

1 BAGG, Referee.

2 NATURE OF THE DECISION

3 The matter on appeal is an order of the Wasco County Court
4 entitled "In the Matter of Proclaiming the Incorporation of the
5 City of Rajneeshpuram." The order was entered May 26, 1982,
6 and, in pertinent part, states as follows:

7 "IT FURTHER APPEARING TO THE COURT: That as
8 provided in ORS 221.050 (1) Notice of said Election to
9 be held on May 18, 1982, was advertised and posted in
three public places within the area of the proposed
incorporation; and

10 "IT FURTHER APPEARING TO THE COURT: That ORS
11 221.050(2) requires this Court within 10 days after
12 the election on the incorporation of a city to canvass
the returns of the election and proclaim whether a
majority of the votes cast on the proposition favor it.

13 "NOW, THEREFORE, IT IS HEREBY PROCLAIMED: That a
14 canvass of the returns of the election on the
15 proposition to incorporate the City of Rajneeshpuram
16 have been conducted by this Court and a majority of
the voters cast on the proposition favor the
incorporation of the City of Rajneeshpuram; and

17 "IT IS HEREBY FURTHER PROCLAIMED: That the area
18 described in the Notice of election is incorporated as
the City of Rajneeshpuram as of May 18, 1982."

19 Petitioners allege that the act "is the final decision of a
20 local government that concerns the application of the goals and
21 comprehensive plan provisions." See ORS 197.015(10) and ORS
22 197.175(1). Petitioners allege the decision is reviewable,
23 therefore, under the provisions of Oregon Laws 1979, ch 772,
24 sec 4, as amended by Oregon Laws 1981, ch 748.

25 FACTS

26 The decision under review is the end result of an election

1 held on May 18, 1982. The election was for the purpose of
2 determining whether or not certain territory within the county
3 should be incorporated into the City of Rajneeshpuram. The
4 results of that election were prepared by the Wasco County
5 Clerk and contained in the record in a document simply entitled
6 "Election Results." On May 26, 1982, the county court met to
7 consider these results. This action was required under ORS
8 221.050. ORS 221.050 requires (1) the county court to submit
9 the proposition for incorporation to the voters in an election;
10 and (2) within ten days after that election, to canvas the
11 returns of the election and proclaim whether a majority of the
12 votes cast favored the incorporation. If the votes cast
13 favored the incorporation, under ORS 221.050(2), the area "is
14 incorporated as a city from the date of the election."

15 ALLEGATIONS OF ERROR

16 Petitioners make six assignments of error.¹ Each of the
17 assignments of error assumes that the proclamation appealed is a
18 land use decision and, therefore, reviewable by this Board under
19 Or Laws 1979, ch 772, sec 2(4) as amended by Or Laws 1981, ch
20 748. Respondents filed a motion to dismiss for lack of juris-
21 diction alleging that the Wasco County Court "had no discretion to
22 consider any land use planning criteria before proclaiming the
23 results of the incorporation election." Respondents argue that
24 the proclamation issued by the county court was not a land use
25 decision as defined in ORS 197.015(10). Respondent states that it
26 had a "ministerial duty to perform - the proclamation of an

1 election result." The county had no discretion but to issue
2 the proclamation and declare the city incorporated as required
3 in ORS 221.050(2).² Respondent compares the duty described
4 in ORS 221.050(2) with the duty in ORS 221.040(2) governing
5 whether or not the county court is to submit an issue of an
6 incorporation to the voters. That statute provides, in
7 pertinent part, that

8 "[t]he court may alter the boundaries as set forth in
9 the petition to include all territory which may be
10 benefited by being included within the boundaries of
11 the proposed incorporated city, but shall not modify
12 boundaries so as to exclude any land which would be
13 benefited by the formation of the proposed city." ORS
14 221.040(2)

15 Respondent says the above quoted statute allows the county some
16 discretion in setting boundaries, but states that the decision
17 on whether or not to allow the vote on incorporation is not a
18 discretionary function. In support of this proposition,
19 respondents quote 1000 Friends v. Wasco County, 5 Or LUBA 133
20 (1982), wherein this Board held that Wasco County had no
21 discretion in deciding whether or not to allow a vote on the
22 question of incorporation.³

23 Respondent also likens the present case to 1000 Friends v.
24 Wasco County, ____ Or LUBA ____ (LUBA No. 82-039, 1982) wherein
25 we dismissed, for lack of jurisdiction, a challenge to an
26 outdoor mass gathering permit issued by the Wasco County
Court. In that case, we held that we had no jurisdiction over
the local decision, regardless of potential land use
implications, when the decision-making body is afforded no

1 discretion to apply the statewide goals. Because the county
2 has no power to apply land use criteria, the decision is not
3 one reviewable by the Land Use Board of Appeals, according to
4 respondent.

5 In a reply to the motion to dismiss, Petitioners say that
6 the cases cited by respondents were erroneously decided by the
7 Land Use Board of Appeals. Petitioners' view is that the
8 county court was obliged under ORS 197.175(1) to apply
9 statewide land use planning goals to incorporation.
10 Petitioners say that there are other statutes, particularly
11 subdivision statutes, which do not cross-reference or restate
12 the requirement that statewide planning goals apply, and yet
13 the Supreme Court has concluded that subdivision and
14 partitioning decisions must so comply with the goals. See
15 Meeker v. Bd. of Co. Comm., 287 Or 655, 601 P2d 904 (1979);
16 Alexanderson v. Union Co. Court, 289 Or 427, 616 P2d 459
17 (1980). In other words, whether or not ORS Chapter 197 is
18 cited in each and every statute controlling annexations and
19 other such decisions is not determinative, argue petitioners.

20 For the reasons expressed in 1000 Friends v. Wasco Co., 5
21 Or LUBA 133 (1982), we determine we lack jurisdiction to review
22 the decision. Where a statute leaves no room to permit a local
23 government to apply land use criteria, the local government may
24 not be charged with failure to apply such criteria. Here, the
25 legislature has directed a step by step process whereby an
26 election to determine incorporation of territory into cities is

1 to be held, how the results of the election are to be
2 canvassed, and what is to occur should the election favor
3 incorporation. The county court was left with no discretion to
4 apply statewide land use goals or its own comprehensive plan.
5 To apply statewide land use goals or the comprehensive plan in
6 this particular case, conceivably, could result in the local
7 government refusing to declare the territory to be
8 incorporated. Should the county court refuse to declare the
9 territory incorporated because of violations of land use laws,
10 the vote of the people would be made a nullity. We are cited
11 to no authority in statute or case law that would suggest that
12 a local government could act in derogation of a vote.

13 Because we find that the challenged decision is not a land
14 use decision which we may review under the provisions of Oregon
15 Laws 1979, ch 772, sec 4, as amended by Oregon Laws 1981, ch
16 748, this case is dismissed.

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FOOTNOTES

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4 "First Assignment of error: The County Court Erred by
5 Approving Incorporation Absent a Demonstration of Need
6 for Urban Uses.

7 "A. The Goals Apply to Incorporation

8 "B. The County Court Failed to Show Need for Urban
9 Uses as Required by Goal 14

10 "Second Assignment of Error: "The County Court's
11 Order Violates the Locational Factors in Goal 14 and
12 Goal 2, Part II

13 "Third Assignment of Error: The County's Findings
14 Adopted November 4, 1981 Are Not Supported by
15 Substantial Evidence in the Record

16 "Fourth Assignment of Error: The County Court
17 Improperly Concluded that Goal 3 is Inapplicable in
18 this Proceeding

19 "Fifth Assignment of Error: The Order Violates Wasco
20 County's Comprehensive Plan and Goal 2

21 "Sixth Assignment of Error: The County Court's Order
22 is Invalid Because Petitioners Were Denied an
23 Impartial Tribunal. Judge Cantrell's Failure to
24 Disclose Ex Parte Contacts and Conflicts of Interest,
25 and His Failure to Withdraw from this Proceeding,
26 Violated Fasano Safeguards and 14th Amendment Due
27 Process Requirements

28 "A. Nature of the Impartial Tribunal Requirement

29 "B. Requirement of an Appearance of Fairness

30 "C. Judge Cantrell's Failure to Disqualify Himself
31 was Reversible Error."

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33 ORS 221.050(2) states:

34 "Within 10 days after an election held pursuant to
35 subsection (1) of this section on a proposition to
36 incorporate an area as a city, the county court calling the
37 election shall canvass the returns of the election and

1 proclaim whether a majority of the votes cast on the
2 proposition favors it. If it does, that area described in
3 the notice of election is incorporated as a city from the
4 date of the election."

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7 The issue in 1000 Friends v. Wasco County, 5 Or LUBA 133
8 (1982) was whether an order of a county court calling for an
9 election on incorporation (pursuant to a proper petition for
10 incorporation) was a land use decision under ORS 197.015(10).
11 We held that such a decision was not a land use decision
12 reviewable by LUBA. We concluded the legislature did not
13 intend land use criteria to apply to county election
14 responsibilities under ORS 221.040.