

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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

JAMES G. PERKINS, SHIRLEE )  
PERKINS, DAVID DICKSON, )  
MELINDA DICKSON, KELLY )  
MC GREER, ROSEMARY MC GREER, )  
and 1000 FRIENDS OF OREGON, )  
an Oregon nonprofit )  
corporation, )  
  
Petitioners, )  
  
vs. )  
  
CITY OF RAJNEESHPURAM, )  
  
Respondent. )

LUBA No. 83-094  
83-095  
  
FINAL OPINION  
AND ORDER

Appeal from the City of Rajneeshpuram.

Mark J. Greenfield, Portland, filed the Petition for Review and argued the cause on behalf of Petitioners.

Ma Prem Sangeet, Rajneeshpuram, filed the response brief and argued the cause on behalf of Respondent City.

Wilford K. Carey, Hood River, filed a brief and argued the cause on behalf of Participant Wasco County.

BAGG, Chief Referee; KRESSEL, Referee; DUBAY, Referee participated in the decision.

REVERSED 02/09/84

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1983, ch 827.

1 Opinion by Bagg.

2 NATURE OF THE DECISIONS

3 Petitioners and Intervenor Wasco County challenge two  
4 ordinances adopted by Respondent City of Rajneeshpuram.<sup>1</sup> The  
5 first, Ordinance 83-11, annexes about 119 acres to the city.  
6 The second, Ordinance 83-12, rezones the annexed property to  
7 allow for urban uses. Petitioners and Participant Wasco County  
8 ask this Board to reverse both ordinances.

9 STANDING

10 Standing is an issue in this proceeding. Each petitioner  
11 alleges an appearance before the City of Rajneeshpuram, and  
12 each alleges having submitted testimony in opposition to the  
13 proposed action. Other than 1000 Friends of Oregon, each  
14 petitioner has ranching interests in the area.

15 James and Shirlee Perkins own approximately 8,500 acres in  
16 four separate areas in Wasco and Wheeler Counties. In an  
17 affidavit submitted in support of standing, the Perkins allege:  
18 (1) that the permanent residents and the visitors to the  
19 commune (which the Board understands to be a term referring to  
20 all of the persons living within the Big Muddy Ranch) will  
21 travel through and past the Perkins' property; (2) that roads  
22 used in order to reach the commune are also used by the Perkins  
23 for livestock, and the stock will be endangered by those  
24 traveling to the commune. The Board understands the  
25 petitioners to claim other losses from trespass and to say  
26 these problems and their probable increase are the result of

1 continued growth at Rajneeshpuram. These petitioners claim  
2 incorporation of and annexations to the City of Rajneeshpuram  
3 increase the likelihood of uninvited and unwelcome visitors and  
4 damage to their ranching operations.

5 The Perkins have alleged sufficient facts and injuries to  
6 have standing to bring this appeal. The Board is mindful of  
7 the respondent's view that there will be no increased  
8 population as a result of this annexation. However, the  
9 incorporation of additional territory into the city facilitates  
10 urban development, and therefore more urban activity. Greater  
11 urban activity includes the likelihood of increased movement to  
12 and from the city at sometime in the future, if not now.  
13 Therefore, the city's insistence there will be no population  
14 growth does not negate petitioners' standing to challenge these  
15 decisions. See 1000 Friends of Oregon v Benton County, 294 Or  
16 79, 653 P2d 1249 (1982) and Warren v Lane County, 6 Or LUBA 47  
17 (1982).

18 David Dickson and Melinda Dickson allege they live on and  
19 manage a 3500 acre ranch which lies along the roadway leading  
20 to the Big Muddy Ranch. They say that prior to the purchase of  
21 the ranch by its present owners, there was "very little  
22 traffic" going past their property, and now there has been a  
23 "tremendous increase in traffic." They allege this additional  
24 traffic endangers their children and livestock. The traffic  
25 "alters the quiet rural nature of our area and interferes with  
26 our use and enjoyment of our property." Affidavit of David and

1 Melinda Dickson at 2. The Dicksons say "the dust generated  
2 regularly by traffic past our property is now equal to the  
3 amount formally generated only on the opening day of deer  
4 season." Ibid at 5. They attribute the dust to increased  
5 traffic caused by the activities "relating to Rajneeshpuram."  
6 Id. The Dicksons say that if the city continues to grow, there  
7 will be even more traffic. They also allege that aircraft  
8 flying in and out of Rajneeshpuram fly over their house, and  
9 these flights have disturbed their sleep.

10 Petitioners David and Melinda Dickson (along with the  
11 McGreers) assert the annexation and rezoning "are geared to  
12 attract and accommodate thousands of people." Petition for  
13 Review at 2. Petitioners' interests are adversely affected by  
14 additional traffic resulting from tourists and other visitors  
15 to Rajneeshpuram. Expansion of the airport, facilitated by  
16 this annexation, "means more noise as more jets fly more  
17 frequently over petitioners' properties. Petitioners have been  
18 awakened or harassed by planes flying to or from Rajneeshpuram  
19 at low altitudes over their properties. This sound is  
20 unpleasant, distracting and very disturbing to petitioners."  
21 Petition for Review at 3-4.

22 The Board believes the Dicksons have alleged sufficient  
23 facts and injuries to support their claim for standing for the  
24 reasons stated in our discussion of the Perkins' claims.

25 Kelly McGreer and Rosemary McGreer base their standing on  
26 their ownership and farming of land adjoining the northeast

1 corner of the Big Muddy Ranch. The McGreers allege that at the  
2 time a dam was being constructed at Rajneeshpuram, they could  
3 hear the sounds of construction. They were unable to say for  
4 certain whether the sounds were associated with construction of  
5 the dam or other construction activities at Rajneeshpuram.  
6 They further allege they can hear noise from airplanes  
7 departing from Rajneeshpuram. They allege the airplanes fly  
8 over their property, including over their house, at an  
9 elevation of less than 1,000 feet on departure. The McGreers  
10 claim the noise is unpleasant and distracting. As with the  
11 Dicksons, the McGreers view the annexation as attracting more  
12 people. This attraction will result in harm to petitioners  
13 through the same increase in traffic as discussed above. See  
14 Petition for Review at 2 and 3 and affidavit of Kelly and  
15 Rosemary McGreer.

16 The Board believes these allegations are sufficient to  
17 confer standing on the McGreers. Petitioners' claim that the  
18 further expansion of the city will result in activities which  
19 injure or annoy them is sufficient to grant standing.<sup>2</sup>

20 Petitioner 1000 Friends of Oregon advises that the  
21 organization was formed to "secure the reasonable  
22 implementation of Oregon's land use laws." 1000 Friends  
23 alleges that unlawful non-farm development on agricultural land  
24 are adverse to these purposes and harmful to Oregon's land use  
25 planning program. Therefore, 1000 Friends urges it is  
26 adversely affected by the decision on review here.

1 Respondent does not specifically challenge the standing of  
2 1000 Friends of Oregon.<sup>3</sup> Accordingly, the Board finds 1000  
3 Friends has standing to bring this appeal. The Board wishes to  
4 note, however, that in so doing it is making no comment as to  
5 the adequacy of the allegations made by 1000 Friends in support  
6 of its claim of standing.

7 PARTICIPATION BY WASCO COUNTY

8 Wasco County filed a statement of intent to participate.  
9 Following that statement of intent to participate, Wasco County  
10 submitted a brief which in large part joins with petitioners in  
11 contesting the ordinances under review in this proceeding.  
12 Wasco County makes a claim for standing on the ground that  
13 these decisions violate a joint management agreement between  
14 Wasco County and the City of Rajneeshpuram. The county also  
15 alleges the actions were done in violation of provisions of the  
16 Wasco County plan.

17 Respondent claims Wasco County lacks standing to challenge  
18 the decisions because the county did not object to the city's  
19 annexation in the proceeding before the city. The Board  
20 understands this statement to be an assertion that the county  
21 failed to make an appearance as required by ORS 197.830(3)(b).  
22 The Board notes, however, that within participant's brief is a  
23 statement that the county did object to the annexation. The  
24 participant cites two letters from the Wasco County planning  
25 office to the city. The first letter was written August 9,  
26 1983, and urges the city to delay the annexation. The second

1 letter dated August 23, 1983, also recommends postponing  
2 annexation. This letter includes a statement that the county  
3 does not object to the rezoning but says the rezoning of the  
4 annexed territories for urban designation prior to the county's  
5 adoption of a new urban growth boundary would be contrary to  
6 the city's own comprehensive plan.

7 The Board believes the letters of the Wasco County planning  
8 staff to the city constitute sufficient appearance to qualify  
9 under the provisions of ORS 197.830(3)(b). We do not believe a  
10 specific authorization by the governing body need exist in  
11 order for a letter or other appearance by local government  
12 agents to be sufficient to meet the appearance standards set  
13 out in the law. For the purposes of establishing the standing  
14 of a local government, it is sufficient if a representative of  
15 the local governing body makes an appearance in an official  
16 capacity.

17 Wasco County has standing to participate in this review  
18 proceeding.<sup>4</sup>

19 FACTS

20 The City of Rajneeshpuram does not have an acknowledged  
21 comprehensive plan. The city and the county have not agreed to  
22 an urban growth boundary, and the urban growth boundary  
23 recognized by the city and amended immediately prior to this  
24 annexation has not received acknowledgment from LCDC. LCDC  
25 has, however, issued a continuance order about the previous  
26 city urban growth boundary, finding it not in compliance with

1 Sections 3, 4 and 5 of Goal 14. See Footnote 12, *infra*. The  
2 Board understands that as a result of the comments in the LCDC  
3 continuance order and the LCDC staff evaluation of the urban  
4 growth boundary, the city notified Wasco County it intended to  
5 change its urban growth boundary. Wasco County postponed its  
6 consideration of the proposed revisions. The city went ahead  
7 on August 24, 1983, and adopted changes to the urban growth  
8 boundary. Also during this period, the city was considering  
9 the annexations subject to this appeal. The Wasco County  
10 planning office, in a letter of August 9, 1983, urged the city  
11 to postpone the annexations.

12 The annexation ordinance, Ordinance 83-11, and the zoning  
13 of the annexed areas by Ordinance 83-12, were both adopted by  
14 the city on August 28, 1983.

15 The annexed territory comprises approximately 119 acres.  
16 The county comprehensive plan designates the land "A-1 (80)."  
17 This designation is an exclusive farm use designation. See ORS  
18 215.203. After annexation, the city zoned the land for urban  
19 uses utilizing various zones. All of the zones allow  
20 development beyond that allowed in an exclusive farm use zone.

21 FIRST ASSIGNMENT OF ERROR<sup>5</sup>

22 "Respondent Had No Lawful Authority to Adopt  
23 Ordinances 83-11 and 83-12"

24 Petitioners argue the City of Rajneeshpuram did not possess  
25 legal authority necessary to approve annexation. Petitioners  
26 assert only lawfully established governments may exercise

1 planning and zoning responsibilities or engage in land use  
2 decision making. Petitioners argue the city was never lawfully  
3 established and cite us to 1000 Friends of Oregon v Wasco  
4 County Court, \_\_ Or LUBA \_\_\_\_ (LUBA No. 81-132, Slip Op of  
5 9/30/83), holding portions of the proceedings leading to  
6 incorporation to violate certain LCDC goals.

7 Our remand in 1000 Friends of Oregon v Wasco County Court,  
8 supra, rendered ineffective the petition for incorporation  
9 until such time as the county took action to correct the  
10 deficiencies noted in the Board's order. See Clackamas County  
11 v LCDC, 35 Or App 725, 582 P2d 59 (1978). As a consequence,  
12 the incorporation was invalid for land use planning purposes.  
13 Whether the Board's order invalidated the incorporation for all  
14 purposes is a matter about which the Board expresses no  
15 opinion.<sup>6</sup>

16 Because the city was not formed in compliance with all land  
17 use regulations, the city lacked authority to incorporate new  
18 territory into its boundaries.

19 The first assignment of error is sustained.

20 SECOND ASSIGNMENT OF ERROR

21 "The Annexation and Rezoning Violate Wasco County's  
22 Comprehensive Plan Policies Governing Agricultural  
23 Land and the County's Exclusive Farm Use Zoning for  
the Area"

24 Petitioners cite the order of the Wasco County Circuit  
25 Court entered October 24, 1983, holding that Wasco County has  
26 land use jurisdiction over all decisions affecting lands on the

1 Big Muddy Ranch, including the annexed property. Petitioners  
2 say this Board is bound by that order. The result, according  
3 to petitioners, is that the Board must find that the annexation  
4 and rezoning violate the county's exclusive farm use zoning  
5 applied and still existing on the annexed lands.

6 The city responds that the Wasco County plan is not in  
7 compliance with statewide planning Goal 14. The city says LCDC  
8 required the city to make changes in its urban growth boundary  
9 in order to comply with Goal 14, and these changes have not  
10 been incorporated into the Wasco County plan. We understand  
11 the city to argue that because the Wasco County plan has not  
12 been updated, any violation of the plan's old provisions is of  
13 no consequence.

14 The Board understands this assignment of error to be a  
15 repeat of the first assignment of error. The Board agrees that  
16 the City of Rajneeshpuram lacks the authority to annex and  
17 rezone territory. However, the Board declines to find the  
18 city's action in violation of the Wasco County plan. The  
19 city's attempt to annex and rezone the territory is a nullity.  
20 The county plan designations and zones applied to this land  
21 remain in effect. Nothing has happened to violate the Wasco  
22 County plan.<sup>7</sup>

23 The second assignment of error is denied.

24 THIRD ASSIGNMENT OF ERROR

25 "The Annexation and Rezoning Violate Rajneeshpuram's  
26 Comprehensive Plan Provisions Governing Annexations"

1 In this assignment of error, petitioners assume for the  
2 sake of argument that Rajneeshpuram has authority to make land  
3 use decisions. Petitioners then argue the decisions are not  
4 valid under the city's plan. Petitioners point to a provision  
5 in the city's plan requiring a showing of need before  
6 annexations may occur.

7 "The City shall consider annexation of suitable  
8 adjacent land when required to provide for growth in  
9 the economy or population, or when needed to provide  
adequate services [sic] and facilities." City of  
Rajneeshpuram Comprehensive Plan, Volume II, Policy  
35, p. 86.

10

11 Petitioners next cite the city's annexation implementation  
12 policies including the following:

13 "1. The City will consider annexation of adjacent  
territory when:

14

15 " - the percentage of suitable vacant buildable land  
16 for any one of the following purposes falls below 25%  
of its total allotment: residential, commercial,  
industrial, community services or parks;

17 " - when insufficient land exists for the feasible and  
18 cost-effective siting of facilities to serve the  
City's requirements." Id.

19 Petitioners argue Implementation Strategy 1, supra, sets  
20 forth conditions which have not been met. Petitioners assert  
21 the city failed to show the percentage of suitable vacant land  
22 for any one purpose has fallen below 25% of the total  
23 allotment. Also, petitioners say there is no evidence of  
24 insufficient land for "feasible and cost-effective siting of  
25 facilities." Petitioners advise the only facts on this issue  
26 are that there is no sewer or water service available yet in

1 Budda Grove. See Record, p. 9. Petitioners urge that the mere  
2 fact urban facilities have not been provided does not mean  
3 there is insufficient land for feasible and cost-effective  
4 siting of facilities.<sup>8</sup>

5 The city argues the two factors cited by petitioners in  
6 Implementation Strategy 1 of Policy 35 are to be read as  
7 alternatives. The city's brief advises the city intended the  
8 word "or" appear after discussion of the first factor, and the  
9 absence of "or" is a clerical mistake. The city then argues  
10 that where a statute (or here, an ordinance) is ambiguous, it  
11 is the Board's duty to review it to determine legislative  
12 intent. The city's interpretation should be given preferential  
13 consideration. See Curly's Dairy, Inc. v State Department of  
14 Agriculture, 244 Or 15, 415 P2d 740 (1966).<sup>9</sup> The city argues  
15 the interpretation posited by the petitioners inhibits  
16 annexation of suitable adjacent land when required to meet  
17 growth needs. As the purpose of the comprehensive plan is to  
18 facilitate annexations under such conditions, the city's  
19 interpretation is to be preferred, according to the city.<sup>10</sup>

20 The Board believes the city's interpretation of  
21 Implementation Strategy 1 of Policy 35 is correct. Policy 35,  
22 appearing at page 86 of the plan, provides as follows:

23 "The City shall consider annexation of suitable  
24 adjacent land when required to provide for growth in  
25 the economy or population, or when needed to provide  
adequate services and facilities." (Emphasis  
supplied).

26

1 This policy mirrors Implementation Strategy 1. The first part  
2 of Policy 35 calls for annexation when required to provide for  
3 growth. Implementation Strategy 1 provides the standard to  
4 determine when the growth reaches the level necessary to  
5 trigger a need for more land. The city has determined that  
6 standard to be when less than 25% of available land remains in  
7 the buildable lands inventory. The second part of Policy 35,  
8 stated in the alternative, mirrors the second part of  
9 Implementation Strategy 1 calling for implementation when there  
10 is insufficient land to site facilities and services. Given  
11 what appears to be a parallel structure between the policy and  
12 the first of its implementation strategies, the Board believes  
13 the city's interpretation of how the plan should be read is  
14 reasonable and not contrary to the express terms of the  
15 ordinance. The Board will therefore defer to the city's  
16 interpretation. Alluis v Marion County, 7 Or. LUBA 98 (1983).  
17 A question remains as to whether the city complied with this  
18 policy when it initiated this annexation.

19 Respondent argues that it meets the second part of  
20 Implementation Strategy 1 because the findings show there is  
21 insufficient land for feasible and cost effective siting of  
22 commercial facilities in the Jesus Grove area. The city  
23 argues, for example, that it makes more sense to site a hotel  
24 in an annexed area adjacent to existing roads and existing  
25 commercial, sewage, electrical and water facilities than in an  
26 undevelopment area of the city (Budda Grove), which is six

1 miles away and has no utility services.<sup>11</sup>

2 The city has gone to great length to explain why it  
3 believes it needs the facilities and why it is "feasible and  
4 cost effective" to place the facilities next to existing  
5 services and not in another portion of the city some miles  
6 away. The findings are sufficient to show that there is not  
7 sufficient land within the city for the "feasible and cost  
8 effective siting" of the facilities.<sup>12</sup>

9 The third assignment of error is denied.

10 FOURTH ASSIGNMENT OF ERROR

11 "Respondent Erred by Failing to Adopt Findings of Fact  
12 Supporting its Decision to Rezone the Annexed Lands"

13 In this assignment of error, petitioners complain that the  
14 city failed to adopt any findings to support the rezoning of  
15 the annexed lands, and failure to adopt findings is error.  
16 Petitioners remind the Board that it may not assume that the  
17 Respondent City acted properly or speculate on why the  
18 respondent did not adopt the findings. Green v Hayward, 275 Or  
19 693, 552 P2d 815 (1976).

20 The Respondent City agrees its decision must be supported  
21 by findings. The city claims the findings labeled "annexation"  
22 contain sufficient findings to justify both the annexation and  
23 the rezoning ordinances. The city argues that at most it is  
24 guilty of simply not labeling its findings "Findings for  
25 Annexation and Rezoning."

26

1 The city's annexation findings (identified as "Attachment  
2 I" in the record) include a discussion of compliance with the  
3 Rajneeshpuram Development Code. The findings conclude the  
4 proposed annexation "will include immediate changes in the  
5 zoning map...." The findings also say:

6 "The proposed zoning classifications are appropriate  
7 for the intended uses (as per Section 3.010).

8 "Thus, the proposed annexation with related changes to  
9 the zoning map are in compliance with the City's  
10 Development Code." Attachment I, p. 81.

11 These references to the development code and its criteria  
12 for rezoning are sufficient to show that the city's findings  
13 were designed to support both the annexation and the rezoning.  
14 The adequacy of the findings is a separate issue.

15 The fourth assignment of error is denied.

16 FIFTH ASSIGNMENT OF ERROR

17 "The Ordinance in Question Violates LCDC's  
18 Pre-Acknowledgment Annexation Rule"

19 Under this assignment of error, petitioners catalog a list  
20 of violations of LCDC's Annexation Rule. The rule provides:

21 "For the annexation of lands not subject to an  
22 acknowledged plan the requirements of Goal No. 3  
23 (Agricultural Lands) and Goal No. 14 (Urbanization)  
24 OAR 660-10-060 shall be considered satisfied only if  
25 the city or local government boundary commission,  
26 after notice to the county and an opportunity for it  
to comment, finds that adequate public facilities and  
services can be reasonably made available; and:

"(a) The lands are physically developed for urban uses  
or are within an area physically developed for urban  
uses; or

1       "(b) The lands are clearly and demonstrably needed for  
2       an urban use prior to acknowledgment of the  
3       appropriate plan and circumstances exist which make it  
4       clear that the lands in question will be within an  
5       urban growth boundary when the boundary is adopted in  
6       accordance with the goals.

7       "Land for which the findings above cannot be made  
8       shall not be annexed until acknowledgment of an urban  
9       growth boundary by LCDC as part of the appropriate  
10       comprehensive plan." OAR 660-01-315.

### 11       INTRODUCTION

12       The existence of LCDC's annexation rule is not a  
13       replacement for Goal 14 or other goals which may apply to a  
14       particular annexation proposal. ORS 197.175(1). The Board  
15       understands the annexation rule to be a guide to  
16       pre-acknowledgment annexations. That is, if all of the  
17       inquiries required under the annexation rule are made, most,  
18       but perhaps not all, of the substantive goal requirements will  
19       have been addressed.

20       The Commission recognized that the annexation rule could  
21       not be used to escape other goal requirements. In Tillamook  
22       Citizens for Responsible Development v Tillamook County, 1 Or  
23       LUBA 295 (1980) the Commission said

24       "the procedural requirements of all applicable goals,  
25       including the Goal 2 exceptions procedure, must be  
26       considered in the annexation of lands not subject to  
27       an acknowledged comprehensive plan." Tillamook, 1 Or  
28       LUBA at 311.

29       The Commission did not explain how the exceptions process  
30       applied to the annexation of lands not subject to an  
31       acknowledged comprehensive plan, but the Board understands this

1 statement, nonetheless, to be a recognition that the rule may  
2 not be used to escape other goal requirements including the  
3 requirement to take an exception where necessary.<sup>13</sup> Indeed,  
4 because the annexation rule may not be used to escape other  
5 goal requirements, the rule may be considered an attempt to  
6 interpret goal requirements. Violations of portions of the  
7 rule may or may not result in reversal or remandable error.  
8 Only where a violation of the rule may be seen as a violation  
9 of an applicable goal will grounds for reversal or remand exist.

10 In this case, petitioners' assertions of violations of  
11 portions of the annexation rule may be seen to have their  
12 foundation in one or more goal requirements. The petitioners  
13 specifically cite violations of particular LCDC goals in the  
14 Sixth, Seventh and Eighth Assignments of Error. The Board  
15 believes it is of little purpose to test the city's annexation  
16 decision against the annexation rule where the ultimate inquiry  
17 must be to goal compliance. If the decision does not meet  
18 statewide planning goals, it can not meet the requirements of  
19 the annexation rule. Therefore, we will not engage in what is  
20 an ultimately pointless discussion of compliance with the  
21 annexation rule where petitioners have made specific  
22 allegations of violations of statewide planning goals that  
23 apply to annexations.

24 There is another reason not to discuss the annexation  
25 rule. This annexation was done in conjunction with rezoning  
26 and immediate conversion of rural land for urban use. Our

1 review must look to what happened, and not simply to bits of  
2 what happened or what might have happened. Our review must  
3 always be responsive to the facts of a particular case. Were  
4 the Board to answer each abstract question presented, the Board  
5 believes it would compound the opportunity to make error and to  
6 confuse and mislead parties in future cases. Therefore, the  
7 Board will conduct its review by looking at the facts of this  
8 case and how the law applies to those facts. We believe we  
9 must consider the annexation and the rezoning together under  
10 the applicable goals.

11 INTRODUCTION TO THE SIXTH, SEVENTH AND EIGHTH ASSIGNMENTS OF  
12 ERROR

13 In the following three assignments of error, petitioners  
14 attack the annexation and the rezonings as being in violation  
15 of statewide planning goals.

16 SIXTH ASSIGNMENT OF ERROR

17 "Respondent's Failure to Take an Exception Violated  
18 Goal 2 and Oregon Laws 1983, Chapter 827, Section  
19a(c)."

19 SEVENTH ASSIGNMENT OF ERROR

20 "Respondent's Failure to Take an Exception Violated  
21 Goal 3"

22 EIGHTH ASSIGNMENT OF ERROR

23 "Respondent's Failure to Take an Exception Violated  
24 Goal 14"

25 In these three assignments of error, and in the first part  
26 of Assignment of Error No. 5, petitioners say Goals 2, 3 and 14  
apply to any decision of an unacknowledged jurisdiction to

1 annex or rezone agricultural lands for urban use. Petitioners  
2 say that until acknowledgment, conversion of agricultural land  
3 to any of the uses not specified in ORS 215.213 requires an  
4 exception, and failure to take an exception violates Goals 2, 3  
5 and 14. Petitioners claim the only exception to this rule is  
6 the establishment of an urban growth boundary, governed by Goal  
7 14, and annexations and rezonings are acts quite distinct from  
8 establishment of urban growth boundaries. See Roth v LCDC, 57  
9 Or App 611, 646 P2d 905 (1981).

10 Respondent City argues that after the decision in 1000  
11 Friends of Oregon v LCDC, 292 Or 735, 642 P2d 1158 (1982), it  
12 was clear that if the exception process in Goal 2 is to be  
13 followed at all, it is to be taken at the time of a change to  
14 an urban growth boundary, not an annexation. It is only the  
15 establishment or amendment to an urban growth boundary that  
16 makes a change from rural to urban or urbanizable land,  
17 according to respondent.

18 While the Board believes the question of whether annexation  
19 outside of an urban growth boundary must always be accompanied  
20 by an exception is an interesting question, that issue is not  
21 presented under the facts of the case.<sup>14</sup> In this case, the  
22 annexation was undertaken not only for the purpose of redrawing  
23 a jurisdictional boundary, but also for the purpose of  
24 permitting immediate conversion to urban uses. Under these  
25 circumstances, the Board finds the city was obliged to apply  
26 the goals and take an exception to allow this conversion to

1 urban use. The exception is necessary to explain why rural  
2 land (in this case agricultural land) had to be taken for urban  
3 uses prior to its inclusion within an acknowledged urban growth  
4 boundary. City of Sandy v Clackamas County, 3 LCDC 139 (1979);  
5 Ashland v Jackson County, 2 Or LUBA 378 (1981).<sup>15</sup>

6 The Board agrees with petitioners that failure to take the  
7 exception results in violation of Goals 2, 3, and 14.

8 Assignments of error six through eight are sustained.

9 NINETH ASSIGNMENT OF ERROR

10 "The Annexation and Rezoning Violate Coordination  
11 Requirements Set Forth in Respondent's Comprehensive  
Plan Policies Governing Annexations"

12 TENTH ASSIGNMENT OF ERROR

13 "The Annexation and Rezoning Violate the Intent,  
14 Purposes and Provisions of ORS 197.005, 197.010,  
197.190, and the Coordination Requirements of Goals 2  
and 14"

15 ELEVENTH ASSIGNMENT OF ERROR

16 "The Annexation and Rezoning Violate the Urban Growth  
17 Area Joint Management Agreement Between Wasco County  
18 and Respondent"

19 A. Violations Of Goals 2 and 14.

20 Petitioners claim Goal 2 requires that plans and  
21 implementation measures be coordinated with the plans of  
22 affected governmental units and argue that Goal 2 requires city  
23 plans to be consistent with county comprehensive plans. The  
24 Board understands petitioners to view the annexation and  
25 rezoning to be implementation measures which must be  
26 coordinated with the county. Petitioners allege Goal 2 has

1 been violated because the amendment to the urban growth  
2 boundary, the annexation and the rezoning were not agreed to by  
3 the county. Indeed, Respondent City amended the urban growth  
4 boundary only four days before it made the decision to annex  
5 and rezone the property subject to this proceeding. Goal 2  
6 does not permit unilateral decisions, according to  
7 petitioners.<sup>16</sup>

8 According to petitioners, Goal 14 requires the  
9 "establishment and change" of urban growth boundaries must be  
10 "a cooperative process between the city and the county or  
11 counties that surround it." Because the city did not cooperate  
12 in establishment and change of the urban growth boundary,  
13 petitioners say the urban growth boundary violates Goal 14 and  
14 the annexation "compounds and renews the initial Goal 14  
15 violation." Petition for Review at 33.

16 The city responds that it made a meaningful attempt to  
17 coordinate its action with that of Wasco County. It actively  
18 sought to cooperate, and the county did not reciprocate.

19 The Board does not believe the city may be cited for a  
20 violation of the coordination requirements in Goal 2 and the  
21 "cooperative" directive in Goal 14 where the other necessary  
22 party declines to continue with the coordination process or  
23 simply disagrees with the other jurisdiction. The respondent  
24 notes in its brief and the record confirms that the city  
25 actively sought comments from the county and proceeded at  
26 attempts to coordinate its efforts with the county. The Board

1 believes this attempt is enough to satisfy the goal. See Beinz  
2 v City of Dayton, 29 Or App 761, 566 P2d 904 (1977). See also  
3 Twin Rocks Water District, et al v Rockaway, 2 Or LUBA 36  
4 (1980).<sup>17</sup>

5 The Board, therefore, declines to hold the city in  
6 violation of Goals 2 and 14 as alleged.

7 B. Alleged Violations Of The Coordination Requirements Of The  
8 Rajneeshpuram Comprehensive Plan.

9 Under this subassignment of error, petitioners say the city  
10 was under an obligation to coordinate its efforts with those of  
11 the county by virtue of a provision in its own comprehensive  
12 plan. The plan provides:

13 "2. The City shall coordinate all measures for  
14 annexation with affected County jurisdictions and  
15 existing or future agreements for the management of  
16 urban growth boundaries. The City shall not rezone  
annexed territory as urban or urbanizable until such  
land is included within the Urban Growth Boundary."  
Rajneeshpuram Comprehensive Plan, Vol. 2, p. 86.

17 Petitioners allege this provision is violated first because  
18 respondent did not coordinate the annexation proposal with  
19 Wasco County and second because the land was not yet included  
20 within the city's urban growth boundary.

21 The Board does not find any violation of the coordination  
22 requirement in the city's plan. The Board understands the  
23 city's plan to use "coordinate" in the same manner as the term  
24 is used in the goals, and the Board does not believe the city's  
25 failure to make a coordinated urban growth boundary and  
26 annexation and rezoning under these circumstances constitutes

1 error under the plan. See our discussion under (A) above.

2 We can not accept petitioners' claim as to the second part  
3 of the plan policy. We do not believe it is necessary to read  
4 the plan to contemplate only an acknowledged urban growth  
5 boundary. While the city surely intended that its urban growth  
6 boundary would be acknowledged, the plan may also be read to  
7 refer to the boundary as drawn by the city prior to  
8 acknowledgment. This latter reading is the one urged by the  
9 city in this case, and we believe it reasonable. Alluis v  
10 Marion Co., 7 Or LUBA 98 (1983).

11 C. Alleged Violation Of Urban Area Agreement.

12 Petitioners allege the Urban Growth Area Joint Management  
13 Agreement existing between Wasco County and the city provides  
14 that any amendments to the urban growth boundary are to be  
15 initiated by the city and adopted by a majority of both the  
16 city council and the county court. The Board understands  
17 petitioners to argue that in order to proceed with the  
18 annexation and rezoning, there had to be an agreed to urban  
19 growth boundary. Therefore, argue petitioners, without a  
20 properly adopted urban growth boundary, the annexation and  
21 rezoning actions violate the agreement.

22 The city contends the Joint Management Agreement was made  
23 in contemplation of post-acknowledgment changes in the city's  
24 urban growth boundary. The city argues that the Roth decision  
25 makes it clear that there is no such thing as an amendment to  
26 an unacknowledged urban growth boundary. Amendments can only

1 be to acknowledged urban growth boundaries. In other words,  
2 the agreement is not relevant.

3 The city is correct that the management agreement  
4 contemplates changes to a post-acknowledgment urban growth  
5 boundary. If interpreted to include the making of an urban  
6 growth boundary, the agreement would only be a statement of a  
7 requirement already existing in Goals 2 and 14. The Board  
8 concludes the city is correct that that the agreement is a  
9 method to insure coordination and cooperation in amendments to  
10 an existing (that is, acknowledged) urban growth boundary. No  
11 such urban growth boundary exists here.

12 The Ninth, Tenth, and Eleventh Assignments of Error are  
13 denied.

14 The annexation and rezoning of territory by the City of  
15 Rajneeshpuram is reversed.

16

17

18

19

20

21

22

23

24

25

26

FOOTNOTES

1  
2  
3 1  
4 The county's participation is really an intervention, and  
5 the Board considers the brief filed by Wasco County to be a  
6 motion for intervention. See 1983 Or Laws, ch 827, §31(5) and  
7 OAR 661-10-050. The motion is granted.

8  
9 2  
10 There was an additional claim of injury as a result of the  
11 potential loss of groundwater resources resulting from  
12 activities in the city. This claim was withdrawn by  
13 petitioners.

14  
15 3  
16 The Board understands respondent's general argument on  
17 standing to be in support of the city's view the individual  
18 petitioners have failed to allege facts sufficient to show they  
19 are entitled to standing.

20  
21 4  
22 We note the parties have not asked us to determine whether  
23 the city's decision to annex and rezone is "legislative" or  
24 "quasi-judicial." Both parties appear to have argued this  
25 standing issue as though the decisions were quasi-judicial  
26 requiring not only an appearance before the local governing  
body, but also entitlement to notice and hearing or a statement  
of adverse affect or aggrievement. See ORS 197.830(3). This  
decision was initiated by the city itself, and may indeed be a  
legislative decision. If so, no appearance by Wasco County was  
necessary, only a statement of adverse affect or aggrievement.  
See ORS 197.830(2).

27  
28 5  
29 For convenience the Board will consider the assignments of  
30 error as stated and as numbered by petitioners. The Board  
31 believes the assignments of error stated by Intervenor Wasco  
32 County mirror those of petitioners. Wasco County's assignments  
33 of error are as follows:

34 FIRST ASSIGNMENT OF ERROR

35 "Respondent had no legal authority over land use matters at  
36 the time of the adoption of Ordinances 83-11 and 83-12."

1 SECOND ASSIGNMENT OF ERROR

2 "The annexation and rezoning violate Wasco County's  
3 Comprehensive Plan and Zoning Ordinance."

4 THIRD ASSIGNMENT OF ERROR

5 "The annexation and rezoning violate the City of  
6 Rajneeshpuram Urban Growth Area Joint Management Agreement."

7 FOURTH ASSIGNMENT OF ERROR

8 "Respondent violated coordination requirements of Statewide  
9 Land Use Goals 2 and 14 and Oregon Statutes governing  
10 comprehensive planning coordination."

11 FIFTH ASSIGNMENT OF ERROR

12 "The rezoning is not supported by adequate findings of  
13 fact."

14 SIXTH ASSIGNMENT OF ERROR

15 "The Annexation Ordinance No. 83-11 violates LCDC's  
16 Annexation Rule OAR 660-01-315 concerning lands not subject  
17 to an acknowledged plan."

18 6

19 Oregon's land use laws present an additional set of  
20 requirements to a valid incorporation. We believe compliance  
21 with land use criteria is mandatory, and a failure to meet  
22 these criteria renders the incorporation void at least for land  
23 use purposes. See 1 E McQuillan, Municipal Corporations,  
24 §3.45, 3.46 (3d ed, 1971).

25 Respondent argues that even if there were some irregularity  
26 in its incorporation, it is nonetheless a de facto municipal  
corporation. "As a result, it enjoys the strict limitations to  
any challenge to its existence...." Respondent's brief at 15.  
The only available challenge, according to respondent, is a quo  
warranto proceeding. A quo warranto action is outside the  
jurisdiction of this Board. The city then says since the  
petitioners' argument requires a holding that the incorporation  
was flawed, the Board may not sustain the assignment of error.  
The Board does not understand that it must reject a challenge  
to a land use decision of a local government (in this case the  
approval of a petition for incorporation) simply because it may  
later be held that the effect of the Board's ruling may render  
an incorporation invalid or unable to exercise land use  
authority.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

---

7  
The Board expresses no opinion on whether a reversable (or remandable) error would exist were a city to annex and rezone land in violation of the express terms of an unacknowledged comprehensive plan. Such circumstances do not exist in this case. See ORS 197.175. The Board believes a more appropriate challenge in such an event would be to compliance with statewide goals, not the county plan.

---

8  
Petitioners make an additional argument that the standards applied to the annexation are somewhat different than those contained in the plan. Petitioners posit the new implementation strategies had to be adopted on August 23, 1983, by Ordinance 83-10, the only ordinance adopted on that day. Petitioners say that Ordinance 83-10 does not purport to adopt annexation and urbanization policies for the city, but only adopts a revised urban growth boundary, a plan map and supporting findings. Petitioners assert the implementation strategies identified in the findings cannot, therefore, apply here.

Respondent does not directly answer this charge but discusses the strategies in the plan "in its original form." Brief of Respondent at 22. The Board considers the applicable strategies to be those in the original plan dated September 7, 1982. See Footnote 11, infra.

---

9  
See also 5th Avenue Corporation v. Washington Co., 282 Or 591, 581 P2d 50 (1978) where the Court said a county interpretation of its enactments is entitled to "some weight" unless it is clearly contrary to the expressed language and intent of the enactment. 282 Or at 599-600.

---

10  
The city also argues it did not confine itself to Policy 35 but considered also Policy 33, requiring the city to provide sufficient land for current needs in all the land use categories, and Implementation Strategy 3 of Policy 34 requiring urban development to occur only when urban facilities are available. The city also says Implementation Strategies 4 and 6 of Policy 34 were considered.

Implementation Strategies 4 and 6 of Policy 34 state as follows:

1 "In areas where urban level facilities and services  
2 are not available, the following uses shall be  
permitted:

3 " - Wildlife and other natural resources management  
4 activites;

5 " - Utility facilities and services except electric  
substations, sewage lagoons and sanitary landfills;

6 " - Farm uses."

7 \* \* \*

8 " - All development must take place on public sewer  
9 and water lines and have adequate transportation  
10 access; provided that individual developments may be  
11 permitted to proceed with onsite water and/or sewage  
12 disposal systems, if urban level of services are not  
13 available and it is determined that such development  
will not preclude the subsequent to the DPA. The city  
shall require that such development be connected to  
urban services when they become available." City of  
Rajneeshpuram Comprehensive Plan, Vol II at 84.

14 11

15 As another example, the city cites the Board to findings  
16 about the airport. The city seeks to expand the airport, and  
17 wishes to expand it beyond the scale and intensity permitted  
within an exclusive farm use zone. The Board understands the  
city's findings to say that there is no other suitable location  
for the airport and its necessary expansion.

18 There are findings about needed parking space to  
19 accommodate visitors to the city, enlargement of the facilities  
20 for the police force, a need for a factory which will include a  
21 tool shop and other enterprises, storage facilities, a  
recreation hall and lounge and a hotel. See Record Attachment  
1, pp. 45, 47, 50, 51, 52, 61, 63, 64, 69, 70, 72, 73.

22 12

23 Petitioners make an additional argument about a third  
24 implementation strategy which permits the city to consider  
25 annexation "when the coordination of the use and development of  
26 natural resources surrounding the city is required to protect  
the health, safety and welfare of the city and its citizens."  
The Board is unable to find such an implementation strategy in  
the urbanization and annexation sections of the city's plan.  
The Board understands the comprehensive plan applicable to this

1 proceeding is the one made part of the record in LUBA Nos.  
2 82-085 and 82-086, and the plan shows an adoption date of  
3 September 7, 1982.

4 If we are mistaken, and the policy is applicable, our  
5 holding on this assignment of error is unchanged. Policy 35 is  
6 stated in the alternative. The implementation strategies may  
7 be considered to be stated in the alternative as they mirror  
8 the provisions of Policy 35. For the reasons stated in our  
9 discussion of this assignment of error, we do not believe the  
10 city needed to make findings on this particular implementation  
11 strategy.

12  
13

14 Petitioners explain that had LCDC not interpreted the  
15 annexation rule to require an exception, the rule would be  
16 unlawful. Petitioners say LCDC may not amend a goal through an  
17 administrative rule and cite Willamette University, 45 Or App  
18 355, 608 P2d 1178 (1980), as support for this proposition.

19 The exception process in Goal 2 is as follows:

20 "When, during the application of the statewide goals  
21 to plans, it appears that it is not possible to apply  
22 the appropriate goal to specific properties or  
23 situations, then each proposed exception to a goal  
24 shall be set forth during the plan preparation phases  
25 and also specifically noted in the notices of public  
26 hearing. The notices of hearing shall summarize the  
27 issues in an understandable and meaningful manner.

28 "If the exception to the goal is adopted, then the  
29 compelling reasons and facts for that conclusion shall  
30 be completely set forth in the plan and shall include:

31 "(a) Why these other uses should be provided for;

32 "(b) What alternative locations within the area could  
33 be used for the proposed uses;

34 "(c) What are the long term environmental, economic,  
35 social and energy consequences to the locality,  
36 the region or the state from not applying the  
37 goal or permitting the alternative use;

38 "(d) A finding that the proposed uses will be  
39 compatible with other adjacent uses." Goal 2,  
40 Part II - Exceptions.

41

1  
14

2 GOAL 14: "To provide for an orderly and efficient  
transition from rural to urban land use.

3 "Urban growth boundaries shall be established to identify  
4 and separate urbanizable land from rural land.

5 "Establishment and change of the boundaries shall be based  
upon consideration of the following factors:

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

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

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

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

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

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

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

18 "Before the establishment of an urban growth boundary, all  
19 lands within city limits shall be urban or urbanizable. When  
the amount of land within a city's incorporated limits is  
20 determined to be adequate to satisfy the needs set forth in  
factors (1) and (2) above, the city limits may be designated as  
21 the urban growth boundary without consideration of factors (3)  
through (7) above.

22 "The results of the above considerations shall be included  
in the comprehensive plan. In the case of a change of a  
23 boundary, a governing body proposing such change in the  
boundary separating urbanizable land from rural land, shall  
24 follow the procedures and requirements as set forth in the Land  
Use Planning Goal (Goal 2) for goal exceptions.

25 "Any urban growth boundary established prior to January 1,  
26 1975 which includes rural lands that have not been built upon

1 shall be reviewed by the governing body, utilizing the same  
2 factors applicable to the establishment or change of urban  
growth boundaries.

3 "Establishment and change of the boundaries shall be a  
4 cooperative process between a city and the county or counties  
that surround it.

5 "Land within the boundaries separating urbanizable land  
6 shall be considered available over time for urban uses.  
Conversion of urbanizable land to urban uses shall be based on  
7 consideration of:

8 "(1) Orderly, economic provision for public facilities and  
services;

9 "(2) Availability of sufficient land for the various uses  
10 to insure choices in the market place;

11 "(3) LCDC goals; and,

12 "(4) Encouragement of development within urban areas before  
conversion of urbanizable areas."

13  

---

14 15

15 We recognize the city has redrawn its urban growth  
16 boundary. However, the city's urban growth boundary is not  
acknowledged. The decision, therefore, must be tested against  
the goals, not against the city's unacknowledged statement (in  
its urban growth boundary) of how the goals apply.

17  

---

18 16

19 Petitioners concede that Wasco County declined to cooperate  
20 on the issue of the urban growth boundary until this Board had  
ruled on the matter of the city's incorporation, but  
21 petitioners do not believe this refusal constitutes any error  
on the part of the county or any failure to "coordinate" on the  
22 part of the county. Petitioners go on to say that there can be  
no accommodation of conflicting interests, which is part of the  
23 coordination responsibility, until some determination is  
rendered on the validity of the city's incorporation. The  
24 Board understands petitioners to say Wasco County was justified  
in not proceeding with the review and analysis of the city's  
25 urban growth boundary issues, and under these circumstances,  
the city's unilateral act of drawing an urban growth boundary  
26 violates the goals and particularly Goal 2. Under Goal 2, the  
city "should have delayed its decision." For the reasons  
discussed supra, the Board does not find the city was obliged  
to stop and wait for the county.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

---

17

The Board is cited to no law or goal establishing a hierarchy of authority between cities and counties. The Board does not believe one jurisdiction may hold another captive by simply declining to continue with the coordination process.