

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3
4 DEPARTMENT OF LAND CONSERVATION)

5 AND DEVELOPMENT,)

6)

7 Petitioner,)

LUBA No. 92-090

8)

9 vs.)

FINAL OPINION

10)

AND ORDER

11 MARION COUNTY,)

12)

13 Respondent.)

14

15

16 Appeal from Marion County.

17

18 Jane Ard, Salem, filed the petition for review and
19 argued on half of petitioner. With her on the brief was
20 Charles S. Crookham, Attorney General; Jack Landau, Deputy
21 Attorney General; and Virginia L. Linder, Solicitor General.

22

23 Jane Ellen Stonecipher, Salem, filed the response brief
24 and argued on behalf of respondent.

25

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

28

29 AFFIRMED 08/21/92

30

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

1 Opinion by Holstun.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a county decision approving the
4 formation of a service district to develop a public sewerage
5 system to serve the Fargo freeway interchange in Marion
6 County.

7 **FACTS**

8 The Fargo Interchange is presently served by private
9 sewerage facilities. The Fargo Interchange is planned and
10 zoned to permit a variety of commercial uses serving freeway
11 travelers. The current private sewerage facilities are
12 inadequate; groundwater contamination is occurring, creating
13 a health hazard. The service district approved by the
14 challenged decision would replace the existing privately
15 owned sewerage systems with a single publicly owned sewerage
16 system.

17 Although the decision discusses two specific
18 alternatives for providing sewer service within the
19 approximately 116 acres included in the service district
20 boundaries, a decision on the specific alternative to be
21 implemented is not made in the challenged decision.¹ The
22 challenged decision refers to the two alternative "systems

¹The primary difference between the two alternatives currently under consideration is the manner of treating the sewage and disposing of the effluent. One alternative would transmit the collected sewage via a pressurized pipeline to the nearby city of Donald, for treatment and disposal. The other alternative noted calls for onsite treatment, with an outfall line to the Willamette River to the north.

1 under consideration at this time," and it is clear that a
2 decision concerning the particular sewerage system to be
3 constructed will be made in the future. Record 9. The
4 challenged decision only creates the service district and
5 authorizes that service district to develop a public
6 sewerage system to replace the existing private sewerage
7 systems.

8 **DECISION**

9 The challenged decision includes findings addressing
10 "Land Use Considerations." The county found that it was
11 unnecessary to amend its comprehensive plan, because the
12 plan allows formation of service districts in rural areas.
13 Petitioner disputes that finding and assigns as error the
14 county's failure to amend its comprehensive plan to
15 specifically authorize formation of the disputed service
16 district, and its failure to address or take exceptions to
17 applicable statewide planning goals.

18 **A. Rural Development Policy 3**

19 The county's comprehensive plan and land use
20 regulations have been acknowledged by the Land Conservation
21 and Development Commission. See ORS 197.251; OAR 660,
22 Division 3. The plan identifies Rural Development Centers
23 as areas providing limited commercial facilities in rural
24 areas of the county. The plan lists three types of Rural
25 Development Centers: (1) Rural Communities, (2) Rural
26 Service Centers, and (3) Freeway Interchanges. The Fargo

1 Interchange is one of the Freeway Interchanges identified in
2 the plan; it is not designated as a Rural Community or Rural
3 Service Center.

4 The plan includes seven Rural Development Policies
5 which limit the types and level of commercial uses allowable
6 within the three types of Rural Development Centers. Rural
7 Development Policy 3 provides as follows:

8 "Service districts within rural communities may be
9 created and expanded to serve the entire
10 designated rural community; however, services
11 shall not be extended outside of the community
12 unless necessary to correct a health hazard."
13 (Emphasis added.) Plan 44.

14 The above quoted policy specifically provides for
15 formation of service districts within rural communities and
16 limits extension of services outside rural communities.
17 Therefore, petitioner reasons, the failure of the plan to
18 specifically provide for service districts in Rural Service
19 Centers and Freeway Interchanges means the plan prohibits
20 service districts in those two types of Rural Development
21 Centers.

22 Respondent rejects the interpretation offered by
23 petitioner. According to respondent, Rural Development
24 Policy 3 does nothing more than specifically allow service
25 districts in Rural Communities and impose limits on
26 extension of services by such districts.

27 Although the negative inference petitioner reads into
28 Rural Development Policy 3 may be plausible, the policy does

1 not state service districts are allowable only within Rural
2 Communities, as it clearly could have if that was the
3 county's intent. Thus, we do not see a basis in the
4 language of the policy, or its context, for this Board to
5 insist that Rural Development Policy 3 be read to include an
6 implied prohibition against service districts in Freeway
7 Interchanges and Rural Service Centers.²

8 With one exception, noted later in this opinion,
9 petitioner makes no argument that the interpretation
10 suggested by respondent is inconsistent with the underlying
11 legislative purpose of Rural Development Policy 3 or other
12 related plan policies. A number of plan provisions make it
13 clear that community sewerage systems may be allowed in the
14 three types of Rural Development Centers. The Rural
15 Services Policies section of the plan "outlines overall
16 policy for service districts as well as specific policy
17 statements for each type of rural service." Plan 52. The
18 General Policies listed under the Rural Services Policies
19 specifically recognize both public and private service
20 facilities and, among other things, limit the circumstances
21 when they are necessary and impose limits on their sizing to
22 maintain rural character. However those General Policies do

²A variety of other plan provisions cited by respondent limit provision of urban services such as sewerage systems in rural areas and favor private systems. However, it is clear that the plan does not prohibit sewerage systems in rural areas. To the contrary, the plan specifically recognizes that sewerage systems will be constructed in rural areas.

1 not in any way express a difference between the
2 permissibility of service districts in Rural Communities as
3 opposed to Freeway Interchanges and Rural Service Centers.
4 Neither is that distinction expressed in the plan's Special
5 District Policies or Private Facility Policies.³ Plan 53-
6 55.

7 In summary, there is nothing inconsistent with the
8 language of Rural Development Policy 3, its context or its
9 purpose in interpreting it as having nothing to do with
10 service districts in Freeway Interchanges or Rural Service
11 Centers. See Clark v. Jackson County, 313 Or 508, ___ P2d
12 ___ (1992). We conclude that the more limited
13 interpretation argued by respondent is reasonable, more
14 consistent with the words of the policy and therefore
15 correct. McCoy v. Linn County, 90 Or App 271, 752 P2d 323
16 (1988).

17 This subassignment of error is denied.

18 **B. Plan Preference for Private Service Facilities in**
19 **Rural Areas**

20 Petitioner cites a number of plan provisions that it
21 claims establish a preference for provision of community
22 sewerage facilities by private, rather than public,
23 entities. The plan includes a statement that

³Special District Policy 6 limits, but does not preclude, creation or expansion of special districts providing sewerage services in rural areas. Plan 53.

1 "[i]n rural areas, the establishment of public
2 facilities can, however, have a detrimental affect
3 [sic] of encouraging urban sprawl which destroys
4 the rural character by overdevelopment."⁴ Plan
5 47.

6 The plan also includes a number of statements to the effect
7 that, in general, sewerage facilities in rural areas are
8 privately owned.⁵ Plan 49, 50-51. However, this appears to
9 be more an expression of existing reality than an expression
10 of policy.⁶ The plan Private Facility Policies clearly
11 allow private sewerage facilities in rural areas, but they
12 do not purport to preclude public sewerage facilities in
13 rural areas. Plan 54. As noted earlier, the Special
14 District Policies that appear immediately before the Private
15 Facility Policies similarly do not preclude approval of
16 publicly owned sewerage facilities, either in rural areas
17 generally or in Freeway Interchanges in particular.

18 Whether the plan provisions noted in the previous

⁴It is not at all clear to us that the quoted plan language uses the word "public" here to distinguish between services provided by a public rather than a private entity. Rather, the language appears to use the term "public facilities" as meaning "urban" or "quasi-urban" facilities. Regardless of the intended meaning, the paragraph following the language quoted in the text recognizes that public services will be provided in rural areas, although on a less cost effective basis than in urban areas.

⁵The plan identifies the Labish Village Sewer District as a rural area, not included in a Rural Community, where sewerage facilities are provided by a service district. Petitioner contends this explicit recognition of one rural sewer service district not located in a Rural Community shows an overall intent to preclude more such rural sewer service districts outside Rural Communities.

⁶The plan notes that the county's experience with privately maintained sewerage systems has been mixed. Plan 50.

1 paragraph are read alone, collectively, or in conjunction
2 with Rural Development Policy 3, we do not agree that they
3 can be interpreted to express an absolute prohibition
4 against service districts ever being formed to provide
5 sewerage facilities within a Freeway Interchange. There are
6 numerous plan provisions limiting the circumstances that may
7 warrant such facilities and the permissible scope of such
8 facilities, whether they are provide by a public or private
9 entity; but there is no absolute prohibition.

10 This subassignment of error is denied.

11 **C. Urban Growth Policies**

12 The plan includes a number of Urban Growth Policies.
13 Petitioner contends the county erred by not adopting
14 findings specifically addressing the Urban Growth Policies
15 and that the challenged decision violates Urban Growth
16 Policy 7.

17 The applicability of the Urban Growth Policies is not
18 as broad as petitioner suggests. The Urban Growth Polices
19 are directed at urbanizable lands within urban growth
20 boundaries. Plan 64. The plan states that the "urban
21 growth policies * * * should guide the conversion of the
22 urbanizable areas adjacent to each city to urban uses."⁷
23 The Fargo Interchange is located over two miles from the

⁷Statewide Planning Goal 14 (Urbanization) provides that urban growth boundaries are to separate urbanizable lands from rural lands. The goal provides that urbanizable lands included within urban growth boundaries are to be available for conversion to urban uses.

1 nearest urban growth boundary. Therefore, the formation of
2 the subject service district does not involve conversion of
3 urbanizable land to urban uses, as those terms are used in
4 the plan and Goal 14. With one exception noted below, we
5 therefore do not agree that the Urban Growth Policies apply
6 to the challenged decision.

7 The Urban Growth Policies include the following:

8 "6. Generally cities are the most logical
9 providers of urban services. Where special
10 service districts exist beyond the city
11 limits and within the urban growth boundary
12 such as around Salem, all parties shall work
13 towards the development of the most efficient
14 and economical method of providing needed
15 services. Urban Services should not be
16 extended beyond the urban growth boundary.

17 "7. Urban densities and urban services shall be
18 established only within recognized urban
19 growth boundaries."⁸ (Emphasis added.)

20 Petitioner appears to argue that because the challenged
21 decision authorizes a service district to construct a public
22 sewerage system outside an urban growth boundary, Urban
23 Services Policy 7 ipso facto is violated by that decision.
24 As we have already explained, a number of other plan
25 provisions clearly envision the location of sewerage
26 facilities outside urban growth boundaries in certain
27 circumstances. The broad reading of Urban Services Policy 7
28 suggested by petitioner ignores these other plan provisions

⁸Urban Growth Policy 7 is the only policy specifically cited by petitioner.

1 and would render them a nullity. Such interpretations of
2 comprehensive plan provisions are to be avoided. See
3 Kittleson v. Lane County, 20 Or LUBA 286, 291 (1990); Foster
4 v. City of Astoria, 16 Or LUBA 879, 885 (1988); Forest
5 Highlands Neighborhood Assoc. v. Portland, 11 Or LUBA 189,
6 193 (1984). We reject petitioner's interpretation of Urban
7 Services Policy 7.

8 To the extent petitioner argues that connecting a
9 sewage collection system in the Fargo Interchange with
10 treatment facilities in the nearby city of Donald violates
11 Urban Services Policy 6, the challenge is premature. The
12 challenged decision does not authorize such a connection.
13 When and if that option is selected, Urban Services Policy 7
14 may be addressed and, if found to be applicable, findings
15 may be adopted explaining whether such a connection would
16 violate the policy. We need not and do not consider whether
17 that policy is violated by the decision challenged in this
18 appeal.

19 This subassignment of error is denied.

20 **D. ORS 197.175(1)**

21 ORS 197.175(1) provides in relevant part as follows:

22 "Cities and counties shall exercise their planning
23 and zoning responsibilities, including but not
24 limited to, a city or special district boundary
25 change which shall mean the annexation of
26 unincorporated territory by a city, the
27 incorporation of a new city and the formation or
28 change of organization of or annexation to any
29 special district * * *, in accordance with the
30 [statewide planning goals]." (Emphasis added.)

1 Petitioner argues that even though the county's plan
2 and land use regulations are acknowledged, the statewide
3 planning goals remain applicable to decisions to form a new
4 special district by virtue of the above quoted portion of
5 ORS 197.175(1). Because the county did not apply the
6 statewide planning goals in this matter, petitioner argues
7 the challenged decision must be remanded.

8 We do not agree. The above statutory language applies
9 to all "planning and zoning responsibilities." The specific
10 references to formation of special districts and certain
11 other actions simply makes it clear that such actions are
12 "planning and zoning responsibilities." It is true that ORS
13 197.175(1) requires that planning and zoning
14 responsibilities be exercised in accordance with the
15 statewide planning goals. But that requirement cannot be
16 read in isolation. ORS 197.175(2)(c) makes it clear that
17 until a local government's comprehensive plan and land use
18 regulations are acknowledged, land use decisions must comply
19 with the statewide planning goals. However, after
20 acknowledgment, the acknowledged plan and land use
21 regulations establish the controlling criteria in most
22 circumstances. ORS 197.175(2)(d). Byrd v. Stringer, 295 Or
23 311, 313, 666 P2d 1332 (1983); City of Corvallis v. Benton
24 County, 16 Or LUBA 488, 500 (1988); Todd v. Jackson County,
25 14 Or LUBA 233, 237 (1986). The statutes governing our
26 scope of review clarify when the statewide planning goals

1 continue to apply following acknowledgment and when they do
2 not. ORS 197.835(4) and (5) make it clear that the
3 statewide planning goals continue to apply directly to
4 decisions amending an acknowledged plan or land use
5 regulations or adopting new plan or land use regulation
6 provisions. ORS 197.835(6) makes it clear that for other
7 kinds of decisions governed by an acknowledged plan and land
8 use regulations, the statewide planning goals do not apply.
9 The challenged decision in this appeal falls into the latter
10 category and the goals do not apply.

11 This subassignment of error is denied.

12 The county's decision is affirmed.

13