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

MARILYN ADKINS,)
)
Petitioner,)
)
vs.)
)
HECETA WATER DISTRICT,)
)
Respondent.)

LUBA No. 91-139

FINAL OPINION
AND ORDER

Appeal from Heceta Water District.

Marilyn Adkins, Florence, filed the petition for review and argued on her own behalf.

D. Ronald Gerber, Florence, filed the response brief and argued on behalf of respondent.

William Van Vactor, Eugene, filed an amicus brief and argued on behalf of amicus Lane County.

SHERTON, Referee; HOLSTUN, Chief Referee; KELLINGTON, Referee, participated in the decision.

REMANDED 05/01/92

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of ORS 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a regulation adopted by the board of
4 directors of the Heceta Water District (district)
5 establishing standards for obtaining a hookup to the
6 district's water system within the Clear Lake watershed.

7 **MOTION TO APPEAR AS AMICUS**

8 Pursuant to OAR 661-10-052, Lane County (county) moves
9 to appear as an amicus in this proceeding. The county
10 argues that it seeks to protect its interest in the
11 integrity of its acknowledged Rural Comprehensive Plan
12 (RCP). The county further argues that it seeks to protect
13 county residents who are adversely affected by the
14 challenged regulation. The county contends this Board's
15 review of issues involving (1) coordination between the
16 district and the county, as required by ORS 197.185 and
17 Statewide Planning Goal 2 (Land Use Planning); and
18 (2) consistency of the challenged regulation with the
19 acknowledged RCP, would be significantly aided by the
20 county's participation.

21 The district opposes the county's motion. The district
22 argues the county should not be allowed to participate as an
23 amicus because the county seeks to advance, through its
24 amicus brief, its private and partisan interest in an
25 ongoing dispute between the county and the district over
26 intergovernmental coordination and control over land uses in

1 the affected area. The district cites cases from federal
2 courts and the courts of other jurisdictions to the effect
3 that an entity having a direct or private interest in the
4 outcome of litigation should not be granted amicus status.

5 OAR 661-10-052(1) provides in relevant part:

6 "A person or organization may appear as amicus
7 only by permission of the Board on written motion.
8 The motion shall set forth the interest of the
9 movant and state reasons why a review of relevant
10 issues would be significantly aided by
11 participation of the amicus. * * *"

12 The above quoted rule does not specify whether an amicus'
13 interest in an appeal may be private in nature. However,
14 Oregon Rules of Appellate Procedure 8.15(1) specifically
15 recognizes that an amicus curiae may represent a private
16 interest:

17 "A person or organization may appear as amicus
18 curiae in any case pending before the appellate
19 court on written application * * *. The
20 application to appear amicus curiae shall state
21 whether the applicant intends to present a private
22 interest of its own or to present a position as to
23 the correct rule of law that does not affect a
24 private interest of its own. * * *" (Emphasis
25 added.)

26 Because the Oregon appellate courts do not bar persons or
27 organizations representing a private interest from appearing
28 as amicus curiae, we decline to interpret OAR 661-10-052(1)
29 as doing so.

1 The county's motion to appear as amicus is allowed.¹

2 **MOTION TO FILE REPLY BRIEF**

3 Pursuant to OAR 661-10-039, petitioner moves for
4 permission to file a reply brief. There is no opposition to
5 the motion, and it is allowed.

6 **MOTION TO TAKE OFFICIAL NOTICE**

7 The district requests that the Board take official
8 notice of two documents which it contends constitute
9 administrative history of the adoption of OAR 340-41-270 by
10 the Environmental Quality Commission (EQC). These documents
11 are (1) a November 28, 1990 staff report and request for EQC
12 action by the Department of Environmental Quality (DEQ)
13 concerning the adoption of proposed OAR 340-41-270, and
14 (2) a November 26, 1990 Hearing Summary concerning issues
15 raised at the hearings held by DEQ on the proposed rule.

16 The county agrees that we may take official notice of
17 these documents, as administrative history of

¹The district also argued that the county's amicus brief, submitted with its motion, improperly raises new assignments of error and arguments which are not raised in the petition for review. However, in a telephone conference on March 6, 1992, the parties agreed that the issues addressed in the amicus brief concerning compliance with Goal 2 requirements for intergovernmental coordination and consistency with the county comprehensive plan are raised in the petition for review. The parties further agreed that issues addressed in the amicus brief concerning compliance with the Goal 2 requirement for an adequate factual base and with Goals 5 (Open Spaces, Scenic and Historic Areas, and Natural Resources), 11 (Public Facilities and Services) and 17 (Coastal Shorelands) are not raised in the petition for review. Accordingly, the Board will not consider issues raised in the amicus brief regarding compliance with Goals 2 (factual base), 5, 11 or 17.

1 OAR 341-41-270.² Oregon Evidence Code (OEC) Rule 202(2);
2 Byrnes v. City of Hillsboro, 104 Or App 95, 97, 798 P2d 1119
3 (1990) (Byrnes); Foland v. Jackson County, 18 Or LUBA 731,
4 738, aff'd 101 Or App 632 (1990), aff'd 311 Or 167 (1991)
5 (Foland). However, the county contends that because the
6 documents are not part of the local government record, we
7 may only consider the documents as aids in interpreting OAR
8 341-41-270, not as evidence in support of the challenged
9 decision.

10 We agree with the county that the purpose for which we
11 may take official notice of state legislative or
12 administrative history is to aid in interpretation of state
13 enactments. In reviewing the evidentiary support for a land
14 use decision, LUBA has never held it has authority to take
15 official notice of adjudicative facts under OEC 201. With
16 regard to adjudicative facts, LUBA's review is generally
17 limited by ORS 197.830(13)(a) to the record of the
18 proceeding below.³ Blatt v. City of Portland, ___ Or LUBA
19 ___ (LUBA No. 90-152, June 28, 1991), aff'd 109 Or App 259
20 (1991). Therefore, we also agree with the county that any

²Petitioner did not submit a written response to the district's request. However, we understand petitioner's position on this issue to be the same as the county's.

³For certain purposes not relevant to this appeal, an evidentiary hearing before LUBA may be authorized under ORS 197.830(13)(b). However, evidence received by LUBA in such an evidentiary hearing becomes part of LUBA's record, not part of the record of the decision making body being reviewed by LUBA.

1 statements of fact found in the documents offered by the
2 district as legislative history of OAR 321-41-270 cannot
3 constitute evidentiary support for the challenged decision,
4 as those documents are not part of the local record.

5 The district's motion to take official notice is
6 allowed.

7 **FACTS**

8 The district is a domestic water supply district,
9 formed in 1966 pursuant to ORS chapter 264. The district
10 serves a portion of Lane County located north of the City of
11 Florence.⁴ The district's primary source of water is Clear
12 Lake. The watershed of Clear Lake includes Collard Lake, a
13 smaller tributary lake. The county has zoned land within
14 the Clear Lake watershed Nonimpacted Forest Lands (F-1),
15 Impacted Forest Lands (F-2), Natural Resource (NR), Marginal
16 Lands (ML) and Rural Residential (RR). Petitioner owns and
17 resides on property within the Clear Lake watershed.

18 In December 1990, the Environmental Quality Commission
19 (EQC) amended OAR 340-41-270 to provide that it is EQC
20 policy to protect the Clear Lake watershed "in order to
21 preserve the existing high water quality in Clear Lake * * *
22 for use as a public water supply source requiring only
23 minimal filtration." OAR 340-41-270 establishes total

⁴We cannot determine from the record how far the district's domestic water service area extends and whether it includes urban, as well as rural, land.

1 phosphorus annual loading limits for Clear Lake and Collard
2 Lake. It also prohibits the issuance of (1) permits
3 allowing connection of development in the watershed to a
4 sewerage facility, (2) on-site sewage system construction-
5 installation permits, and (3) favorable site evaluation
6 reports for on-site sewage systems, within the Clear Lake
7 watershed "until a plan is submitted to and approved by the
8 Department [of Environmental Quality (DEQ)] showing how
9 [the] total phosphorus loadings limitations required by [the
10 rule] will be achieved and maintained."⁵ OAR 340-41-270(5).
11 The rule requires such plan to include (1) projected
12 phosphorous loadings for existing and planned development
13 within the Clear Lake watershed, (2) adopted ordinances
14 necessary to carry out the plan, and (3) agreements,
15 contracts or other information showing what entity will
16 effectively implement each provision of the plan.
17 OAR 340-41-270(5)(a)-(b).

18 The district adopted a regulation establishing
19 temporary (90 day) emergency standards for obtaining a
20 hookup to the district's water system on June 20, 1991. On
21 July 15, 1991, the district board of directors held a public
22 hearing on a proposed regulation establishing permanent

⁵The district contends OAR 340-41-270 does not identify the entity required to prepare and submit to DEQ such a watershed management plan. The county contends the rule requires it to prepare and submit the watershed management plan. In any case, no such watershed management plan has yet been submitted to or approved by DEQ.

1 water system hookup standards. Notice of the public hearing
2 was published in the Siuslaw News. Record 16. No other
3 individual or published notice of the hearing was given. On
4 August 19, 1991, the board of directors adopted the
5 challenged regulation (Regulation Two), which is described
6 below. Regulation Two became effective on September 18,
7 1991, the date the temporary standards expired.

8 Regulation Two establishes standards for obtaining a
9 hookup to the district's water system to serve property
10 located within the Clear Lake watershed. An applicant for a
11 new hookup must submit a development plan identifying the
12 exact areas to be developed, the nature of the development
13 allowed (including vegetation removal or alteration), and
14 any roads, structures or other improvements on the property.
15 Regulation Two 4.B(2). Additionally, the applicant must
16 demonstrate that the proposed development to be served by
17 the water hookup "will not contribute any phosphorous
18 pollution or other undesirable pollution from septic systems
19 or nonpoint sources of pollution into Clear Lake, Collard
20 Lake [or any other lake or tributary] emptying into any of
21 the lakes within the [Clear Lake] watershed." Regulation
22 Two 4.B(1).

23 Regulation Two also regulates "increased water
24 consumption" from existing district water system hookups
25 serving property within the Clear Lake watershed. According
26 to the regulation, "increased water consumption" occurs when

1 alterations to property served by an existing hookup have
2 the effect of increasing the demand for water. The
3 regulation also states that adding structures, rooms or
4 decks, expanding landscaping and removing vegetation from
5 previously uncleared areas "are defined as increasing the
6 demand for water." Regulation Two 1. The development plan
7 required for and standards applicable to approving
8 "increased water consumption" from an existing hookup are
9 similar to those for new hookups, described above.
10 Regulation Two 5.C(1) and (2).

11 **JURISDICTION**

12 LUBA's review jurisdiction is limited to local
13 government, special district and state agency "land use
14 decisions." The district's decision is a "land use
15 decision" if it meets either (1) the statutory definition in
16 ORS 197.015(10); or (2) the significant impacts test
17 established by City of Pendleton v. Kerns, 294 Or 126,
18 133-34, 653 P2d 996 (1982). Billington v. Polk County, 299
19 Or 471, 479, 703 P2d 232 (1985); City of Portland v.
20 Multnomah County, 19 Or LUBA 468, 471 (1990). We first
21 consider the statutory test.

22 ORS 197.015(10)(a)(A) provides that "land use decision"
23 includes:

24 "A final decision or determination by a local
25 government or special district that concerns the
26 adoption, amendment or application of:

27 "(i) The [statewide planning] goals;

- 1 (ii) A comprehensive plan provision;
2 (iii) A land use regulation; or
3 (iv) A new land use regulation[.]"

4 The district contends the burden of establishing this
5 Board's jurisdiction is on petitioner. Billington v. Polk
6 County, supra, 299 Or at 475; City of Pendleton v. Kerns,
7 supra, 294 Or at 134 n 7; City of Portland v. Multnomah
8 County, supra. The district argues petitioner failed to
9 allege the challenged decision meets the above quoted
10 statutory definition of "land use decision" and, therefore,
11 this Board should not consider whether the challenged
12 decision satisfies the statutory definition.

13 In her petition for review, petitioner alleges the
14 challenged decision violates Goal 2, the RCP and the
15 county's land use regulations. Petition for Review 19-20.
16 We believe this is sufficient to constitute an allegation
17 that the challenged decision is a land use decision under
18 the statutory test.⁶ We first consider whether the decision
19 concerns the application of the goals.

20 There is no dispute the county's comprehensive plan and
21 land use regulations are acknowledged by the Land
22 Conservation and Development Commission (LCDC) under

⁶That petitioner made these allegations in the body of the argument in the petition for review, rather than in a separate statement of jurisdiction, as required by OAR 661-10-030(3)(c), is at most a technical violation of our rules and does not affect our review where the other parties' substantial rights are not prejudiced. OAR 661-10-005.

1 ORS 197.251. The district argues that whereas prior to
2 acknowledgment, a special district's actions affecting land
3 use must be both in accordance with the goals and consistent
4 with the applicable comprehensive plan, after acknowledgment
5 of a county's plan, a special district's actions affecting
6 land use need only be consistent with the applicable
7 comprehensive plan. Cf. Byrd v. Stringer, 295 Or 311, 666
8 P2d 1332 (1983) (goals are inapplicable to county land use
9 decisions after acknowledgment of county comprehensive
10 plan). The district further argues that it would be
11 inconsistent with this Board's scope of review, as
12 established by ORS 197.835, for the goals to remain
13 applicable to district decisions after acknowledgment of the
14 county's comprehensive plan. According to the district,
15 nothing in ORS 197.835 authorizes LUBA review of a decision
16 for compliance with the goals after the applicable
17 comprehensive plan has been acknowledged.

18 ORS 197.185 provides in relevant part:

19 "(1) Special districts shall exercise their
20 planning duties, powers and responsibilities
21 and take actions that are authorized by law
22 with respect to programs affecting land use,
23 * * * in accordance with [the statewide
24 planning] goals * * *.

25 "(2) Each special district operating within the
26 boundaries of a county assigned coordinative
27 functions under ORS 197.190(1) * * * shall
28 enter into a cooperative agreement with the
29 county * * *. Such agreements shall include
30 a listing of the tasks which the special
31 district must complete in order to bring its

1 plans or programs into compliance with the
2 goals, including a generalized time schedule
3 showing when the tasks are estimated to be
4 completed and when the plans or programs
5 which comply with the goals are to be
6 adopted. In addition, a program to
7 coordinate the development of the plans and
8 programs of the district with other affected
9 units of local government shall be included
10 in the agreement. Such agreements shall be
11 subject to review by [LCDC]. * * *

12 There is no dispute that in this case the district and
13 the county have never entered into the cooperative agreement
14 required by ORS 197.185(2). The purpose of such an
15 agreement is to insure that a district's plans and programs
16 are in compliance with the goals. Therefore, where no such
17 cooperative agreement has been entered into by a district
18 and the applicable county, as is the case here, there can be
19 no question that pursuant to ORS 197.185(1), the goals
20 continue to apply to a district's actions with respect to
21 programs affecting land use.⁷

22 The district has adopted a system of standards for
23 obtaining approval for new water hookups and increased use
24 of existing water hookups. These standards are designed to
25 protect the water quality of Clear Lake and will
26 significantly affect development activity within the Clear
27 Lake watershed. Therefore, the district's adoption of

⁷We do not determine whether, where a district enters into a cooperative agreement with the applicable county and LCDC approves that agreement pursuant to ORS 197.185(2), the district must still make decisions under programs affecting land use in accordance with the goals.

1 Regulation Two is an action with respect to a program
2 affecting land use. As established under the assignment of
3 error, infra, the coordination requirement of Goal 2 applies
4 to the challenged decision.⁸ Accordingly, the challenged
5 decision concerns the application of the goals and,
6 therefore, is a "land use decision" which this Board has
7 jurisdiction to review.⁹

8 **ASSIGNMENT OF ERROR**

9 Both petitioner and the county contend the adoption of
10 a regulation establishing standards for development within
11 the Clear Lake watershed to protect the water quality of
12 Clear Lake exceeds the district's statutory authority.
13 However, petitioner and the county also concede the adoption
14 of such a regulation could be within the district's
15 authority if it were enacted (1) under a cooperative
16 agreement with the county, entered into pursuant to ORS

⁸We do not agree with the district's contention that where the applicable county plan and land use regulations are acknowledged, we lack authority under ORS 197.835 to reverse or remand a special district decision for failure to comply with the goals. Under ORS 197.835(5)(b), we are required to reverse or remand a special district decision amending a land use regulation or adopting a new land use regulation if the decision is not in compliance with the goals and "the comprehensive plan does not contain specific policies or other provisions which provide the basis for the regulation." Also, under ORS 197.835(7)(a)(D), we have authority to reverse or remand a land use decision if a special district improperly construes the applicable law.

⁹Because we conclude the challenged decision meets the statutory definition of a "land use decision," we do not consider whether it also satisfies the significant impacts test, as is contended by petitioner.

1 197.185(2),¹⁰ and (2) after coordination with the county,
2 DEQ and other affected governmental units, as required by
3 Goal 2. See Petition for Review 7, 9, 18; Amicus Brief 8.
4 Therefore, we first consider whether the district complied
5 with applicable Goal 2 coordination requirements in adopting
6 Regulation Two.

7 Goal 2 provides, in relevant part:

8 * * * Each [city, county, state and federal
9 agency or special district] plan and related
10 implementation measure shall be coordinated with
11 the plans of affected governmental units.

12 * * * Opportunities shall be provided for review
13 and comment by * * * affected governmental units
14 during preparation, review and revision of plans
15 and implementation [measures].

16 "**Affected Governmental Units** -- are those local
17 governments, state and federal agencies and
18 special districts which have programs, land
19 ownerships, or responsibilities within the area
20 included in the plan.

21 * * * * *

22 "**Coordinated** -- as defined in ORS 197.015(5).^[11]

23 "**Implementation Measures** -- are the means used to
24 carry out [a] plan. These [include] management
25 implementation measures such as ordinances,
26 regulations or project plans * * *.

¹⁰As stated above, the parties agree that no such cooperative agreement has previously been entered into. However, the parties advise the Board that a draft cooperative agreement is currently being reviewed by county and district staff.

¹¹ORS 197.015(5) provides that "[a] plan is 'coordinated' when the needs of all levels of governments * * * and the citizens of Oregon have been considered and accommodated as much as possible."

1 **"Plans** -- as used here encompass all plans which
2 guide land-use decisions, including both
3 comprehensive and single purpose plans of cities,
4 counties, state and federal agencies and special
5 districts." (Emphasis added.)

6 Under the above emphasized provisions of Goal 2,
7 special districts must coordinate their plans and
8 implementation measures with affected governmental units.
9 Regulation Two is either a single purpose "plan" which
10 establishes standards for decisions affecting land use or an
11 implementation measure to carry out such a plan.¹² In
12 either case, Goal 2 requires the district to coordinate its
13 adoption of Regulation Two with "affected governmental
14 units." There is no dispute that with regard to
15 Regulation Two, the county is an affected governmental unit.

16 The Goal 2 requirement for coordination requires the
17 jurisdiction developing a plan or implementation measure
18 (1) to exchange information with other affected governmental
19 units, or at least to invite them to enter into such an
20 exchange; and (2) to consider and accommodate the needs of

¹²At oral argument, the district argued that Regulation Two is not a "plan" or an "implementation measure" subject to the Goal 2 coordination requirement, primarily because ORS ch 264 does not authorize a domestic water supply district to adopt "plans." According to the district, Regulation Two was adopted solely pursuant to its authority under ORS 264.310 to "adopt and promulgate regulations concerning the use of water and the property of the district." However, we note that both the Oregon Supreme Court and Court of Appeals have stated that the 1973 enactment of ORS 197.185 gave special districts additional authority to adopt "plans" for the performance of their functions, consistent with the goals. Jackson County v. Bear Creek Authority, 53 Or App 823, 827, 632 P2d 1349 (1981), aff'd 293 Or 121, 124-25, 645 P2d 532 (1982).

1 such affected governmental units as much as possible in
2 formulating or revising the plan or implementation measure.
3 Rajneesh v. Wasco County, 13 Or LUBA 202, 210 (1985);
4 Westside Neighborhood v. School Dist. 4J, 5 Or LUBA 63, 74,
5 rev'd on other grounds 58 Or App 154, rev den 294 Or 78
6 (1982).

7 As far as we can tell from the record in this case, the
8 district did nothing to inform the county of its proposed
9 regulation or to invite an exchange of information with the
10 county. It is not disputed that the county had no knowledge
11 of the proposed regulation until after Regulation Two was
12 adopted by the district. Additionally, there is nothing in
13 Regulation Two indicating that the district considered or
14 attempted to accommodate the county's needs. Newspaper
15 publication of a notice of its hearing on the proposed
16 regulation is not, in itself, sufficient to satisfy the
17 coordination requirement of Goal 2. See Twin Rocks Water
18 Dist. v. Rockaway, 2 Or LUBA 36, 45-46 (1980).

1 The assignment of error is sustained.¹³

2 The district's decision is remanded.

¹³Because we remand the district's decision for coordination with the county, the district will have the opportunity, on remand, to consider and respond to petitioner's and the county's arguments that aspects of Regulation Two are inconsistent with the RCP and Lane Code. We therefore do not address these aspects of petitioner's assignment of error further.