged urban growth boundary. The property is zoned  
8 for industrial purposes, which zoning is consistent with the  
9 1980 Benton County Comprehensive Plan designation for the  
10 property.

11 Petitioner challenges the county's decision as having  
12 violated statewide Goals 2, 3, 14 and 11. Petitioner contends  
13 Goals 2 and 3 were violated because no exception was taken, and  
14 the proper procedures for taking an exception to the Benton  
15 County Comprehensive Plan were not followed. Petitioner  
16 contends Goal 14 was violated because the county failed to  
17 apply the seven factors in Goal 14 for establishing an urban  
18 growth boundary. In addition, petitioner contends there was a  
19 lack of substantial evidence to support the findings which the  
20 county did make under Goal 14. Petitioner argues, finally,  
21 that Goal 11 was violated because the county's findings  
22 pertaining to Goal 11 are inadequate, conclusory and not  
23 supported by substantial evidence.

24 STATEMENT OF FACTS

25 Intervenor Central Mountain Enterprises (CME) applied to  
26 the Benton County Planning Commission for approval to subdivide

1 74 acres of land located outside the City of Philomath and  
2 within the city's adopted but as yet unacknowledged urban  
3 growth boundary. The property is zoned industrial, which  
4 zoning complies with the Benton County Comprehensive Plan of  
5 1980. The request was to divide the 74 acres, consisting of  
6 two parcels, into 18 lots of two to ten acres each.

7 The Planning Commission denied the application because the  
8 property consisted of agricultural land within the meaning of  
9 Goal 3 and an exception to Goal 3 was, therefore, necessary in  
10 order to approve the subdivision. The decision was appealed to  
11 the Board of Commissioners which determined that an exception  
12 to Goal 3 was not required inasmuch as the land was within the  
13 adopted urban growth boundary for the City of Philomath. The  
14 decision that an exception was not required was apparently  
15 based, in part, on the opinion of LCDC staff that an exception  
16 was not required because the county and the City of Philomath  
17 had previously utilized the Goal 14 process for establishment  
18 of the Philomath urban growth boundary.

19 The county reversed the decision of the Planning Commission  
20 and approved the subdivision. As noted above, the findings  
21 state that an exception to Goal 3

22 "need not be taken because this land has been  
23 included in the Philomath urban growth boundary (see  
24 Philomath Plan, pages 69-87 and especially pages  
25 79-87). Philomath has provided justification for this  
26 land (as adopted by Benton County) by addressing Goal  
14 (Urbanization). Goal 14 criteria essentially  
duplicate criteria contained in the Goal 2 exceptions  
procedure. Four additional findings (Nos. 2-5 below)  
support the need for industrial land consistent with

1 Goal 14."

2 "Findings" 2 through 5 (they are designated "conclusions"  
3 in the order) state that the property will be used for light  
4 industrial purposes and, as such, will provide for a transition  
5 between heavy industrial uses to the south and rural  
6 residential uses to the north and east. Development of the  
7 property is to be in three phases, which phasing is to be  
8 designated on the final plat. Finding 3 states that the  
9 Philomath Comprehensive Plan "indicates" that only 16 acres of  
10 land is available for industrial development within the City of  
11 Philomath and that this land lies within the 100 year flood  
12 plain. The Board of Commissioners concluded in Finding 3 that  
13 additional industrial lands were needed to meet the needs of  
14 the City of Philomath and that this particular subdivision  
15 "will provide a logical area to accommodate additional  
16 industrial growth, as planned for since 1970."

17 Finding 4 notes that the city's comprehensive plan states  
18 the city "desires to accommodate industrial growth with an  
19 additional need of 1,802 workers by the year 2000." The plan  
20 says that 790 of these workers could be employed as a result of  
21 industrial use of this property. Finding 4 says that the City  
22 of Philomath has made certain additional findings, presumably  
23 in its comprehensive plan, to the effect that most future  
24 industrial areas are to be located north of the city limits  
25 where most existing industry is located. This area is  
26 preferred because it is relatively flat, there is a lot of

1 space for expansion, there is the immediate availability of  
2 rail access and utilities could be extended to service the area  
3 when needed. The county adopted these findings as its own for  
4 purposes of approving the subdivision request.

5 The county found that the Philomath Comprehensive Plan,  
6 urbanization segment, encourages the development of a regional  
7 industrial center for diversified development to provide  
8 employment opportunities for the existing and future labor  
9 force of the city, rural and regional areas. While the City of  
10 Philomath presently has several heavy industries, a subdivision  
11 providing light industrial opportunities would help provide  
12 further diversity for the city. The county also noted its own  
13 comprehensive plan provision which states:

14 "Within the county and the region, cities should  
15 be reserved the right to determine their own economic  
16 future within the bounds of the overall health of the  
17 county and regional economy."

18 The county found that Goal 11, as it related to the  
19 subdivision request, was also addressed and satisfied by the  
20 City of Philomath Comprehensive Plan. As previously indicated,  
21 the plan notes that "utilities could be extended to service the  
22 area when needed." The county also found that the City of  
23 Philomath had applied for a \$500,000 block grant to provide  
24 sewer and water service and street improvement for industrial  
25 uses to the northeast Philomath area in which the subject  
26 property is located. If this grant is approved the city will  
have sufficient resources to adequately service the area. If

1 the grant is not approved, the county has conditioned  
2 development of the site upon establishment of these services.

3 STANDING

4 Both Benton County and the City of Philomath challenge  
5 petitioner's standing in this case. Petitioner's standing is  
6 derived from the alleged standing of three of its members.  
7 There is no question that the three members appeared before  
8 Benton County. The question involves whether the three members  
9 have adequately demonstrated that they were "adversely  
10 affected" by the county's decision. Petitioner's  
11 representatives contend they were adversely affected;  
12 respondents argue the allegations of injury are not based upon  
13 any evidence in the record and are speculative.

14 Petitioner's standing is allegedly derived from the  
15 standing of three members, Mike Saslow, Catharin Newcomb and  
16 Nona Olson. Mr. Saslow lives on a 4 acre tract, approximately  
17 1600 feet from the proposed subdivision, and along with his  
18 wife, breeds, trains and sells Morgan horses. It is contended  
19 that land prices in the surrounding area, including Mr.  
20 Saslow's, have risen sharply. Petitioner asserts that Mr.  
21 Saslow intends to continue and possibly expand his agricultural  
22 pursuits but that increased land prices and increased taxes on  
23 his land will make it unprofitable and impractical to continue  
24 to do so. It is also alleged that Mr. Saslow enjoys a scenic  
25 view from his residence which view includes the subject  
26 property. The alleged industrial structures and activities on

1 the site will spoil this view. Petitioner also contends Mr.  
2 Saslow is within sight and smell of the proposed development  
3 and will be annoyed by industrial odors and pollution emanating  
4 from the site. Petitioner says Mr. Saslow can smell industrial  
5 odors originating from beyond the proposed development.  
6 Petitioner also contends the increased traffic which the  
7 development will generate will interfere with Mr. Saslow's use  
8 and enjoyment of his property and that the need to rebuild and  
9 widen the road leading to the property will result in  
10 condemnation of ten feet of frontage along his property.

11 Petitioner alleges that Ms. Newcomb engages in agricultural  
12 pursuits on her nine acre tract located approximately 1700 feet  
13 from the proposed development. Petitioner asserts Ms. Newcomb  
14 is injured by CME's request in that the request will result in  
15 higher land prices which will make it impractical for her to  
16 continue or expand her agricultural pursuits. Petitioner also  
17 alleges that CME's request will alter the nature drainage  
18 pattern in the area which will result in damage to her property  
19 and loss of pasturage.

20 Ms. Olson lives 950 feet from the proposed development,  
21 according to petitioner, and will be injured in that her scenic  
22 view will be spoiled by any industrial activities on CME's  
23 property. Petitioner also asserts Ms. Olson will be affected  
24 by sound, odor and pollutants emanating from the tract.  
25 Finally, petitioner asserts that Green Road which abutts Ms.  
26 Olson's property will need to be widened as a result of CME's

1 request and that this widening will result in condemnation of  
2 ten feet of Ms. Olson's property and increased traffic, noise,  
3 congestion and pollution causing Ms. Olson injury in the use  
4 and enjoyment of her property.

5 Respondents assert that petitioner's members have not  
6 established that their interests will be adversely affected or  
7 that they will be aggrieved by approval of CME's subdivision  
8 request. Respondents allege that the allegations of injury of  
9 petitioner's members are either speculative in nature and  
10 without any evidentiary support in the record or that they do  
11 not give rise to a legitimate claim of injury. For example,  
12 respondents contend that the allegation of rising land prices  
13 is unsubstantiated in the record as well as are the contentions  
14 concerning adverse effects from noise, odor and pollution as a  
15 result of industrial activity on the CME property. Respondent  
16 Benton County argues that the allegations of two of  
17 petitioner's members concerning interference with their scenic  
18 view do not give rise to an injury to petitioner's members  
19 sufficient to confer standing because these persons do not have  
20 a vested right to a scenic view of property located within an  
21 adopted urban growth boundary. The county takes a similar  
22 position with respect to the allegations of increased traffic  
23 and that because traffic is expected to increase within an  
24 urban growth boundary no claim of injury can be made on this  
25 basis. In summary, Benton County argues that because it is  
26 expected that once land is included within an urban growth

1 boundary views will change, roads will have to be widened and  
2 so forth, a person who is affected by a specific development  
3 proposal which will in fact cause these things to happen has no  
4 standing to complain because that person was not "adversely  
5 affected" within the meaning of Oregon Laws 1979, ch 772,  
6 section 4.

7 Oregon Laws 1979, ch 772, section 4(6) requires that facts  
8 in support of standing must be alleged in the Petition for  
9 Review. LUBA Rule 8(C)(2) provides:

10 "If respondent challenges petitioner's standing  
11 on the basis that the facts alleged in support of  
12 standing are not true, respondent shall state in its  
13 brief under a separate heading the true facts and in  
14 what manner the facts alleged by petitioner are  
15 untrue. If necessary in order to obtain sufficient  
16 information to dispute petitioner's allegations of  
17 standing respondent may take petitioner's deposition  
18 pursuant to ORS 183.425. Such deposition, if relied  
19 upon by respondent, shall be appended to respondent's  
20 brief, or filed with the Board and served on all  
21 parties as soon as practicable."

22 There is nothing in Oregon Laws 1979, ch 772, or in the  
23 Board's rules which requires the evidentiary basis for facts  
24 alleged in support of standing to exist in the record of the  
25 proceedings. Facts relative to a petitioner's standing to  
26 appeal to this Board are often not germane to the issues  
before the governing body at the time it is considering a  
particular land use request. To require a petitioner before  
this Board to supply a evidentiary basis in the record for his  
standing to appeal a local government's land use decision would  
needlessly, we believe, lengthen the proceedings below.

1 Rule 8(C)(2) quoted above provides a respondent with the  
2 opportunity to challenge the truth of factual assertions made  
3 by petitioner in support of standing. If a respondent truly  
4 believes there is no basis to support an assertion of injury,  
5 the respondent may simply deny the assertion and state what it  
6 believes the true effect of the decision will be. This action  
7 will then place the petitioner in the position of having to  
8 provide evidentiary support for his or her claim of standing.  
9 To require the evidentiary support for a claim of standing  
10 before any attack is made on that standing would serve no  
11 legislative policy.

12 The question with which we are faced, however, is whether  
13 respondent's have, in fact, denied any allegations of injury or  
14 have simply alleged that they are insufficient because they are  
15 without evidentiary support in the record. Benton County, at  
16 least, seems to have put in issue whether land prices will rise  
17 and whether Green Road will need to be widened as a result of  
18 CME's request by attaching two affidavits to its brief refuting  
19 these claims. Still, no where in Respondent Benton County's  
20 brief or in Intervenor City of Philomath's brief do we find a  
21 specific denial of the claim of injury.

22 Fortunately, we do not have to resolve this dilemma because  
23 we find petitioner has alleged facts sufficient to give it  
24 standing, the truth of which are clearly not challenged.  
25 Petitioner has alleged that two of its members will be  
26 adversely affected as a result of loss of scenic views which

1 they presently enjoy from their property. We disagree with  
2 Respondent Benton County that one must have a vested right to a  
3 scenic view in order for that person to be able to challenge a  
4 land use decision which interferes with that view. Here, not  
5 only is petitioner contending that its members will be  
6 adversely affected by location of an industrial plant or plants  
7 within view of the property of petitioner's members, petitioner  
8 is also claiming that no industrial activity or any other urban  
9 use should be allowed at this site because the urban growth  
10 boundary has not yet been properly established. When one  
11 asserts that property should not be developed for an urban use  
12 and that development will alter the land's scenic value, we  
13 believe sufficient claim of injury has been made to confer  
14 standing. See 1000 Friends of Oregon v Multnomah County, 39 Or  
15 App 917, 593 P2d 171 (1978). For the foregoing reasons, we  
16 conclude that petitioner has alleged sufficient facts to show  
17 that the interest of at least two of its members, Mr. Saslow  
18 and Ms. Olson, have been adversely affected within the meaning  
19 of Oregon Laws 1979, ch 772, section 4. Petitioner, thus, has  
20 representational standing to assert the interests of its  
21 members. 1000 Friends of Oregon v Marion County, 1 Or LUBA 33  
22 (1980).

23 OPINION

24 1. Assignments of Error 1 - 4.

25 Petitioner's first four assignments of error concern the  
26 interrelationship of Goals 3 and 14 to a land use decision made

1 within an adopted but unacknowledged urban growth boundary.  
2 Petitioner argues that prior to acknowledgement of an urban  
3 growth boundary a jurisdiction, in order to allow a proposed  
4 non-farm use of agricultural land within the UGB, must (1) take  
5 an exception to Goal 3 and (2) apply the seven factors in Goal  
6 14 for establishment of a UGB. Concerning the application of  
7 Goal 3, petitioner argues that "generalized findings in the  
8 comprehensive plan may [not] be used to justify the decision in  
9 this particular case...a site specific application of the goals  
10 [is] required prior to acknowledgement of the comprehensive  
11 plan," citing Sole v Lane County, 1 Or LUBA 186, 189 (1980).  
12 Concerning Goal 14, petitioner argues it was error for the  
13 county to only consider the four conversion factors in Goal 14  
14 for converting urbanizable land to urban and to not consider  
15 the seven factors in Goal 14 for establishment of a UGB.  
16 Petitioner argues that the findings which the county did make  
17 do not satisfy the seven factors in Goal 14 for establishment  
18 of a UGB. Specifically, petitioner argues the findings do not  
19 satisfy the first, third and sixth factors of Goal 14.<sup>1</sup>

20 Respondents argue that it was unnecessary for the county to  
21 apply Goal 3 specifically because the property was located  
22 within an adopted urban growth boundary and the seven factors  
23 in Goal 14 for establishment of an urban growth boundary were  
24 applied when the boundary was adopted.

25 Prior to acknowledgement of the applicable comprehensive  
26 plan and implementing ordinances, all applicable goals must be

1 applied to specific land use decisions. See Sunnyside  
2 Neighborhood League v Board of Commissioners of Clackamas  
3 County, 280 Or 3, 569 P2d 1063 (1977). However, this  
4 requirement does not mean that prior to acknowledgement of a  
5 city or county's comprehensive plan and implementing ordinances  
6 a jurisdiction must always demonstrate that a land use decision  
7 independently conforms to the requirements of the individual  
8 statewide goals. A jurisdiction which can show that its land  
9 use decision complies with an adopted but unacknowledged  
10 comprehensive plan and that plan's implementing ordinances need  
11 not, in addition, demonstrate that the decision complies with  
12 the applicable goals.<sup>2</sup> A jurisdiction which does attempt to  
13 rely upon its comprehensive plan and implementing ordinances to  
14 show compliance with the statewide goals is not, however,  
15 immune from attack on the basis that the decision made violates  
16 the applicable statewide planning goals. Where such an attack  
17 is made the inquiry is not whether the jurisdiction  
18 independently demonstrated compliance with the goals but  
19 whether the applicable comprehensive plan and implementing  
20 ordinance provisions with which the decision at issue is  
21 consistent comply with the applicable goals. Such an inquiry  
22 is proper because, prior to acknowledgement, the applicable  
23 goals remain as the ultimate standard for land use decision  
24 making. See Sunnyside, supra.

25 In the present case, the land use decision involves a  
26 non-farm use on agricultural land as defined in Goal 3 within

1 an adopted but unacknowledged urban growth boundary. For  
2 purposes of this opinion, we assume the proposed use is a  
3 "urban" use of land, since none of the parties has urged to the  
4 contrary. Goals 3 and 14 are thus "applicable goals" with  
5 which the county must ultimately demonstrate compliance. Here,  
6 the City of Philomath and Benton County have jointly adopted an  
7 urban growth boundary for the City of Philomath. If the seven  
8 factors in Goal 14 for establishment of an urban growth  
9 boundary were properly considered and applied when the urban  
10 growth boundary was adopted, the concerns of Goal 3 as well as  
11 the concerns of Goal 14 relating to the conversion of land from  
12 rural to urbanizable would have been adequately addressed. It  
13 is our function, therefore, in the review of this particular  
14 land use decision to determine whether Benton County and the  
15 City of Philomath adequately addressed Goals 3 and 14 when the  
16 urban growth boundary for the City of Philomath was adopted.

17 Petitioner argues that Benton County did not adequately  
18 address in Goal 14 in approving CME's subdivision request  
19 because the Philomath Comprehensive Plan findings referenced in  
20 Benton County's order fail to demonstrate that the urban growth  
21 boundary complies with Goal 14 Factors 1, 3 and 6. The first  
22 factor in Goal 14 for establishment of an urban growth boundary  
23 requires consideration of "demonstrated need to accommodate  
24 long range urban population growth requirements consistent with  
25 LCDC goals." Petitioner argues that just because Philomath  
26 wants to have a population of 9,000 people by the year 2000 and

1 "desires to accommodate industrial growth with an additional  
2 need of 1,802 workers by the year 2000" is not the equivalent  
3 of a statement that there is a demonstrated need for 9,000  
4 people or 1,800 workers. Petitioner argues the city erred in  
5 basing its urban growth boundary on a projected population of  
6 9,465 when population growth estimates furnished by the Council  
7 of Governments' staff showed a year 2000 population of 5,000 to  
8 6,000 people. An increase of 5,000 to 6,000 is the highest  
9 percentage increase anywhere in Benton County, according to  
10 petitioner. Petitioner says that 1,802 workers would represent  
11 a 66% increase in the total population of the city "not to  
12 mention the additional retail, service and commercial workers  
13 engendered by such growth."

14 The basis for Philomath's population projection is set  
15 forth in its plan at pages 76-77 as follows:

16 "The City of Philomath has elected to utilize a  
17 population projection of 9,000 persons in the year  
18 2000. This projection is higher than the range of  
19 standard population projections for the Linn-Benton  
20 County area prepared by the Portland State University  
21 and Oregon District 4 Council of Governments. For  
22 this reason the projection has been reviewed by Benton  
23 County as required by the LCDC policy paper regarding  
24 urban development. Benton County concurred in the  
25 population estimate finding that community attitudes  
26 exist which favor growth and that no adverse impacts  
to adjacent jurisdictions will occur.

23 "In developing a population projection, the City  
24 of Philomath used statistical analysis in addition to  
25 finding community support for increased growth. A  
26 nine year time frame was used rather than a longer  
period, to examine past trends. This decision was  
made given relatively recent nationwide trends for  
increased population movement to the sun belt and  
Pacific Northwest regions of the country. Nationwide

1 trends also show increased movement toward  
2 non-metropolitan small towns. The Philomath growth  
rate for the years 1970 to 1979 was 5.35%\*\*\*"

3 Based upon the above, the City of Philomath estimated its year  
4 2000 population to be 8,800 people.

5 We conclude contrary to petitioner's assertions that the  
6 City of Philomath projected population for the year 2000 is  
7 based upon more than the mere "desires" of the city to grow. A  
8 statistical analysis based upon population trends for the past  
9 nine years was used by the city in arriving at its projected  
10 population figure. This population figure was the basis upon  
11 which the urban growth boundary was drawn. We conclude,  
12 therefore, that Factor 1 of Goal 14 has not been violated as  
13 alleged by petitioner.<sup>3</sup>

14 Factor 6 of Goal 14 pertaining to the establishment of  
15 urban growth boundaries requires consideration of:

16 "Retention of agricultural land as defined, with  
17 Class I being the highest priority for retention and  
Class VI the lowest priority;"

18 Petitioner alleges that this factor was inadequately considered  
19 because "the retention of this agricultural land is not  
20 addressed at all by the findings, nor is the intergal question  
21 of alternative locations addressed." The City of Philomath  
22 Comprehensive Plan addresses Factor 6 as follows:

23 "All of the soils in and surrounding Philomath  
24 are Class II through IV agricultural soils, so any  
land that would be included in the UGB must also be of  
25 these classes.

26 "Approximately 75% of the soils within the urban  
growth boundary and outside the city limits are Class

1 III and IV, which are of lower priority for  
2 preservation in Class I and II soils. The remaining  
25% are Class II soils."

3 We believe the above quoted finding adequately satisfies  
4 the concerns of factor 6 in Goal 14, at least as compliance  
5 with that factor has been addressed by petitioner. Petitioner  
6 has not alleged how the boundary may have been drawn  
7 differently to exclude agricultural land of a higher priority  
8 and include agricultural land of a lower priority.

9 Factor 3 of Goal 14 requires consideration of the "orderly  
10 and economic provision of public facilities and services" in  
11 the establishment of an urban growth boundary. Petitioner  
12 contends this factor was not adequately addressed in Benton  
13 County's approval of CME's subdivision request because the  
14 county did not give proper consideration to the adequacy of the  
15 city's sewage treatment plant and the plant's ability to handle  
16 any additional effluent. Petitioner argues the record shows  
17 that the current sewage treatment plant is designed to treat  
18 approximately 350,000 gallons per day. The average flow into  
19 the plant in winter months is approximately 652,000 gallons per  
20 day, or 186.3% of the limit established by the Department of  
21 Environmental Quality. Development of Phase I of CME's  
22 proposal would result, directly and indirectly, in as much as  
23 49,600 additional gallons per day, thus aggravate an already  
24 bad problem.

25 Benton County in approving CME's subdivision request made  
26 no findings with respect to the evidence presented by

1 petitioner and referred to above. Benton County did, however,  
2 adopt certain findings from the City of Philomath Comprehensive  
3 Plan as follows:

4 "That the majority of industrial sites to the  
5 northeast of the city do not have public water and  
6 sewer at this time and that before these sites can be  
developed the provision of these utilities is  
essential."

7 \*\*\*

8 "Goals 11 (Public Facilities and Services) and 12  
9 (Transportation) are addressed in the Philomath  
Comprehensive Plan as follows:

10 'a. Most future industrial areas (should)  
11 be located north of the city limits near the  
12 Southern Pacific Railroad tracks. This is where  
13 most existing industry is located, there is a  
14 great deal of space for expansion, the terrain is  
flat, there is immediate availability of rail  
access and utilities could be extended to service  
the area when needed.

15 'b. Industrial development in the Philomath  
16 area must meet established state and federal air  
and water quality standards as a prerequisite for  
development and continued operation.'"

17 In addition to the above, the county made the following finding:

18 "9. The City of Philomath has been invited to  
19 apply for a \$500,000 federal community development  
20 block grant to provide sewer and water service and  
21 street improvement for industrial uses to the  
22 northeast Philomath area in which the subject property  
is located. If approved, this will allow adequate  
services to be provided to the site as the money  
becomes available. Should this not occur, conditions  
number 2 and 19 specifically provide for establishment  
of these services prior to development."

23 Although not specifically referenced by Benton County in  
24 its order, the City of Philomath Comprehensive Plan makes some  
25 additional statements about the provision of sewer services  
26

1 within the urban growth boundary:

2 "Several urbanization policies provide for the  
3 orderly and economic provision of public facilities  
and services:

4 'That the approval of urban development  
5 proposals within the urban fringe shall be based  
6 upon the availability of city services (sewer,  
7 water and public facilities) contiguity to the  
8 city and joint city-county approval for detailed  
9 annexation.'" Plan page 83.

8 "K. Sewage disposal

9 "1. That an analysis of Philomath's sewer  
10 collection system should be completed to fully  
11 determine the nature and extent of infiltration  
12 problems and how they might be resolved. A  
13 program is currently underway to correct  
14 infiltration problems, in accordance with the  
15 Department of Environmental Quality requirement.  
16 When completed, this should substantially  
17 increase the capacity of the sewage treatment  
18 plant to accommodate a population of 3,500.

15 "2. That the city should begin construction  
16 of an interceptor sewer line along Newton Creek  
17 from West Hills Road south to Plymouth Road.  
18 This line would service the north and east  
19 portions of the Philomath area where almost all  
20 industry will be located, as well as the majority  
21 of the residential development which is expected  
22 in the next few years. This would allow for the  
23 replacement of the 'B' pump station.

20 "3. That within the next five to ten years,  
21 depending on the rate of population growth, the  
22 sewage treatment plant will require some  
23 renovation or expansion. This next additional  
24 can be handled at the existing site, however, in  
25 the future." Plan, pages 49-50.

23 A review of the findings made by Benton County in its order  
24 approving CME's subdivision request and a review of additional  
25 pertinent findings contained in the City of Philomath  
26 Comprehensive Plan lead us to conclude that the City of

1 Philomath has not, for purposes of compliance with factor 3 of  
2 Goal 14, based its urban growth boundary upon an adequate  
3 consideration of the orderly and efficient extension of public  
4 facilities and services. In McGee v City of Cave Junction, \_\_\_  
5 Or LUBA \_\_\_ (LUBA No. 80-166, 1981), we held the City of Cave  
6 Junction erred in establishing an urban growth boundary to  
7 accommodate 5,000 people in the absence of factual evidence to  
8 support its conclusion that it could provide sewer or water  
9 service to serve the needs of such a population. We said,  
10 based upon the record in that case, that Cave Junction's  
11 ability to provide sewer and water service to a projected  
12 population of 5,000 "is, at best, speculative." Slip Op at  
13 10. We noted that Goal 2 requires a factual base to exist in  
14 the record to support decisions made relating to the provision  
15 of public facilities and services.

16 In the present case, the City of Philomath Comprehensive  
17 Plan says only that with certain modifications underway the  
18 present treatment plant could accommodate a population of  
19 3,500. The plan also says that within five or ten years the  
20 treatment plant should be renovated and expanded. However, no  
21 "plan" is set forth in the Philomath Comprehensive Plan showing  
22 how expansion of the treatment plant might be effected. Based  
23 upon this record, therefore, we can only conclude as we did in  
24 McGee v City of Cave Junction, supra, that the City of  
25 Philomath's ability to provide for the sewage needs of a  
26 population in excess of 3,500 is speculative. Factor 3 of Goal

1 14 relating to the establishment of an urban growth boundary  
2 was not properly applied by the City of Philomath in adopting  
3 its comprehensive plan.

4 2. Fifth Assignment of Error.

5 The foregoing discussion is also applicable to petitioner's  
6 fifth assignment of error wherein petitioner contends Benton  
7 County failed to properly consider or apply Goal 11 in  
8 approving CME's subdivision request. Petitioner again  
9 complains that the factual circumstances surrounding the city's  
10 sewage treatment plant as disclosed in the record necessitated,  
11 at a minimum, that Benton County make a finding with respect to  
12 the adequacy of the treatment plant to handle the additional  
13 effluent which would be generated, directly and indirectly, by  
14 CME's subdivision request.

15 Factor 3 of Goal 14 requiring that an urban growth boundary  
16 be based upon consideration of the "orderly and efficient  
17 provision of public facilities and services" is a long range  
18 planning consideration. What must be shown in order to satisfy  
19 that requirement is that a jurisdiction has a plan to provide  
20 over a period of time for the public facility and service needs  
21 of the population which will reside within the urban growth  
22 boundary. When a specific land use request is proposed,  
23 however, a different consideration is involved. That  
24 consideration is one of timing: can the public facilities and  
25 services necessary to satisfy the needs generated by this  
26 particular land use request be made available when they are

1 needed and can they be provided in an orderly and efficient manner?  
2 Whether public facilities and services, including sewage service,  
3 can be adequately provided to serve the needs of a particular  
4 development request is, prior to acknowledgement, addressed through  
5 application of Goal 11.<sup>4</sup>

6 The findings of Benton County in approving CME's subdivision  
7 request have already been set forth in this opinion. No where in  
8 those findings does Benton County address the concerns raised by  
9 petitioner in the hearing relative to sewage treatment plant  
10 capacity.<sup>5</sup>

11 In order to approve CME's subdivision request, consistent with  
12 Goal 11, Benton County was required to find that public facilities  
13 and services could be made available to accommodate the needs  
14 generated by development of the property for industrial purposes.  
15 In view of the "focused testimony" during the hearing on the issue  
16 of the adequacy of the city's sewage treatment plant, Benton County  
17 was required to find that the city's sewage treatment plant was  
18 adequate or could be made adequate to handle whatever additional  
19 effluent might be generated as a result of CME's subdivision  
20 request. See: Norvell v Portland Metro ALGBC, 43 Or App 849, 604  
21 P2d 896 (1979); City of Wood Village v Portland Metro ALGBC, 48 Or  
22 App 79, \_\_\_ P2d \_\_\_ (1980); Sane Orderly Development v Douglas  
23 County Board of Commissioners, 2 Or LUBA 196 (1980). Because no  
24 such finding was made in this case, Benton County failed to  
25 demonstrate how CME's subdivision request was consistent with Goal  
26 11.

FOOTNOTES

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(1) Demonstrated need to accommodate long-range urban population growth requirements consistent with LCDC goals;

(2) Need for housing, employment opportunities, and livability;

(3) Orderly and economic provision for public facilities and services;

(4) Maximum efficiency of land uses within and on the fringe of the existing urban area;

(5) Environmental, energy, economic and social consequences;

(6) Retention of agricultural land as defined, with Class I being the highest priority for retention and Class VI the lowest priority; and,

(7) Compatibility of the proposed urban uses with nearby agricultural activities.

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2

In Metropolitan Service District v Clackamas County, 2 Or LUBA 139, 142 (1980), we said:

"A zoning ordinance need not be shown by the county to independently conform to the statewide planning goals provided that the zoning ordinance is shown to conform to the comprehensive plan and the comprehensive plan in turn is shown to conform to the statewide goals. See 38 Op Ag 1834 at 1839 - 1840."

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3

In its determination, the Land Conservation and Development Commission instructed that the following footnotes be added to the Board's opinion:

"The Land Conservation and Development Commission notes in its conclusion that specific factors of Goal 14 have been satisfied is based on the record before it and the allegations of the petitioner. The Commission does not believe that any conclusions reached in this case with respect to whether certain factors of Goal 14 are satisfied are necessarily

1           determinative when the Commission reviews the  
2           Philomath Urban Growth Boundary in an acknowledgment  
3           proceeding. The Commission's review of a UGB in an  
4           acknowledgment proceeding will be based on a different  
5           record and is an overall review which is not limited  
6           to the allegations of specific parties."

7  
8           "The Board notes that where local government  
9           utilizes or generates a population projection that  
10          varies markedly from the available standard  
11          projection, that projection must have a valid  
12          statistical basis."

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<sup>4</sup>

16          Goal 14 also speaks to the issue of whether public  
17          facilities and services which are adequate to serve the  
18          needs generated by specific development request can be  
19          made available in Factor 1 of the "conversion" factors.  
20          Goal 14 provides, in pertinent part, as follows:

21                 "Conversion of urbanizable land to urban uses  
22                 shall be based on consideration of:

23                         "(1) Orderly, economic provision for public  
24                         facilities and services."

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<sup>5</sup>

27          Benton County's finding concerning the \$500,000  
28          federal community development block grant does not relate  
29          to expansion or renovation of the treatment plant, as we  
30          understand the finding, but only to the laying of sewer  
31          lines northeast of Philomath. Conditions 2 and 19 imposed  
32          by the county in the event the \$500,000 block grant is not  
33          received do not prohibit or restrict development in the  
34          event the treatment plant is not renovated or expanded.

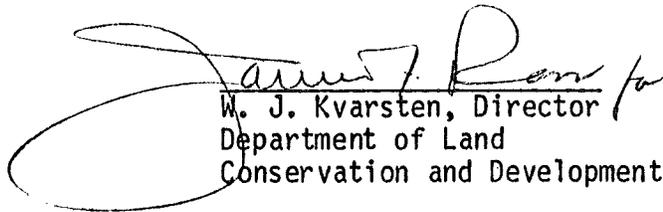


2. Footnote 2 on page 16:

The Commission notes that where local government utilizes or generates a population projection that varies markedly from the available standard projection, that projection must have a valid statistical basis.

DATED THIS 30<sup>th</sup> DAY OF September, 1981.

FOR THE COMMISSION:

  
W. J. Kvarsten, Director  
Department of Land  
Conservation and Development

WJK:ER:af  
6768A/9B



## STATE OF OREGON

## INTEROFFICE MEMO

TO: MEMBERS OF THE LAND CONSERVATION AND DEVELOPMENT COMMISSION      DATE: 9/3/81

FROM: THE LAND USE BOARD OF APPEALS

SUBJECT: FRIENDS OF BENTON COUNTY V. BENTON COUNTY  
LUBA NO. 81-054

Enclosed for your review is the Board's proposed opinion and final order in the above captioned appeal.

This case is about a decision of the City of Philomath approving a subdivision of 74 acres into 18 lots of two to ten acres each. The land is located outside the city limits and within the city's adopted but as yet unacknowledged urban growth boundary. The property is zoned for industrial purposes. Petitioner contends the decision violates Statewide Goals 2, 3, 11 and 14.

The Board concluded that it was not necessary for Benton County to take an exception to Goal 3 prior to acknowledgment of the Philomath Comprehensive Plan if the findings for the Philomath Comprehensive Plan indicated that the urban growth boundary was drawn in accordance with the factors in Goal 14. We also concluded, however, that the findings failed to indicate that the urban growth boundary was drawn in compliance with Factor 3 of Goal 14 relating to the orderly and economic provision of public facilities and services. The findings failed to show the City of Philomath had a plan to expand its sewage treatment plant to service the needs of a population above 3,500, let alone the population of 9,000 which the plan projected by the year 2000 and upon which the urban growth boundary was based.

In addition, the Board concluded that in approving the subdivision request, Benton County failed to properly consider Goal 11. Benton County did not address in its findings the concerns raised by petitioner in the hearing relative to sewage treatment plant capacity. Benton County was required under Goal 11 to find the public facilities and services to be made available to accommodate the needs generated by development of the property for industrial purposes. Because no such finding was made, the Board concluded that Benton County failed to demonstrate how the subdivision request was consistent with Goal 11.

The Board is of the opinion that oral argument would not assist the commission in its understanding or review of the statewide goal issues involved in this appeal. Therefore, the Board recommends that oral argument before the commission not be allowed.



Contains  
Recycled  
Materials

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

3 FRIENDS OF BENTON COUNTY,                    )  
  )  
4                    Petitioner,                    )  
  )  
5                    vs.                            )  
  )  
6 BENTON COUNTY and                            )  
CENTRAL MOUNTAIN ENTERPRISES,                )  
7    )  
  )  
8                    Respondents.                )

  LUBA No. 81-054  
  PROPOSED OPINION  
  AND ORDER

9            Appeal from Benton County.

10           Richard C. Stein, Salem, filed the Petition for Review and  
11           A. Carl Myers argued the cause on behalf of Petitioner. With  
          them on the brief were Ramsay, Stein, Feibleman and Myers.

12           Richard T. Ligon, Corvallis, filed the brief and argued the  
          cause on behalf of Respondent Benton County.

13           Donald M. Kelley, Silverton, filed the brief and argued the  
14           cause on behalf of Respondent Central Mountain Enterprises.  
          With him on the brief were Kelley and Kelley.

15           Robert S. Gardner, Corvallis, filed the brief and argued  
16           the cause on behalf of Intervenor City of Philomath. With him  
          on the brief were Ringo, Walton, Eves & Gardner, P.C.

17           REYNOLDS, Chief Referee; COX, Referee; BAGG, Referee;  
18           participated in this decision.

19                                   REMANDED                                   9/03/81

20  
21           You are entitled to judicial review of this Order.  
22           Judicial review is governed by the provisions of Oregon Laws  
          1979, ch 772, sec 6(a).