

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

3 1000 FRIENDS OF OREGON,           )  
   the Assumed Name of Oregon       )  
4 Land Use Project, Inc., an        )  
   Oregon nonprofit Corporation,    )  
5 KELLY MC GREER,                    )  
   ROSEMARY MC GREER, JAMES G.     )  
6 PERKINS, SHIRLEE PERKINS,         )  
   DAVID DICKSON and                 )  
7 MELINDA DICKSON,                    )  
                                      )  
8                Petitioners,         )  
                                      )  
9                vs.                    )  
                                      )  
10 WASCO COUNTY COURT,                )  
                                      )  
11                Respondents.         )

LUBA No. 81-132

FINAL OPINION  
AND ORDER

12                Appeal from Wasco County.

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

15                Bernard L. Smith, The Dalles, filed the brief and argued  
16 the cause on behalf of Respondent Wasco County.

17                Edward J. Sullivan, Portland, Steven L. Pfeiffer, Portland,  
18 Allen L. Johnson, Eugene, filed the brief. With them on the  
19 brief were O'Donnell, Sullivan & Ramis. Edward J. Sullivan and  
20 Steven L. Pfeiffer argued the cause on behalf of the  
21 Petitioners for Incorporation.

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

24                DISMISSED

3/12/82

25                You are entitled to judicial review of this Order.  
26                Judicial review is governed by the provisions of Oregon Laws  
27 1979, ch 772, sec 6(a).

1 REYNOLDS, Chief Referee.

2 Petitioners appeal the order of respondent Wasco County  
3 Court (the county) granting a petition for incorporation of the  
4 City of Rajneeshpuram, adopting findings and conclusions,  
5 fixing the boundaries of the proposed city and setting the date  
6 for a special election at which registered voters within the  
7 boundaries of the proposed city could vote on the matter of  
8 incorporation. Petitioners set forth in their petition for  
9 review six assignments of error.<sup>1</sup> Petitioners allege, in  
10 summary, that the county's decision violates certain statewide  
11 planning goals as well as the county's comprehensive plan.

12 Respondent county argues we lack jurisdiction over the  
13 county's decision because the goals do not apply to  
14 incorporation decisions. In a supplemental brief, respondents  
15 Knapp, et al, argue that while the statewide goals may apply to  
16 decisions to incorporate they only apply to the question of how  
17 much land should be included within the city and what the shape  
18 of the city should be.

19 Petitioners argue respondent county's interpretation of ORS  
20 197.175(1) is in error for three reasons: (1) It is contrary  
21 to the plain meaning of the statute; (2) It is inconsistent  
22 with rules of statutory construction which require that effect  
23 be given to all provisions of a statute;<sup>2</sup> and (3) It is  
24 inconsistent with the legislative intent behind the amendment  
25 to ORS 197.175(1).

26 To resolve the question of whether we have jurisdiction, we

1 must first determine whether ORS 197.175(1) is clear and  
2 unambiguous on its face. If the statute's meaning is clearly  
3 expressed, then we cannot look to extrinsic aids (e.g.,  
4 legislative history) to decide its meaning. See: Whipple v  
5 Howser, 291 Or 475, 481, \_\_P2d \_\_ (1981). But if the statute  
6 is unclear or ambiguous resort to extrinsic aids is proper.<sup>3</sup>

7 We believe ORS 197.175(1), as amended by 1981 Or Laws, ch  
8 748, section 15 is ambiguous. As written, the statute is  
9 susceptible to different interpretations. One interpretation  
10 is that urged by petitioners, which is that incorporations were  
11 intended to be made subject to the goals. This interpretation,  
12 however, is inconsistent with the grammatical structure of ORS  
13 197.175(1) in its current form. To be grammatically correct,  
14 the statute would have to be changed from its current form:

15 "Cities and counties shall exercise their  
16 planning and zoning responsibilities, including, but  
17 not limited to, a city or special district boundary  
18 change which shall mean the incorporation or  
19 annexation of unincorporated territory by a city and  
20 the formation or change of organization of or  
21 annexation to any special district...in accordance  
22 with...the goals..."

23 to

24 "Cities and counties shall exercise their  
25 planning and zoning responsibilities, including but  
26 not limited to, a city or special district boundary  
change which shall mean incorporation, annexation of  
unincorporated territory by a city or the formation or  
change of organization of or annexation to any special  
district...in accordance with...the goals..."

27 A second interpretation of ORS 197.175(1) is that urged by  
28 respondent Wasco County. Wasco County argues the legislature

1 intended to use the term incorporation as a synonym for  
2 annexation. The common, non-legal definition of incorporation  
3 supports the county's position. Webster's New International  
4 Dictionary, 1145, (3rd Ed. 1966), defines incorporation as:

5       "\* \* \* a union of something with an existing whole  
6       into a new intimate and usu[ally] permanent new whole  
7       \* \* \* a union of diverse things into a whole \* \* \* \*"

8       However, Respondent Wasco County's interpretation is not  
9 supported if incorporation is used in its legal sense.

10 Incorporation, as defined in Black's Law Dictionary (Rev.  
11 Fourth Ed.) is "the act or process of forming or creating a  
12 'corporation;' the formation of a legal or political body \* \* \*  
13 \*" The term incorporation is used in its legal sense in ORS  
14 221.010 to 221.106 which sets out the process for establishing  
15 new cities.

16       Looking at ORS 197.175(1) by itself, we cannot tell whether  
17 the legislature (1) intended incorporation, as used in its  
18 legal sense, to be subject to the goals, but in drafting ORS  
19 197.175(1) made a grammatical error, or (2) intended only to  
20 have "boundary changes" by cities subject to the goals, and  
21 thereby used the term "incorporation" in its common, non-legal  
22 sense. The statute is ambiguous and we must resort to  
23 extrinsic aids to determine the legislature's meaning.

#### 24 CONSIDERATION OF EXTRINSIC AIDS

25       After reviewing the evolvment of ORS 197.175(1), the  
26 legislative history of the 1981 amendment to ORS 197.175(1) and  
referring to the incorporation process set forth in ORS 221.010

1 to 221.106, we believe the legislature intended to use the term  
2 incorporation in its common non-legal sense. Therefore, we  
3 conclude the legislature did not intend to require the goals be  
4 applied in the incorporation process, and we lack jurisdiction  
5 to review the county's order. Our analysis follows:

6 (a) Evolvment of ORS 197.175(1).

7 ORS 197.175(1) (1977 Replacement Part) provided:

8 "Cities and counties shall exercise their  
9 planning and zoning responsibilities in accordance  
10 with ORS 197.005 to 197.430, 215.055, 215.510,  
11 215.515, 2155.535 and 469.350 and the state-wide  
12 planning goals and guidelines approved under ORS  
13 197.005 to 197.430, 215.055, 215.510, 215.515, 215.535  
14 and 469.350."

15 In Petersen v Klamath Falls, 27 Or App 225, 555 P2d 801  
16 (1976) the Court of Appeals held this statute did not require  
17 that annexation decisions comply with the goals. This decision  
18 was appealed to the Supreme Court and the decision was  
19 reversed. Petersen v Klamath Falls, 279 Or 249, 566 P2d 1193  
20 (1977). Pending appeal, however, and probably in response to  
21 the Court of Appeals' decision, the 1977 legislature amended  
22 ORS 197.175(1) to specify that annexation decisions were  
23 subject to scrutiny under the goals. As amended, ORS  
24 197.175(1) (1981 Replacement Part) provided:

25 "Cities and counties shall exercise their  
26 planning and zoning responsibilities, including  
subject to subsection (2) of ORS 197.275, the  
annexation of unincorporated territory pursuant to ORS  
222.111 to 222.750 and the formation of and annexation  
of territory to any district authorized by ORS 198.010  
to 198.915 or 451.010 to 451.600, in accordance  
with...the state-wide planning goals..." (Emphasis  
added).

1 In 1981, ORS 197.175(1) was again amended to add the word  
2 "incorporation." As previously discussed, the term  
3 "incorporation" has a legal meaning which is quite different  
4 from its non-legal meaning. To adopt respondent Wasco County's  
5 position in this case would require that we conclude the  
6 legislature used the word in its non-legal sense and, thus,  
7 amended the statute needlessly. The statute, prior to the 1981  
8 amendment, already clearly and expressly accomplished this  
9 end. See Petersen v Klamath Falls, 279 Or 249, 566 P2d 1193  
10 (1977). The rule, generally, is that a legislative act is not  
11 to be deemed meaningless. Thompson v IDS Life Insurance Co.,  
12 274 Or 649, 656, 549 P2d 510 (1976). See also: Fifth Avenue  
13 Corporation v Washington County, 282 Or 591, 581 P2d 50 (1978).  
14 This rule as applied in this case works against respondent's  
15 position.<sup>4</sup>

16 (b) Legislative History.

17 The rule cited above is only a rule of statutory  
18 construction. It is merely one of many extrinsic aids to be  
19 used in attempting to determine legislative intent. A second  
20 aid is legislative history of the statutory amendment.

21 The legislative history of the 1981 amendment to ORS  
22 197.175(1) suggests that the legislature did use the word  
23 "incorporation" in its common, non-legal sense rather than in  
24 its legal sense, and did engage in a meaningless act. ORS  
25 197.175(1) was amended by HB 2225, Section 15 (1981 Or Laws, ch  
26 748, section 15). When this bill was originally sent to the

1 House Committee on Environment and Energy, the proposed  
2 amendment to ORS 197.175(1) was contained in section 20 of the  
3 bill. The written explanation for the bill, prepared by  
4 Representative Bill Grannell, addressed section 20 as follows:

5 "This section amends ORS 197.175 to clarify that  
6 annexations are land use decisions. This section  
7 accomplishes a housekeeping purpose by clarifying that  
annexations are land use decisions as construed by the  
courts."

8 The minutes of the House Committee on Environment and Energy do  
9 not reflect whether there was any discussion of this  
10 amendment. When HB 2225 was later introduced in the Senate it  
11 was referred to the Senate Committee on Environment/Land Use.  
12 Again, the minutes do not reveal any discussion of the proposed  
13 amendment.

14 The legislative history of HB 2225 strongly suggests,  
15 therefore, that the legislature had no intention of requiring  
16 application of the goals as part of the incorporation process  
17 set forth in ORS 221.010 to 221.106. The legislature only  
18 wanted to accomplish a "housekeeping purpose" by "clarifying"  
19 that annexations were land use decisions subject to the goals.

20 It is possible, however, that the brief legislative history  
21 explaining the amendment to ORS 197.175(1) does not tell the  
22 entire story. The drafters of the amendment may also have  
23 intended, or the legislature in actually voting on the bill may  
24 well have thought, that the goals would be applied as part of  
25 the incorporation process in addition to the annexation process.  
26 The legislative history of HB 2225 does not allow us to

1 eliminate the possibility the goals were intended to be applied  
2 in the incorporation process. We must, therefore, resort to a  
3 third extrinsic aid.

4 (c) Interpretation of ORS 197.175(1) by reference to ORS  
5 221.010-221.106.

6 Incorporation proceedings are governed by ORS 221.010 to  
7 221.106. At all times relevant to the county's decision below,  
8 ORS 221.020 and 221.040 provided, respectively, as follows:

9 ORS 221.020 "The people of an area, no part of  
10 which lies in an incorporated city and in which 150  
11 persons reside, may incorporate a city by approving at  
12 an election called and held according to ORS 221.030  
13 to 221.060 a proposition provided by those sections  
14 for incorporating the city."

15 \* \* \*

16 ORS 221.040 "(1) Upon the filing of the petition  
17 referred to in ORS 221.030, the county court shall fix  
18 the time and place for hearing of such petition and  
19 shall give notice thereof by publication once each  
20 week for two successive weeks in a newspaper published  
21 in the county where the petition is filed and of  
22 general circulation within said boundaries, and by  
23 posting the same for said period of time in three  
24 public places in the area proposed to be  
25 incorporated. The notice shall state the time and  
26 place of the hearing, describe the boundaries set  
forth in the petition and state the purpose of the  
petition. If any portion of the proposed  
incorporation of a city lies within another county or  
counties, then the notice shall be published in a  
newspaper of general circulation in each of the  
counties and in the same time and manner.

"(2) At the time and place fixed for the  
hearing, or at any time and place at which the hearing  
may be continued or postponed, any person interested  
may appear and present oral or written objections to  
the granting of the petition and the forming of the  
proposed incorporated city. The court may alter the  
boundaries as set forth in the petition to include all  
territory which may be benefited by being included

1 within the boundaries of the proposed incorporated  
2 city, but shall not modify boundaries so as to exclude  
3 any land which would be benefited by the formation of  
4 the proposed city. No land shall be included in the  
5 proposed city which will not, in the judgment of the  
6 court, be benefited. If the court determines that any  
7 land has been improperly omitted from the proposed  
8 city and the owner has not appeared at the hearing, it  
9 shall continue the hearing and shall order notice  
10 given to the nonappearing owner requiring him to  
11 appear before it and show cause, if any he has, why  
12 his land should not be included in the proposed city.  
13 The notice shall be given by publication and posting  
14 in the same manner as the original notice for hearing  
15 and for the same period. For the purposes of this  
16 subsection, 'owner' means the legal owner of record  
17 except that if there is a vendee under a duly recorded  
18 contract, such vendee shall be deemed to be the  
19 owner." (Emphasis added).

11 In McManus v. Skoko, 255 Or 375, 467 P2d 426 (1970), the  
12 leading case construing the incorporation statutes,<sup>5</sup> the  
13 Supreme Court held that a county's discretion to alter  
14 boundaries under ORS 221.040(2) did not extend to denying a  
15 petition to incorporate because the county believed  
16 incorporation would be "not commensurate with good governmental  
17 practices and not in the best interest of the general public  
18 nor in the general welfare." 255 Or at 380. While counties  
19 have control over the boundaries of proposed cities, the court  
20 said there was not "the slightest implication" of a legislative  
21 intent to allow the county for the reasons stated above "to  
22 deny the right of 150 inhabitants of a particular area to  
23 decide by a majority vote whether to incorporate their area as  
24 a city." Id at 379. The Court also said:

25 "We are satisfied that if the legislature had  
26 intended to give such power to a county court it would  
have expressed its intention in plain terms." Id at

1 379. (Emphasis added).

2 In Millersburg Development Corp. v Mullen, 14 Or App 614, 514  
3 P2d 367 (1973), the Court of Appeals interpreted McManus as  
4 saying

5 "...the statute (ORS 221.020) gives the right of  
6 an election when the requisites are fulfilled. The  
7 Court determined that there is no evidence of a  
8 legislative intent to allow the commissioners to  
9 refuse to have an election.\*\*\*" 14 Or App at 621.

8 Petitioners argue in this case that respondent Wasco County,  
9 Court was required to apply the goals in deciding whether the  
10 petition for incorporation should be allowed (i.e., whether the  
11 question of incorporation should be submitted to a vote).

12 Petitioners also argue that the county violated the goals in  
13 ordering that the petition for incorporation be allowed. A  
14 fundamental assumption of petitioners is that the goals could  
15 be used by the county court as a basis for refusing to allow an  
16 election.

17 It is our view, based on the holding in McManus, that ORS  
18 221.010 to 221.106 gives a county no discretion to disallow an  
19 election, provided at least 20% of the persons within an area  
20 in which 150 people reside petition the county to incorporate.  
21 The county's sole discretion is to determine which properties  
22 would benefit from the incorporation and to "alter the  
23 boundaries" so as to include only those properties which will  
24 or may benefit by being included within the boundaries. This  
25 discretion is limited in that the county may not so alter the  
26 boundaries as to exclude all properties. Millersburg

1 Development Corp., supra. Because the county has no discretion  
2 to refuse an election, it cannot deny an election on the  
3 grounds the proposed city violates the goals.

4 In addition, the county, with one exception, may not alter  
5 the boundaries of a proposed city based upon what it believes  
6 would result in a well-planned city. The county's discretion  
7 under ORS 221.040(2) in altering the boundaries lies in  
8 determining which properties will benefit from incorporation.  
9 If the county determines property will benefit, the property  
10 must be included within the proposed boundary. If the county  
11 determines the property will not benefit, the property must be  
12 excluded. It is only if the county determines property may  
13 benefit that the county has discretion whether to include or  
14 exclude the property from the proposed boundary. There are no  
15 standards in ORS 221.040(2) as to how the county is to decide  
16 whether property which may benefit should be included. It is  
17 possible, in this limited area, that a county could apply the  
18 goals in deciding whether property which may benefit from  
19 incorporation should be included or excluded. The holding of  
20 the Court of Appeals in Millersburg Development Corp., supra,  
21 seems to give counties wide latitude in deciding whether  
22 property which may benefit is to be included or not. This  
23 latitude certainly could extend to consideration of the  
24 statewide planning goals.

25 The fact counties may have limited discretion to apply the  
26 goals in deciding whether property which may benefit from

1 incorporation should be included does not mean the legislature  
2 intended that counties be required to apply the goals in this  
3 limited area of the incorporation process. There is nothing in  
4 ORS 221.010 to 221.106 to suggest the legislature so intended.  
5 We could conclude that the legislature merely forgot to amend  
6 ORS 221.010 to 221.106 to reference the goals when it amended  
7 ORS 197.175(1). This conclusion would be more plausible,  
8 however, had the 1981 legislature not amended ORS 221.010 to  
9 221.106. Since the 1981 legislature was amending both ORS  
10 197.175(1) and ORS 221.010 to 221.106 at the same time, it  
11 seems reasonable to assume that if the legislature had intended  
12 to grant counties discretion to deny incorporation on the basis  
13 of the goals, the legislature would have said so in the  
14 amendments to ORS 221.010 to 221.106. Similarly, had the 1981  
15 legislature intended to expand counties' responsibilities by  
16 requiring application of the goals when deciding whether  
17 property which may benefit from incorporation should be  
18 included, the legislature could easily have said so in the  
19 amendments to ORS 221.010 to 221.106.

20 We conclude that application of the goals is not feasible  
21 in the incorporation process, given the limited discretion  
22 afforded county governing bodies by statute in this process.  
23 Because application of the goals in the incorporation process  
24 is not feasible, we conclude the legislature intended to use  
25 the term "incorporation" in its non-legal sense and, thus, did  
26 not intend the goals to be applied in the incorporation

1 process.

2 We will not hold the legislature impliedly amended ORS  
3 221.010 to 221.106 so as to change the scope of counties'  
4 discretion or expand their responsibilities by amending ORS  
5 197.175(1). Implied repeal or amendment of statutes are not  
6 favored, League of Women Voters v Lane County Boundary  
7 Commission, 32 Or App 53, 573 P2d 1255 (1978), and will not be  
8 upheld in doubtful cases. Sutherland, Statutory Construction,  
9 4th Ed., Section 22.13. We find this is such a doubtful case.

10 CONCLUSION

11 We conclude that the 1981 legislature in amending ORS  
12 197.175(1) did not intend to require the goals be applied in  
13 the incorporation process.<sup>6</sup> This Board has authority only to  
14 review land use decisions as defined by statute. Fisher v  
15 Colwell, 51 Or App 301, 625 P2d 1333 (1981) (rev den). Land  
16 use decisions are defined in 1981 Or Laws, ch 748, sec 1, as  
17 follows:

18 "(10) 'Land use decision means:

19 "(a) A final decision or determination made by a  
20 local government or special district that  
21 concerns the adoption, amendment or  
22 application of:

23 "(A) The goals;

24 "(B) A comprehensive plan provision; or

25 "(C) A land use regulation; or

26 "(b) A final decision or determination of a  
state agency other than the commission with  
respect to which the agency is required to  
apply the goals."

1 "Land use regulation" as used above is defined as follows:

2 "(11) 'Land use regulation' means any local  
3 government zoning ordinance, land division ordinance  
4 adopted under ORS 92.044 or 92.046 or similar general  
5 ordinance establishing standards for implementing a  
6 comprehensive plan. 'Land use regulation' does not  
7 include small tract zoning map amendments, conditional  
8 use permits, individual subdivision, partitioning or  
9 planned unit development approvals or denials,  
10 annexations, variances, building permits and similar  
11 administrative-type decisions."

12 The county's order which is the subject of this appeal did  
13 not "concern" the adoption, amendment or application of the  
14 goals, a comprehensive plan provision or a land use regulation  
15 within the meaning of 1981 Or Laws, ch 748, section 1(10).  
16 While it is true the county did apply the goals and its  
17 comprehensive plan in its decisionmaking process, the county  
18 was not required to do so. In fact, the county should not have  
19 applied the goals in deciding whether to allow the vote on  
20 incorporation to take place as this was not a discretionary  
21 function. As the county was not required to apply the goals or  
22 a comprehensive plan in the process leading to adoption of the  
23 order on appeal, the decision did not "concern" the application  
24 of the goals or a comprehensive plan within the meaning of 1981  
25 Or Laws, ch 772, sec 4, as amended by 1981 Or Laws, ch 748, sec  
26 1.<sup>7</sup> This Board, therefore, lacks jurisdiction to review the  
order on appeal. The appeal is, accordingly, hereby  
dismissed.<sup>8</sup>

FOOTNOTES

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3 1

4 In the first assignment, petitioners assert that the  
5 statewide planning goals, including Goal 14, apply to  
6 incorporation, and that the county erred by failing to show a  
7 need for urban uses as required by Goal 14. Petitioners'  
8 second assignment of error is that the county violated the  
9 "locational" factor of Goal 14 by allowing an urban use away  
10 from urban areas. The third assignment is that the county's  
11 finding of a need for 2,135 acres as well as certain other  
12 findings are invalid because they rely on a population finding  
13 (1500 - 2000 people in the city by the year 1995) which is not  
14 supported by substantial evidence. In their fourth assignment  
15 of error, petitioners argue the county improperly concluded  
16 Goal 3 did not apply to the incorporation proceeding. The  
17 fifth assignment of error is that the county violated the  
18 urbanization policies of its own comprehensive plan and,  
19 therefore, violated Goal 2. Finally, petitioners argue they  
20 were denied an impartial tribunal because Judge Cantrell had  
21 certain private pecuniary interests which prevented him from  
22 acting impartially in voting on the order.

13 2

14 Petitioners cite ORS 174.010 which provides, in pertinent  
15 part:

16 "In the construction of a statute...where there  
17 are several provisions or particulars such  
18 construction is, if possibly to be adopted as will  
19 give effect to all."

18 3

19 In Springfield Education Association v School District, 290  
20 Or 217, 621 P2d 547 (1980), the Supreme Court discussed three  
21 different classes of terms and an agency's responsibility with  
22 respect to interpreting each class. The classes are exact  
23 terms, inexact terms and delegative terms. The Court said that  
24 for inexact terms resort to extrinsic aids to determine  
25 legislative intent was proper. We believe this same rationale  
26 applies to an entire paragraph in a statute if the paragraph is  
unclear or ambiguous.

23 4

24 A second rule also works against respondents' position.  
25 That rule seems to be that a term in a statute with both a  
26 legal and common meaning is presumed to have been used in its  
legal sense. See 2A Sutherland, Statutory Construction,  
Section 47.30 (1973). But see Section 47.28.

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The statutes involved in McManus were, for all purposes relevant here, identical to the statutes in effect when the county issued its order.

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6

Given our conclusion, it is not feasible to apply the goals in the incorporation process, we also conclude ORS 197.175(1) does not impliedly require application of the goals in the incorporation process. Cf West Side Sanitary District v LCDC, 289 Or 393, 614 P2d 1141 (1980).

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To construe "concerns" as other than "requires" in the context of 1981 Or Laws, ch 748, sec 1(10)(a) could produce an anomalous situation. We could review a local government's decision which involved but did not require application of the goals. If we found the goals were incorrectly applied, we could not reverse or remand the decision. Correct application of the goals would not be required because the goals would not be part of "the applicable law." See 1979 Or Laws, ch 772, sec 5(4)(a)(D).

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We believe strong policy arguments can be made that the goals should be applied by counties in the incorporation process. It is quite possible, for example, that failure to apply the goals could result in serious interference with the state's ability to protect rural areas and, in particular, its valuable resource lands. These policy arguments, however, should be presented to and considered by the legislature, not this Board.