

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

EDWARD DONALDSON, ELIZABETH)
DONALDSON, MARIE GRAY, THOMAS)
HEINTZ, JOHN C. NEELY, JR.,)
WANDA SIMMONS and)
JOHN I. MEHRINGER,)
Petitioners,)
vs.)
LANE COUNTY,)
Respondent.)

LUBA No. 82-017

ORDER
MOTION TO DISMISS

Respondent Lane County has filed a motion to dismiss this appeal on the basis that two indispensable parties to the appeal have not been joined. Petitioners have appealed Lane County Ordinance No. 856, entitled "In the Matter of Amending the Eugene-Springfield Metropolitan Area General Plan, An Element of the General Plan for Lane County," and adopted on February 3, 1982. The cities of Eugene and Springfield adopted the same amendments on February 8, 1982 and March 1, 1982, respectively. These identical actions were taken in response to LCDC's directive on June 25 and 26, 1981, requiring that all three jurisdictions "must adopt a single consistent metropolitan area general plan." LCDC's directive was issued in response to the request for acknowledgment by the three jurisdictions.

Respondent argues that it takes all three ordinances to constitute "a single consistent metropolitan area general

1 plan." In that petitioners have only appealed one of three
2 ordinances, petitioners have not appealed the entire plan. The
3 county makes three arguments in support of its motion to
4 dismiss. First, the county argues any order issued by LUBA
5 could not affect Eugene and Springfield since their ordinances
6 were not appealed. Second, Lane County argues LUBA would be
7 creating an inconsistency if it found a defect in the Lane
8 County ordinance, and any such inconsistency would be violative
9 of LCDC's order and Goal 2 requiring the three jurisdictions to
10 have a single consistent comprehensive plan. Third, Lane
11 County argues Eugene and Springfield are indispensable parties
12 to this appeal without whom this Board cannot proceed.

13 According to Lane County:

14 "The failure to appeal the two cities' plans is, by
15 analogy, the equivalent of a plaintiff who fails to
16 join an indispensable party. In such a situation,
17 ORCP 7 prescribes that a Motion to Dismiss is
appropriate. When an indispensable party is not
joined, pursuant to ORCP 29B, the court's duty is as
follows:

18 "'B. Determination by court whenever joinder not
19 feasible. If a person as described in
20 subsections A.(1) and (2) of this rule cannot be
21 made a party, the court shall determine whether
22 in equity and good conscience the action should
23 proceed among the parties before it, or should be
24 dismissed, the absent person being thus regarded
25 as indispensable. The factors to be considered
26 by the court include: first, to what extent a
judgment rendered in the person's absence might
be prejudicial to the person or those already
parties; second, the extent to which, by
protective provisions in the judgment, by the
shaping of relief, or other measures, the
prejudice can be lessened or avoided; third,
whether a judgment rendered in the person's
absence will be adequate; fourth, whether the

1 plaintiff will have an adequate remedy if the
2 action is dismissed for nonjoinder.'" (Emphasis
3 in original).

4 Respondent county argues that all four of the factors
5 identified in ORCP 29B "weigh in favor of dismissal at this
6 time." First, Lane County says it would be prejudicial to
7 Eugene and Springfield to render a judgment in their absence,
8 because Eugene and Springfield could not achieve acknowledgment
9 if Lane County were required to change its plan. Second, the
10 county argues there is no way to lessen or avoid the prejudice
11 which would result to Eugene and Springfield if the county's
12 ordinance adopting the plan amendment were reversed or
13 remanded. Third, the county says our decision would be
14 inadequate because the plans of Eugene and Springfield would
15 not be directly affected by our decision.

16 "We know the three jurisdictions must have the same
17 plan, yet, an order from LUBA will not act to force
18 that result. To the contrary, it could result in
19 different versions of the very policies petitioners
20 want reviewed. If that were to occur, these revised
21 policies would be completely inadequate, as they
22 wouldn't be adopted by Eugene and Springfield and an
23 acknowledged comprehensive plan would not be
24 possible." Motion to Dismiss at 3-4.

25 Fourth, the county argues petitioners will have an adequate
26 remedy if the appeal is dismissed. Petitioners may contest the
27 metropolitan area general plan during the acknowledgment
28 process which is expected to begin this summer.

29 Respondent Lane County notes that we decided against the
30 county as well as the cities of Eugene and Springfield on a

1 similar motion filed in Elliott v Lane County, 2 Or LUBA 240
2 (1980). In that appeal petitioner challenged Lane County's
3 decision to amend the Eugene-Springfield Metropolitan Area
4 General Plan, but did not appeal identical action by the cities
5 of Eugene and Springfield. Lane County argues our decision in
6 that case should be distinguished for three reasons: 1) a
7 notice of intent to appeal was eventually served on both Eugene
8 and Springfield; 2) Lane County was the last jurisdiction to
9 adopt the plan amendment, whereas here Lane County was the
10 first jurisdiction to adopt the plan amendment; and 3) the
11 cities of Eugene and Springfield were parties to the Elliott
12 decision and are not parties in the present appeal.

13 Petitioners have responded to the motion to dismiss as
14 follows. First, petitioners argue respondent's motion is not
15 timely under LUBA Rule 14B which requires a moving party to
16 make challenges within ten days of the time the moving party
17 obtains knowledge of a failure to comply with statute or rule.
18 Here, Lane County has been on notice since March 2, 1982, when
19 petitioners' notice of intent to appeal was filed, that
20 petitioners only intended to take action against Lane County.
21 The motion to dismiss was not filed until more than two months
22 after respondent Lane County first had notice.¹

23 Petitioners' responds to the merits of the motion to
24 dismiss is a bit difficult to understand, but we interpret
25 petitioners' argument to be primarily that even if petitioners
26 prevailed in this appeal, an unavoidable inconsistency may not

1 necessarily arise. It is just as likely, argue petitioners,
2 that LCDC will, if petitioners prevail in this appeal, order
3 the cities of Eugene and Springfield at the time of
4 acknowledgment to make their plans conform to Lane County's,
5 rather than vice-a-versa. If Lane County's plan is deemed
6 inadequate in some manner and Lane County must amend the plan,
7 then Eugene and Springfield could make their plans consistent
8 with Lane County's simply by amending their plans. A single
9 consistent metropolitan plan for the metropolitan area would
10 then exist, and no inconsistency violative of Goal 2 or LCDC's
11 orders would arise.

12 We note respondent Lane County does not argue that its
13 decision was not a land use decision.² Rather, respondent
14 Lane County argues that petitioners were somehow required to
15 join as indispensable parties the cities of Eugene and
16 Springfield in this appeal. We know of no mechanism in ORS
17 chapter 197 or 1979 Or Laws, ch 772, as amended by 1981 Or
18 Laws, ch 748, which enables, let alone requires, a person
19 filing an appeal of a land use decision to "join" parties other
20 than the governing body. Perhaps in a situation such as this
21 it should be required in the statute that interested parties
22 such as the cities of Eugene and Springfield be at least
23 notified of petitioner's appeal or perhaps even joined as
24 parties to the appeal. No such requirement, however,
25 exists.³ Oregon Rules of Civil Procedure do not apply to
26 administrative proceedings such as the present appeal. The

1 rules of procedure applicable to the present appeal are those
2 contained in LUBA's Rules of Procedure, 1979 Or Laws, ch 772,
3 as amended by 1981 Or Laws, ch 748, and ORS Ch 183 where not
4 inconsistent with 1979 Or Laws, ch 772, as amended by 1981 Or
5 Laws, ch 748. There is no provision we know of which requires
6 that we dismiss this appeal because the cities of Eugene and
7 Springfield, who are obviously interested parties in this
8 appeal, have not been joined as parties.

9 We do believe, however, that the cities of Eugene and
10 Springfield, as interested parties, should be afforded the
11 opportunity to participate in this appeal. There is no
12 evidence in our record of this appeal which suggests the cities
13 of Eugene and Springfield are aware of the appeal.
14 Accordingly, in order to notify the cities of Eugene and
15 Springfield of the pendency of this appeal and to provide them
16 with the opportunity to participate as intervenors, it is
17 ordered that petitioners serve on the cities of Eugene and
18 Springfield a copy of the notice of intent to appeal filed in
19 this matter, together with a copy of this Board's order, and
20 that such service made on the cities of Eugene and Springfield
21 within five (5) days of the date of this order. Should the
22 cities of Eugene and Springfield wish to participate in this
23 appeal, they may do so in accordance with LUBA Rule 11.

24 As provided in the stipulation of the parties dated June 3,
25 1982, respondent's brief shall be filed with the Board within
26 twenty days (20) of the date of this order.

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Respondent Lane County's motion to dismiss is denied.

Dated this 29th day of June, 1982.


Michael D. Reynolds
Chief Hearings Referee

FOOTNOTES

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We have previously ruled that jurisdictional challenges are not subject to the ten (10) day requirement in LUBA Rule 14B. See, e.g., Grant County v Oregon Department of Fish and Wildlife, 1 Or LUBA 214 (1980).

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For this Board to have jurisdiction, a petitioner must appeal a land use decision. A land use decision is defined in ORS 197.015(10) as follows:

9 "(a) A final decision or determination made by a local
10 government or special district that concerns the
11 adoption, amendment or application of:

12 "(A) The goals;

13 "(B) A comprehensive plan provision, or

14 "(C) A land use regulation; or

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

18 Petitioners have appealed an ordinance entitled "In the
19 Matter of Amending the Eugene-Springfield Metropolitan Area
20 General Plan, An Element of the General Plan for Lane County."
21 While it is true Lane County's action is not effective to amend
22 the Eugene-Springfield Metropolitan Area General Plan,
23 nevertheless the county's action is "final" and concerns the
24 adoption of a comprehensive plan provision, if not the
25 application of the statewide goals, within the meaning of ORS
26 197.015(10). The fact that all three jurisdictions have agreed
27 all must concur in any amendment to the Eugene-Springfield
28 Metropolitan Area General Plan before the amendment is
29 effective is not significant. In 1000 Friends of Oregon v
30 Clackamas County, 3 Or LUBA 233 (1981), we said the fact that a
31 comprehensive plan and zone change was conditioned upon a
32 future amendment to the metropolitan service district urban
33 growth boundary did not mean the zone change was not a land use
34 decision. We believe the rationale used to reach the result in
35 1000 Friends of Oregon v Clackamas County, supra, also applies
36 here.

2 LUBA Rule 4(C) requires service on all parties required to
3 be named by Rule 4(A)(6). Rule 4(A)(6)(d) requires to be named
4 in the notice of intent to appeal "[a]ny other person whom the
5 governing body's records indicate was mailed written notice of
6 the land use decision for which review is sought." Governing
7 bodies are required to mail written notice of their decision to
8 "parties" when the decision is subject to ORS 215.406, et seq,
9 and ORS 227.160 - 227.180. No similar requirement exists, as
10 far as we are aware, for legislative decisions such as the one
11 involved in this appeal.
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