

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

CITY OF PORTLAND,)
)
Petitioner,)
)
vs.)
)
MULTNOMAH COUNTY,)
) LUBA No. 90-005
Respondent,)
) FINAL OPINION
and) AND ORDER
)
BILL STALLINGS, HERB BROWN, LEO)
EFFLE, ROCKWOOD WATER DISTRICT,)
and ROCKWOOD WATER PEOPLE'S)
UTILITY DISTRICT,)
)
Intervenors-Respondent.)

Appeal from Multnomah County.

Ruth Spetter, Portland, filed the petition for review and argued on behalf of petitioner.

John L. DuBay, Portland, filed a response brief and argued on behalf of respondent.

Leslie M. Roberts and Frank Josselson, Portland, filed a response brief and argued on behalf of intervenors-respondent. With them on the brief was Josselson, Potter & Roberts.

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

DISMISSED 08/31/90

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

Opinion by Sherton.

NATURE OF THE DECISION

Petitioner appeals a Multnomah County resolution which, pursuant to ORS 261.161(2) and 261.171(1), determines the boundaries of the proposed Rockwood Water People's Utility District (P.U.D.) and submits the question of the formation of the P.U.D. to the electors in the affected area at a special election.¹

MOTION TO INTERVENE

Bill Stallings, Herb Brown, Leo Effle, and the Rockwood Water District move to intervene in this proceeding on the side of respondent. There is no objection to the motion, and it is allowed.²

FACTS

The creation of P.U.D.s is authorized by Art. XI, Sec. 12 of the Oregon Constitution, and they are formed and governed pursuant to the provisions of ORS chapter 261. A petition for the formation of the Rockwood Water P.U.D. was filed with the Multnomah County Clerk on August 31, 1989. The county clerk certified the sufficiency of the signatures on September 1, 1989. The Multnomah County Board of

¹We take official notice of a proclamation adopted by the board of county commissioners on June 5, 1990, which states that a majority of the votes cast at a May 15, 1990 special election were in favor of formation of the P.U.D., and proclaims the incorporation of the Rockwood Water P.U.D.

²On June 27, 1990, we issued an order granting the motion to intervene of Rockwood Water People's Utility District.

Commissioners conducted a hearing on the proposal on November 21, 1989. On December 19, 1989, the board of commissioners adopted the appealed resolution.

The boundaries of the proposed P.U.D. approved by the appealed resolution are almost precisely the same as those of the Rockwood Water District, a domestic water supply district organized in 1925 under ORS chapter 264. The Rockwood Water District has constructed and maintained a complex of water mains, hydrants and storage reservoirs within its territory, and has a current annual budget for capital improvements of \$650,000 to 750,000. Record 132-135. The district presently obtains all of its water from the City of Portland's Bull Run conduits. Record 133.

The original Rockwood Water District encompassed 4,466 acres in eastern Multnomah County and served 11,340 customers (i.e. water meters). Record 37, 126. Of that area, 69% (3,085 acres) has been annexed by the City of Gresham, but has not been withdrawn from the district. Record 37. The remaining 31% of the area (1,381 acres) is within the Portland Urban Services Boundary (Portland USB). Id. At the time of the county's hearing on the petition to form the P.U.D., 26% of the area within the Portland USB (351 acres) had been annexed and withdrawn from the district by the City of Portland.

JURISDICTION

Respondent and intervenors-respondent (respondents) contend the Board lacks jurisdiction over petitioner's appeal.³ Respondents argue that the county's resolution is controlled by a statutory scheme governing P.U.D. formation which makes no provision for application of comprehensive plan or land use regulation provisions. United Citizens v. Environmental Quality Comm., 15 Or LUBA 500 (1987) (EQC determination under ORS ch 454 that threat to drinking water exists); Kegg, v. Clackamas County, 15 Or LUBA 239 (1986) (county refusal to accept deed for right-of-way under ORS ch 368). Respondents also argue that the appealed resolution is not a "land use decision" subject to LUBA review. Finally, intervenors argue that, under ORS 261.630 and 261.635, exclusive jurisdiction to review the appealed resolution is in the Multnomah County Circuit Court.

LUBA's review jurisdiction is limited to local government, special district and state agency "land use decisions." ORS 197.825(1). We first address respondents' contention that the appealed decision is not a "land use decision" subject to LUBA review. A local government decision is a land use decision if it meets either (1) the statutory definition in ORS 197.015(10); or (2) the significant impacts test established by City of Pendleton v.

³Intervenors filed a motion to dismiss with their response brief.

Kerns, 294 Or 126, 133-134, 653 P2d 996 (1982). Billington v. Polk County, 299 Or 471, 479, 703 P2d 232 (1985). Furthermore, as the party seeking LUBA review, the burden is on petitioner to establish that the appealed decision is a land use decision. Billington v. Polk County, 299 Or at 475; City of Pendleton v. Kerns, 294 Or at 134 n 7; Portland Oil Service Co. v. City of Beaverton, 16 Or LUBA 255, 260 (1987).

A. Statutory Test

ORS 197.015(10)(a) defines "land use decision" to include:

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

"(i) The goals;

"(ii) A comprehensive plan provision;

"(iii) A land use regulation; or

"(iv) A new land use regulation; * * *

"* * * * *"

Petitioner's statement of jurisdiction in its petition for review provides:

"* * * In this case, the County's action of approving the PUD boundaries as proposed, concerns several provisions of its comprehensive plan as well as subsequent implementing agreements. The provision of municipal services, in a coordinated rather than a fragmented way, is a significant part of any comprehensive plan. See ORS 197.015(5). It is a topic specifically addressed as a problem in the County's comprehensive plan. In addition, the County's decision to ignore

existing intergovernmental agreements relating to service provisions, as addressed in its comprehensive plan, definitely was an action concerning the plan (and potentially, future development) and therefore is a land use decision within LUBA's jurisdiction." Petition for Review 6.

Additionally, in its response to intervenors' motion to dismiss, petitioner specifically contends that the challenged decision concerns the application of Multnomah County Comprehensive Framework Plan (Plan) Policies 4 and 32 and provisions of the Urban Area Planning Agreements (Agreements) between petitioner and the county. We understand petitioner to argue that these Agreements, which petitioner contends recognize the city as the appropriate provider of urban services in the subject area, are a part of the Plan.

With regard to Plan Policy 4 (Intergovernmental Coordination), petitioner argues that under this policy the county is not the primary provider of urban services. Petitioner contends urban area planning agreements, such as those between the county and the city for the purpose of establishing a cooperative framework for determining future service boundaries, are "vital to the continued integrity of community planning efforts and planning for capital improvements." Petitioner's Answer to Intervenors' Motion to Dismiss 3. Petitioner also points out that Policy 4 states the county will ensure that land use planning is coordinated with adjacent jurisdictions through the adoption

of such agreements.

With regard to Plan Policy 32 (Capital Improvements), petitioner quotes portions of the introductory findings to this section of the plan which state that the provision of public facilities and services is a key component in implementation of the comprehensive plan and that water is a basic service necessary to support development. Petitioner also argues that these findings state that the provision of urban services by as many as 60 separate special districts has led to a fragmented and costly approach to service delivery which has impeded coordinated land development in the area.

Respondents argue petitioner bases much of its arguments regarding the applicability of Plan Policies 4 and 32 not on the policies themselves, but rather on introductory findings which respondents contend are not policy and do not establish standards for county land use decisions. With regard to Plan Policy 4 itself, respondents argue that its main point is that the county will coordinate land use planning with adjacent jurisdictions through the adoption of urban planning area agreements. According to respondents, the Plan Policy 4 says nothing about actions by the county to determine the boundaries of a proposed P.U.D.. Respondents contend compliance with Plan Policy 4 was established when the county entered into the Agreements with the city.

Respondents argue that Plan Policy 32, which begins by stating "[f]or those public facilities and services which are provided by Multnomah County, the following goals, policies and strategies apply," addresses only county capital improvements. (Emphasis added by respondent.) Respondents also assert that petitioner does not cite or rely on any provision of Plan Policy 32 itself, but rather solely on descriptive language in the introduction to this policy.

Respondents finally argue that the Agreements between the city and county are neither comprehensive plan provisions nor land use regulations. Respondents argue that the Agreements were adopted to allocate certain planning responsibilities between the city and county for territory in which they both have an interest. Respondents contend these contractual rights and obligations are not part of the county Plan or land use regulations unless provisions of the Agreements were incorporated into or adopted by the Plan or land use regulations.

Respondents argue, in the alternative, that even if the Agreements are considered to be comprehensive plan provisions or land use regulations, petitioner cites for the most part only nonbinding recitals and findings. According to respondents, the only two binding provisions of the Agreements petitioner claims are breached by the county's decision relate to the allocation of service provision

responsibility between the city and county only, and do not govern county decisions on formation of a proposed P.U.D.

In determining whether a local government decision concerns the application of a comprehensive plan provision or a land use regulation,

"* * * it is not sufficient that a decision may touch on some aspects of the comprehensive plan [or land use regulations], rather the comprehensive plan [or regulations] must contain provisions intended as standards or criteria for making the appealed decision. Billington v. Polk County, 299 Or at 475." Portland Oil Service Co. v. City of Beaverton, 16 Or LUBA at 260.

The "Planning Process" section of the Plan states as follows:

"The Inventory involves gathering information on physical, economic, environmental and social factors -- the topics covered in this document, some of which are expanded with greater detail in later stages of the Comprehensive Plan.

"* * * * *

"* * * This is a policy plan. It includes Policies, which are general courses of action designed to guide decisions, and Strategies, which are specific courses of action for implementing the general policies. The policies are adopted public statements of policies, while strategies are recommended courses of action and, as contained in this plan, are not legally binding." (Emphasis in original.) Plan p. 3.

In view of the above quoted Plan language, we agree with respondents that only Plan policies can possibly be intended as standards or criteria for county land use decisions and, therefore, petitioner cannot rely on introductory findings

in the Plan to establish that the appealed decision concerns the application of comprehensive plan provisions.

Plan Policy 4 is the only actual policy cited by petitioner in support of its claim that LUBA has jurisdiction.⁴ That policy provides, in relevant part:

"It is the county's policy to participate in intergovernmental coordination efforts with federal, state and local governments and with special service districts. The county will ensure that the responsibility and support for land use planning will be coordinated with adjacent jurisdictions through the adoption of urban planning area agreements which will recognize:

"A. That it is not the county's primary role to provide urban services, and

"B. That the county's comprehensive framework plan and component community plans and implementing ordinances will be the primary plan for unincorporated areas until and during any jurisdictional transition, and

"C. The county has a responsibility to support the planning process for unincorporated areas and

"D. Establish and participate in a cooperative process to address the future of urban service provision issues.

"* * * * *"

We agree with respondents that Plan Policy 4 simply establishes procedural requirements for county coordination

⁴We note that even if we were to interpret petitioner's argument to contend that Plan Policy 32 itself applies to county decisions on petitions to form P.U.D.s, we would agree with respondents that the language of Policy 32 indicates it applies only to services provided by the county itself.

with other jurisdictions and does not provide standards or criteria for county decisions on petitions for the formation of P.U.D.s.

We also agree with respondents that although Plan Policy 4 directs the county to enter into urban area planning agreements with adjacent jurisdictions to coordinate land use planning, it does not adopt such agreements as part of the comprehensive plan. Petitioner cites nothing to demonstrate that the Agreements which petitioner relies upon are adopted as part of the county comprehensive plan.

A "land use regulation" is defined as

"* * * any local government zoning ordinance, land division ordinance adopted under ORS 92.044 or 92.046 or similar general ordinance establishing standards for implementing a comprehensive plan." ORS 197.015(11).

As far as we can tell, the Agreements which petitioner relies upon have not been adopted by the county, either by ordinance or resolution. We conclude that the Agreements are neither comprehensive plan provisions nor land use regulations.

Because petitioner does not demonstrate that the challenged decision concerns the application of a comprehensive plan provision or a land use regulation, we conclude the decision is not a "land use decision" as defined by ORS 197.015(10). See Anderson Bros. v. City of Portland, ___ Or LUBA ___ (LUBA No. 89-054, November 22,

1989), slip op 5-9.

B. Significant Impacts Test

Even if a local government decision does not satisfy the statutory definition of "land use decision," it may nevertheless be a land use decision subject to LUBA review if it will have a "significant impact on present or future land uses in the area." City of Pendleton v. Kerns, 294 Or at 133-134.

Petitioner does not claim, in the statement of jurisdiction in its petition for review, that the appealed decision is a "significant impacts" land use decision. However, in response to intervenors' motion to dismiss, petitioner argues that the Oregon Supreme Court recognized in City of Pendleton v. Kerns, supra, that a decision concerning provision of certain urban services could have a significant impact on future land uses and, therefore, such a decision is reviewable by LUBA.

Petitioner argues as follows with regard to the impacts of the appealed decision:

"The issue in this case is * * * the disruptive consequences of the PUD's very existence within the City of Portland's urban services boundaries, as one more special district for the provision of a service the County has recognized ought to be provided by the City and for which, as the County also recognized, the City has been planning and expending public funds.

"In addition, it must not be forgotten that the PUD is no ordinary special district. Unlike other districts, it is not anticipated that its

territory can be withdrawn as the City becomes able to serve its citizens within the PUD's boundaries. It can only be dissolved by a vote of its electors. The ramifications, in terms of urban service planning by the City, cannot be too greatly emphasized. The potential for uncoordinated planning and provision of services is enormous and not theoretical. * * * City residents will not be receiving City water services or rates. These missing rates will be felt by the rest of the City's customers and will impact the City's urban services planning for this area as well as other areas." (Emphasis in original.) Petitioner's Answer to Intervenors' Motion to Dismiss 8-9.

Intervenors argue that the subject area is already developed and serviced with an efficient and modern water distribution system owned by the Rockwood Water District. Intervenors also argue that formation of the P.U.D. does not, in itself, dissolve the water district, nor cause a transfer of its assets to the P.U.D. Intervenors further contend that the city's future annexation plans will not be affected by formation of the P.U.D., as a city may annex territory within either a water district or a P.U.D. According to intervenors, the sole way in which the P.U.D. differs from the existing water district is that there is no statutory mechanism for the city to withdraw territory from a P.U.D. after annexation, or to acquire the P.U.D.'s assets.

Intervenors argue that the city's real concern is that the P.U.D. will acquire the water district's water distribution system before the city can achieve annexation

and withdrawal of the unincorporated portions of the water district, and thereby prevent the city from obtaining the existing water district distribution system. Intervenor conclude, therefore, that the appealed decision facilitating formation of the P.U.D. affects only the ownership of the existing water system in the unincorporated portion of the Rockwood Water District's territory, and does not affect the extension or provision of urban services or any other land use issue.

We agree with intervenors that in these unique circumstances (i.e., the formation of a P.U.D. to provide water service to the same developed area where water service is currently provided by an existing domestic water supply district distribution system), the only significant effect of the creation of the P.U.D., and its potential acquisition of the assets of the water district, is on the manner in which the city may obtain ownership of the water distribution facilities in the subject area. Petitioner argues only that the formation of the P.U.D. will be "disruptive," and will affect its urban services planning and the water rates paid by its customers. Petitioner does not demonstrate, and we do not find, formation of the P.U.D. will have significant impacts on the present or future uses of land in the subject area.

We conclude the appealed decision does not satisfy either the statutory or "significant impacts" tests and,

therefore, is not a land use decision over which we have review jurisdiction.⁵

This appeal is dismissed.

⁵Since we conclude we do not have jurisdiction over the appealed decision, we need not consider respondents' other two bases for arguing that we lack jurisdiction.