

1                               BEFORE THE LAND USE BOARD OF APPEALS  
2                               OF THE STATE OF OREGON  
3

4       KENT PRICE,                               )  
5    )  
6                       Petitioner,                               )  
7    )  
8               vs.    )  
9    )  
10       ARCH CAPE SERVICE DISTRICT, and )               LUBA No. 91-138  
11       ARCH CAPE WATER SERVICE DISTRICT,                )  
12    )  
13                       Respondents.                               )  
14  
15

16               Appeal from Clatsop County.  
17

18               Edward J. Sullivan and Mark J. Greenfield, Portland,  
19       filed the petition for review. With them on the brief was  
20       Preston, Thorgrimson, Shidler, Gates & Ellis. Daniel Kearns  
21       argued on behalf of petitioner.  
22

23               Kenneth S. Eiler, Seaside, filed a response brief and  
24       argued on behalf of respondents. With him on the brief was  
25       Bauske & Eiler.  
26

27               HOLSTUN, Chief Referee; SHERTON, Referee; KELLINGTON,  
28       Referee, participated in the decision.  
29

30                       AFFIRMED                               01/31/92  
31

32               You are entitled to judicial review of this Order.  
33       Judicial review is governed by the provisions of ORS  
34       197.850.

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner challenges a decision adopted by the Arch  
4 Cape Water Service District (hereafter water district) and  
5 the Arch Cape Service District (hereafter sewer district).  
6 The challenged decision, among other things, for a period of  
7 one year limits issuance of water and sewer hookups within  
8 the districts' service area to one water and one sewer  
9 hookup per tax lot.

10 **FACTS**

11 Arch Cape is an unincorporated coastal community  
12 located in the southern part of Clatsop County. Arch Cape  
13 is designated as a Rural Service Area (RSA) in the Clatsop  
14 County Comprehensive Plan (hereafter plan).<sup>1</sup> However, Arch  
15 Cape is not included within an acknowledged urban growth  
16 boundary (UGB) established pursuant to Statewide Planning  
17 Goal 14 (Urbanization). Arch Cape is located several miles  
18 south of Cannon Beach, the nearest incorporated municipality  
19 with an acknowledged UGB.

20 The water and sewer districts were created in the early  
21 1970s pursuant to ORS chapter 451. The Clatsop County Board  
22 of Commissioners serves as the governing body for both

---

<sup>1</sup>RSAs "are those [areas] with a combination of physical, biological and social/economic characteristics which make them necessary and suitable for residential, commercial, or industrial development and includes those [areas] which can be adequately served by existing or planned urban services and facilities." Plan 29.

1 districts. The sewer district operates a sewage treatment  
2 plant with 225 hookups. The water district operates a water  
3 storage tank, filtration plant and water delivery system  
4 with 212 hookups.

5 The Arch Cape Advisory Committee (hereafter advisory  
6 committee) provides recommendations to the water and sewer  
7 districts. Following a study, the advisory committee  
8 identified a number of existing problems with both the water  
9 and sewerage systems and discovered that the demands being  
10 placed on both systems frequently exceeded their design  
11 capacity. The advisory committee recommended that for one  
12 year the districts limit additional water and sewer hookups  
13 to one each per tax lot.<sup>2</sup>

14 The board of county commissioners, sitting as the

---

<sup>2</sup>The advisory committee also recommended the following:

- "1. Develop RFP's for engineering firms and then evaluate their proposals.
- "2. Research funding mechanisms for changes needed and updating worn out equipment.
- "3. Work with the County Planning Department to get a more accurate estimate of the total potential tax lots within the current district boundaries.
- "4. Evaluate the need to revise the boundary lines to be compatible with plant capacity ratings.
- "5. Evaluate possible plant expansion to increase capacity rather than reduce boundary lines.
- "6. Work with the South West Coastal Zone Comprehensive Plan Periodic Review Committee to integrate water and sewer service potential into their final product." Record 18.

1 governing body of the water and sewer districts, conducted  
2 public hearings and, thereafter, adopted the decision  
3 challenged in this proceeding. In addition to imposing the  
4 one year restriction on water and sewer hookups, the  
5 challenged decision includes the following:

6 "IT IS \* \* \* RESOLVED that an amendment to the  
7 Comprehensive Plan be initiated to remedy the  
8 disparity between demand and capacity of the  
9 existing water and sewer systems; and

10 "IT IS FURTHER RESOLVED that during the period in  
11 which this resolution remains in effect, staff  
12 shall undertake additional studies to determine  
13 improvements that can be made to increase public  
14 facility capacity and to identify possible methods  
15 of financing \* \* \* [.]" Record 1.

16 Petitioner owns land within the water and sewer  
17 districts' service area affected by the limit on future  
18 hookups and appeals the decision to this Board.

19 **FIRST ASSIGNMENT OF ERROR**

20 "Clatsop County erred in failing to comply with  
21 the requirements of ORS 197.505 to 197.540 when it  
22 adopted the challenged resolution because the  
23 County's action here imposed a de facto  
24 development moratorium. The state moratorium  
25 statute of ORS 197.505, et seq. applies to all  
26 urban and urbanizable lands, and the Arch Cape RSA  
27 is necessarily included in this category. The  
28 decision does not contain adequate findings and is  
29 not supported by substantial evidence in the whole  
30 record - all to the prejudice of petitioner's  
31 substantial rights."

32 Under ORS 197.505 to 197.540<sup>3</sup> cities, counties and

---

<sup>3</sup>ORS 197.505 through 197.530 were amended in 1991. 1991 Or Laws,  
ch 839, §§ 1 through 4. However, the 1991 legislative amendments did not

1 special districts are required to adopt certain findings  
2 before they may impose moratoria.<sup>4</sup> Petitioner contends the  
3 challenged decisions constitute moratoria and argues the  
4 service districts failed to adopt the statutorily required  
5 findings prior to adopting their decisions.

6 The "moratoria" subject to ORS 197.505 to 197.540 are,  
7 by definition, limited geographically to "urban or  
8 urbanizable land."<sup>5</sup> See n 4, supra. The Arch Cape RSA is

---

become effective until September 29, 1991, after the challenged decision became final. Therefore, to the extent the statutory limits on moratoria are applicable in this case, that limitation is imposed by the statutes as they existed prior to the 1991 legislative amendments. Our citations to ORS 197.505 through 197.540 in this opinion are to the statutes as they existed prior to the effective date of the 1991 amendments.

<sup>4</sup>ORS 197.505(1) defines "moratorium" as follows:

"As used in ORS 197.505 to 197.540, 'moratorium on construction or land development' means engaging in a pattern or practice of delaying or stopping issuance of permits, authorizations or approvals necessary for the subdivision and partitioning of, or residential construction on, urban or urbanizable land. It does not include actions engaged in, or practices in accordance with a comprehensive plan or implementing ordinances acknowledged by the Land Conservation and Development Commission under ORS 197.251, nor does it include denial or delay of permits or authorizations because they are inconsistent with applicable zoning or other laws or ordinances." (Emphasis added.)

<sup>5</sup>Although "urban or urbanizable land" is not defined in ORS 197.505, definitions of "urban land" and "urbanizable land" are included in the statewide planning goals. Those definitions are as follows:

"Urban Land. Urban areas are those places which must have an incorporated city. Such areas may include lands adjacent to and outside the incorporated city and may also:

"(a) Have concentrations of persons who generally reside and work in the area

"(b) Have supporting public facilities and services.

1 not "urban land," as that term is defined in the statewide  
2 planning goals, because it is not within or adjacent to "an  
3 incorporated city." The Arch Cape RSA is not "urbanizable  
4 land," as that term is defined in the statewide planning  
5 goals, because it is not within an "acknowledged urban  
6 growth boundary."<sup>6</sup> Nevertheless, petitioner contends the  
7 Arch Cape RSA should be considered as falling within the  
8 meaning of "urban and urbanizable land," as those words are  
9 used in ORS 197.505(1), because the Arch Cape RSA clearly is  
10 planned and zoned in a manner which permits urban intensity  
11 development.<sup>7</sup> Therefore, petitioner contends, the Arch Cape

---

"Urbanizable Land. Urbanizable lands are those lands within  
the urban growth boundary and which are identified and

"(a) Determined to be necessary and suitable for future urban  
uses

"(b) Can be served by urban services and facilities

"(c) Are needed for the expansion of an urban area."  
(Emphases added.)

<sup>6</sup>In 1000 Friends of Oregon v. LCDC (Curry Co.), 301 Or 447, 498-501, 724  
P2d 268 (1986), the Oregon Supreme Court explained that when a  
comprehensive plan is acknowledged, urban and urbanizable lands are  
included within acknowledged UGBs and rural lands are located outside UGBs.

<sup>7</sup>The zoning applied within the Arch Cape RSA includes commercial,  
industrial, and a number of residential districts. The RSA-SFR zone  
permits residential development on lots of one acre where the slope exceeds  
25%, but permits residential development on lots as small as 7,500 square  
feet where the slope is less than 12%. Petitioner's argument that the Arch  
Cape RSA is "quasi-urban land" is based on (1) the density of residential  
and other types of development permissible within the Arch Cape RSA under  
existing planning and zoning, (2) the presence of water and sewer service  
within the Arch Cape RSA, (3) concerns expressed by the Department of Land  
Conservation and Development during the proceedings that led to  
acknowledgment of the county's comprehensive plan and land use regulations

1 RSA is properly viewed as "urban or urbanizable land"  
2 subject to the statutory limits imposed on moratoria by ORS  
3 197.505 to 197.540. Because the service districts failed to  
4 address or demonstrate compliance with those standards,  
5 petitioner contends the challenged decision must be  
6 invalidated.<sup>8</sup>

7 Petitioner argues the types of development permitted  
8 under the current planning and zoning applied to the Arch  
9 Cape RSA under the acknowledged Clatsop County Comprehensive  
10 Plan in fact are urban intensity uses. Petitioner points  
11 out that in 1000 Friends of Oregon v. LCDC (Curry Co.), 301  
12 Or at 502, the Supreme Court stated:

13       "\* \* \* [A]ny decision which allows 'urban uses' of  
14       'rural land' converts that land and must comply  
15       with or take exception to Goal 14, even if that  
16       decision does not change the use of the land. \* \*  
17       \*" (Emphasis in original.)

18 Petitioner asks this Board to apply the Supreme Court's  
19 rationale in this case and determine that because the  
20 current zoning allows urban intensity uses in the Arch Cape  
21 RSA, the RSA has been "converted" to "urban and urbanizable  
22 land" as those terms are used in ORS 197.505(1). Petitioner

---

that development within the Arch Cape RSA might outstrip the capacity of the water and sewerage system, and (4) explicit county comprehensive plan and land use regulation requirements that sewer and water services must be adequate to serve development within the RSA, before subdivision or building permit approvals may be granted.

<sup>8</sup>Respondents offer several arguments why they believe the challenged decision does not constitute a moratorium. We address only one of those arguments in this opinion.

1 argues that the density of development allowed in the Arch  
2 Cape RSA is greater than that which the Supreme Court  
3 determined "converted" rural land to urban or urbanizable  
4 land in 1000 Friends of Oregon v. LCDC (Curry Co.).

5 Petitioner's argument assumes that in the above quote,  
6 the Supreme Court concluded that allowing urban intensity  
7 uses on rural land "converts" that land to "urban or  
8 urbanizable land." We believe petitioner misunderstands the  
9 court's conclusion. The statement quoted is in a section of  
10 the opinion entitled "Conversion of Rural Land to Urban  
11 Uses." (Emphasis added.) Id., at 498. At the beginning of  
12 this section, the court states that "a local government may  
13 not 'convert rural land' outside UGBs to 'urban uses' unless  
14 it complies with or takes an exception to Goal 14 \* \* \*."  
15 Id. The court then explains that it will consider whether,  
16 under the county plan acknowledged by the challenged LCDC  
17 order, "'rural land' is being 'converted' to 'urban uses.'"  
18 Id.

19 In a subsection of this section of the opinion,  
20 entitled "Conversion," the court responds to the county's  
21 argument that "no exceptions to Goal 14 are necessary,  
22 because [the county's] Goal 3 and 4 exceptions areas do not  
23 convert 'rural land' to 'urban uses,' but merely recognize  
24 existing development." (Emphasis in original.) Id. at 501.  
25 It is this argument to which the court responds in the  
26 statement quoted above. In this context, it is clear that

1 the court was saying that decisions allowing urban intensity  
2 uses on "rural land" convert such land to "urban uses" and,  
3 therefore, such decisions must be made in compliance with  
4 Goal 14 (by placing the land in question within a UGB) or by  
5 taking an exception to Goal 14. The court was not saying  
6 that allowing urban intensity uses on "rural land" converts  
7 that land into "urban or urbanizable land." Indeed, in the  
8 preceding subsection of the opinion (entitled "Rural Land"),  
9 the court specifically concluded that county land outside of  
10 UGBs, even though occupied by urban intensity  
11 ("quasi-urban") uses, remains "rural land."<sup>9</sup> Id. at 501.

12 We conclude the Arch Cape RSA does not contain "urban  
13 or urbanizable land" and, therefore, the challenged decision  
14 is not a moratorium under ORS 197.505(1).

15 The first assignment of error is denied.

16 **SECOND ASSIGNMENT OF ERROR**

17 "Respondent acted inconsistently with and in  
18 violation of ORS 197.175(2), 197.185, 451.120(2),  
19 451.130, 451.472, State-wide Planning Goals 1, 2  
20 and 11, and the county's acknowledged  
21 comprehensive plan and zoning ordinance by  
22 adopting the resolution. Adoption of the  
23 resolution violates the County's Public Facilities  
24 and Services plan element as well as § 3.108(1)(a)  
25 of the LWDUO."

---

<sup>9</sup>The court recognized that if an exception to Goal 14 were taken for such lands, they could be considered "quasi-urban land." However, no exception to Goal 14 has been adopted or acknowledged for the Arch Cape RSA and, in any case, ORS 197.505(1) does not refer to "quasi-urban land."

1           **A.    ORS 197.175(2) and Statewide Planning Goal 1**

2           Although petitioner alleges violations of ORS  
3 197.175(2) (cities and counties are required to adopt and  
4 amend comprehensive plans in accordance with statewide  
5 planning goals) and Statewide Planning Goal 1 (Citizen  
6 Involvement), the argument presented concerning Goal 1 and  
7 ORS 197.175 under this assignment of error is that "[t]he  
8 procedure by which the [decision] was adopted violated [Goal  
9 1 and] ORS 197.175(2) \* \* \*." Petition for Review 32. We  
10 are unable to determine how petitioner believes Goal 1 and  
11 ORS 197.175(2) are violated and do not consider these  
12 allegations further.<sup>10</sup>

13           This subassignment of error is denied.

14           **B.    ORS 451.120(2), 451.130, 451.472**

15           ORS 451.120(1) empowers service districts to adopt  
16 master plans for the development of service facilities, and  
17 ORS 451.120(2) requires that such master plans be  
18 coordinated with comprehensive plans of affected cities and  
19 counties.    ORS 451.130 empowers the board of county  
20 commissioners to require conformance to such master plans.  
21 ORS 451.472 empowers service districts to "construct,  
22 maintain and operate [authorized] service facilities \* \* \*."

23           As far as we can tell, petitioner argues the challenged

---

<sup>10</sup>To the extent these references have some relation to petitioner's allegations that the challenged decision represents a de facto amendment of the county comprehensive plan, we consider those allegations below under the third assignment of error.

1 decision is a master plan within the meaning of ORS  
2 451.120(1) and was not properly coordinated with the county  
3 comprehensive plan.

4 Respondents contend the challenged decision is not a  
5 master plan within the meaning of ORS 451.120. Respondents  
6 further contend there is no dispute that the service  
7 districts may construct, maintain and operate water and  
8 sewerage facilities pursuant to ORS 451.472. Accordingly,  
9 respondent contends petitioners fail to demonstrate how the  
10 challenged decision violates ORS 451.120(2), 451.130 or  
11 451.472. We agree with respondent.

12 This subassignment of error is denied.

13 **C. Goal 11 (Public Facilities and Services)**

14 Most of petitioner's arguments under this subassignment  
15 of error concern policies in the county's acknowledged  
16 comprehensive plan adopted to implement Goal 11. However,  
17 petitioner does include the following argument under this  
18 assignment of error:

19 "Goal 11 does not provide as an option the  
20 imposition of a development moratorium which  
21 allows local governments to avoid improving and  
22 expanding public facilities." Petition for Review  
23 29.

24 Even if the statewide planning goals continue to apply to  
25 service districts located within counties with acknowledged  
26 comprehensive plans, petitioner offers no explanation for  
27 why, under the circumstances presented in this case, the  
28 method of allocating water and sewer hookups adopted by the

1 districts violates Goal 11. The above argument suggests  
2 that the method selected is invalid simply because it is not  
3 specifically authorized by Goal 11. We reject the  
4 suggestion.

5 This subassignment of error is denied.

6 **D. ORS 197.185, Goal 2 (Land Use Planning)**

7 ORS 197.185(1) requires that special districts take  
8 action with respect to programs affecting land use "in  
9 accordance with the [statewide planning] goals \* \* \*." Goal  
10 2 requires that the districts' actions with respect to  
11 programs affecting land use be consistent with the county  
12 comprehensive plan.

13 The county comprehensive plan was acknowledged in 1984.  
14 As noted above, the comprehensive plan and zoning provisions  
15 applicable in the Arch Cape RSA permit some of the RSA-SFR  
16 zoned properties to be subdivided into lots of as little as  
17 7,500 square feet. Petitioner argues that before the  
18 disputed decision was adopted, his property could have been  
19 divided and developed with far more dwellings than would be  
20 allowed under the challenged decision.

21 According to petitioner, it was recognized during the  
22 proceedings that led to acknowledgment of the county  
23 comprehensive plan that the number of lots potentially  
24 requiring service under the plan and zoning designations  
25 applied to land within the Arch Cape RSA could exceed the  
26 facilities' capacity. Notwithstanding that concern, LCDC

1 acknowledged the county comprehensive plan and land use  
2 regulations based largely on plan Goal 11 policy provisions.  
3 Petitioner contends that plan language envisions a procedure  
4 where lots may be subdivided and hookups obtained through an  
5 administrative process which does not envision a rigid limit  
6 of one water hookup and one sewer hookup per current tax  
7 lot. Petitioner contends such a rigid limit frustrates the  
8 ability of land owners to utilize the plan and zoning  
9 provisions that clearly envision and allow their property to  
10 be subdivided and developed.

11 Petitioner argues plan Goal 11 policy provisions under  
12 "Basic Findings,"<sup>11</sup> "General Public Facilities Policies,"  
13 "Water Supply Systems Policies" and "Waste Disposal  
14 Policies" are violated by the challenged decision.<sup>12</sup>

---

<sup>11</sup>The Basic Finding cited by petitioner is as follows:

"Within RSAs, UGBs and municipalities, a community water system is considered a basic service required for development. In Rural and Conservation Plan designations, this level of service is not required for development. However, construction of residences or division of land must show availability of water from some source." Basic Findings, page 5.

<sup>12</sup>Those policies cited by petitioner are as follows:

"Clatsop County recognizes the level of public facilities and services described in the section "Appropriate Levels of Public Facilities in the County" \* \* \* as that which is reasonable and appropriate for development in different Plan designations in the County. Development of facilities and services in excess of those levels and types shall not be approved by the County." General Public Facilities Policy 1.

"Development shall be allowed only if the public facilities (water, sanitation, schools and fire protection) are capable of supporting increased loads. The County shall consider prior

1           These policies limit water and sewerage facilities to  
2 those appropriate to serve the types of development  
3 allowable under the plan, limit expansion of water and  
4 sewerage facilities into rural areas, encourage development  
5 of adequate facilities, and require that development within  
6 RSAs only be allowed if there are adequate services to serve

---

subdivision approvals within the facilities service area when reviewing the capabilities of districts." General Public Facilities Policy 3.

"Water and sewer districts shall be encouraged to cooperate with the County in changing district boundaries. Before a public facility (i.e. water, sewer) extends its service area, it should demonstrate the ability to service vacant lands currently served by the public facility." General Public Facilities Policy 6.

"If a community water system is to be utilized, either [for] the development of a subdivision or the building of individual residences, the County shall confer with the local water supplier to insure adequate water is available prior to issuance of plat approvals or building permits." Water Supply Systems Policy 1.

"Clatsop County shall encourage existing community water supply systems to be improved and maintained at a level sufficient to:

- "a. provide adequate fire flow and storage capacity to meet the service area requirements,
- "b. meet the anticipated long-range maximum daily use and emergency needs of the service area, and
- "c. provide adequate pressure to ensure the efficient operation of the water distribution system." Water Supply Systems Policy 3.

"Clatsop County considers sewer services only appropriate for urbanizable lands and RSAs. The intensity of land use facilitated by provisions of sewer is not appropriate for Rural areas. Clatsop County may permit the creation or extension of sewer services outside UGBs and RSAs in the event of a health hazard or water pollution problem identified by DEQ." Water Disposal Policy 1.

1 that development. We cannot see how these policies address  
2 the situation the districts were attempting to address in  
3 the challenged decision.

4 Specifically, none of the cited policies address or  
5 limit the districts' ability to allocate available sewerage  
6 and water system capacity in the manner adopted while  
7 solutions are sought to alleviate system inadequacies.<sup>13</sup>  
8 Although petitioner might prefer a "first come first served"  
9 method of allocating remaining capacity, so that persons now  
10 wishing to divide and develop their property may continue to  
11 do so under existing plan and land use regulation  
12 restraints, we see nothing in the cited policies that  
13 requires the districts to proceed in that manner.

14 This subassignment of error is denied.

15 The second assignment of error is denied.

16 **THIRD ASSIGNMENT OF ERROR**

17 "The board of commissioners violated ORS 197.610  
18 to 197.650 by adopting a de facto plan amendment  
19 without following the statutorily required post-  
20 acknowledgment procedures, without applying any  
21 approval criteria, and without a showing that the  
22 decision complied with the Statewide Planning  
23 Goals. The decision lacks adequate findings and  
24 is not supported by substantial evidence in the  
25 whole record - all to the prejudice of the  
26 petitioner's substantial rights."

---

<sup>13</sup>Nowhere in the petition for review does petitioner specifically dispute that the current water and sewerage systems are inadequate or that the deficiencies identified by the districts are not supported by substantial evidence in the record.

1 Under this assignment of error, petitioner argues the  
2 challenged decision constitutes a de facto amendment to the  
3 county's comprehensive plan.

4 In an Order on Motion to Dismiss issued earlier in this  
5 proceeding, we explained that while the districts' action  
6 might be inconsistent with the county comprehensive plan,  
7 and for that reason invalid, such inconsistent action would  
8 not amount to a de facto amendment of the county  
9 comprehensive plan. Price v. Arch Cape Service District,  
10 \_\_\_ Or LUBA \_\_\_ (LUBA No. 91-138, Order on Motion to  
11 Dismiss, October 31, 1991), slip op 3. For the reasons  
12 explained in that order, we reject petitioner's allegations  
13 to the contrary.

14 The third assignment of error is denied.

15 **FOURTH ASSIGNMENT OF ERROR**

16 "In making the challenged decision, the board of  
17 commissioners, acting as the governing body of the  
18 two service districts, acted beyond the authority  
19 of the districts and violated ORS 197.185 and ORS  
20 Chapter 451 by adopting a resolution which calls  
21 for the initiation of a comprehensive plan  
22 amendment, which actually implemented the  
23 contemplated plan amendment, and which imposes a  
24 development moratorium."

25 Petitioner argues the board of commissioners, in its  
26 capacity as the governing body of the service districts,  
27 lacks authority to initiate amendments to the county  
28 comprehensive plan. We are uncertain whether the districts  
29 are among the persons permitted to initiate amendments to  
30 the county comprehensive plan. However, if they are not, an

1 erroneous statement that they are initiating a comprehensive  
2 plan amendment would simply be without effect. We fail to  
3 see how that aspect of the challenged decision could provide  
4 a basis for reversal or remand of the decision on review in  
5 this proceeding.

6 The fourth assignment of error is denied.

7 The districts' decision is affirmed.