



1 Opinion by Sherton.

2 **NATURE OF THE DECISIONS**

3 Petitioner challenges two orders of the board of county  
4 commissioners approving the formation of a domestic water  
5 supply district and a sanitary service district.

6 **MOTION TO INTERVENE**

7 The Arch Cape Water Service District and the Arch Cape  
8 Service District move to intervene in this proceeding on the  
9 side of respondent. There is no opposition to the motion,  
10 and it is allowed.

11 **INTRODUCTION**

12 Arch Cape is an unincorporated community that contains  
13 urban level development, but is not within an urban growth  
14 boundary (UGB). Water and sewer services are provided to  
15 the Arch Cape community by two county service districts  
16 created pursuant to ORS chapter 451, the Arch Cape Water  
17 Service District (water district) and the Arch Cape Service  
18 District (sewer district). The board of county  
19 commissioners is the governing body of both the water  
20 district and the sewer district.

21 On January 29, 1993, pursuant to ORS 197.835, the board  
22 of commissioners adopted a resolution and order initiating  
23 proceedings to create the Arch Cape Domestic Water Supply  
24 District (domestic water supply district) under ORS  
25 chapter 264, and the Arch Cape Sanitary Service District  
26 (sanitary district) under ORS chapter 250. The order stated

1 the proposed boundaries of the new districts are the same as  
2 those of the existing water and sewer districts. The order  
3 also stated that on the effective date of the formation of  
4 the new domestic water supply and sanitary districts, the  
5 existing water and sewer districts would be dissolved. The  
6 order scheduled the public hearing required by ORS 198.800  
7 for March 3, 1993.

8 On March 3, 1993, after a public hearing, the board of  
9 commissioners adopted an order pursuant to ORS 198.810(1),  
10 determining that the boundaries of the proposed domestic  
11 water supply district would be the same as those of the  
12 existing water district. The order scheduled a final  
13 hearing on formation of the proposed domestic water supply  
14 district for March 24, 1993. The order also stated that  
15 pursuant to ORS 198.810(2), if less than 15% of the electors  
16 registered in the proposed district filed a request for an  
17 election at or before the final hearing, the board of  
18 commissioners may issue an order creating the proposed  
19 domestic water supply district at the final hearing. An  
20 analogous order concerning the proposed sanitary district  
21 was also issued by the board of commissioners on March 3,  
22 1993. These two orders are the subjects of this  
23 consolidated appeal proceeding.

24 **MOTION TO DISMISS**

25 LUBA's review jurisdiction is limited to local  
26 government, special district and state agency "land use

1 decisions." ORS 197.825(1).<sup>1</sup> The county's decision is a  
2 "land use decision" if it meets either (1) the statutory  
3 definition of land use decision in ORS 197.015(10); or  
4 (2) the significant impacts test established by City of  
5 Pendleton v. Kerns, 294 Or 126, 133-34, 653 P2d 996 (1982).  
6 Billington v. Polk County, 299 Or 471, 479, 703 P2d 232  
7 (1985); City of Portland v. Multnomah County, 19 Or LUBA  
8 468, 471 (1990).

9 Respondent and intervenors-respondent (respondents)  
10 move to dismiss this appeal, contending the challenged  
11 decisions meet neither the statutory definition of "land use  
12 decision" nor the significant impacts test and, therefore,  
13 are not subject to review by this Board.<sup>2</sup>

14 **A. Statutory Test**

15 ORS 197.015(10)(a)(A) provides that "land use decision"  
16 includes:

17 "A final decision or determination by a local  
18 government or special district that concerns the  
19 \* \* \* application of:

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<sup>1</sup>Statutory amendments adopted in 1991 extended LUBA's review jurisdiction to include "limited land use decisions," as defined in ORS 197.015(12). However, under ORS 197.015(12), a limited land use decision must pertain to a site within a UGB. In this case, the subject property is not within a UGB, and no party contends the challenged decision is a limited land use decision.

<sup>2</sup>In addition to the arguments discussed below, respondents also argue the challenged decisions fail to satisfy either the statutory test or significant impacts test because they are not final decisions. Because we conclude the challenged decisions fail to meet these tests for other reasons, we do not address respondents' contention that they are not final decisions.

1            "(i) The [statewide planning] goals; [or]

2            "(ii) A comprehensive plan provision[.]

3            "\* \* \* \* \*"

4            Respondents contend the challenged decisions do not  
5 concern the application of the goals or the county  
6 comprehensive plan.<sup>3</sup> Respondents argue that because the  
7 county's comprehensive plan and land use regulations have  
8 been acknowledged, the county is not required to apply the  
9 statewide planning goals to land use actions that do not  
10 amend its comprehensive plan or land use regulations.  
11 ORS 197.175(2)(d); Byrd v. Stringer, 295 Or 311, 666 P2d  
12 1332 (1983); Oregon Worsted Company v. City of Portland, 22  
13 Or LUBA 452, 455 (1991); Kola Tepee, Inc. v. Marion County,  
14 17 Or LUBA 910, aff'd 99 Or App 481 (1989), rev den 309 Or  
15 441 (1990). Consequently, the challenged decisions cannot  
16 concern the application of the goals.

17            Respondents further argue it is well established that  
18 in determining whether a challenged decision is a "land use  
19 decision" because the decision concerns application of a  
20 comprehensive plan provision, it is not enough that the  
21 decision may touch on some aspect of the comprehensive plan.  
22 Rather, the plan must contain provisions that are standards  
23 or criteria for making the challenged decision. City of

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<sup>3</sup>No party contends the challenged decisions concern the application of a "land use regulation" or a "new land use regulation," which are listed in ORS 197.015(10)(a)(A)(iii) and (iv).

1 Portland v. Multnomah County, supra, 19 Or LUBA at 474;  
2 Portland Oil Service Co. v. City of Beaverton, 16 Or LUBA  
3 255, 260 (1987). According to respondents, petitioner has  
4 failed to demonstrate that the county comprehensive plan  
5 contains any provision that is a standard or criterion for  
6 the challenged decisions.

7 Petitioner contends ORS 197.175(1) requires the  
8 challenged decisions to be made in accordance with the  
9 statewide planning goals. Petitioner also contends the  
10 goals are made applicable by ORS 199.462 and 199.410(3).  
11 Petitioner states that when a county initiates the formation  
12 of a district pursuant to ORS 197.835, the hearings and  
13 election must be conducted as provided by ORS 197.800 to  
14 197.825. ORS 197.840. Petitioner argues that at the  
15 March 3, 1993 hearing, the board of county commissioners was  
16 required to "determine, in accordance with the criteria  
17 prescribed by ORS 199.462, if the area could be benefitted  
18 by formation of the district." (Emphasis added.)  
19 ORS 197.805(1). According to petitioner, ORS 199.462(1)  
20 makes both the statewide planning goals and the county  
21 comprehensive plan applicable standards for making the  
22 challenged decisions.

23 Also, because ORS 199.462(1) refers to carrying out the  
24 purposes described in ORS 199.410, petitioner argues the  
25 policy statement of ORS 199.410(3) is an additional approval  
26 standard. According to petitioner, ORS 199.410(3)(d) makes

1 both consistency with the acknowledged county plan and  
2 conformance with the statewide planning goals approval  
3 standards for the challenged decisions.<sup>4</sup>

4 **1. Applicability of Statewide Planning Goals**

5 ORS 197.175(1) provides in relevant part:

6 "Cities and counties shall exercise their planning  
7 and zoning responsibilities, including but not  
8 limited to, a city or special district boundary  
9 change which shall mean the annexation of  
10 unincorporated territory by a city, the  
11 incorporation of a new city and the formation [of]  
12 any special district authorized by ORS 198.705 to  
13 198.955,<sup>[5]</sup> \* \* \* in accordance with the [statewide  
14 planning] goals approved under ORS chapters 196  
15 and 197. \* \* \*" (Emphasis added.)

16 In DLCD v. Marion County, 23 Or LUBA 619, 626-27  
17 (1992), we explained that the specific reference in ORS  
18 197.175(1) to the formation of special districts, and the  
19 requirement that such actions comply with the statewide  
20 planning goals, do not mean the goals continue to apply to

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<sup>4</sup>ORS 199.410(3)(d) states that one of the purposes of ORS 199.410 to 199.534 is to:

"Provide that boundary determinations are consistent with acknowledged local comprehensive plans and are in conformance with statewide planning goals. In making boundary determinations the [boundary] commission shall first consider the acknowledged comprehensive plan for consistency of its action. Only when the acknowledged local comprehensive plan provides inadequate policy direction shall the [boundary] commission consider the statewide planning goals. \* \* \*"

<sup>5</sup>A domestic water supply district organized under ORS chapter 264 and a sanitary district organized under ORS chapter 250 are defined as "districts" for the purposes of ORS 198.705 to 198.955. ORS 198.710, 198.010(2) and (11).

1 such actions after acknowledgment:

2 "[ORS 197.175(1)] applies to all 'planning and  
3 zoning responsibilities.' The specific references  
4 to formation of special districts and certain  
5 other actions simply makes it clear that such  
6 actions are 'planning and zoning  
7 responsibilities.' It is true that ORS 197.175(1)  
8 requires that planning and zoning responsibilities  
9 be exercised in accordance with the statewide  
10 planning goals. But that requirement cannot be  
11 read in isolation. ORS 197.175(2)(c) makes it  
12 clear that until a local government's  
13 comprehensive plan and land use regulations are  
14 acknowledged, land use decisions must comply with  
15 the statewide planning goals. However, after  
16 acknowledgment, the acknowledged plan and land use  
17 regulations establish the controlling criteria in  
18 most circumstances. ORS 197.175(2)(d). Byrd v.  
19 Stringer, [supra]; City of Corvallis v. Benton  
20 County, 16 Or LUBA 488, 500 (1988); Todd v.  
21 Jackson County, 14 Or LUBA 233, 237 (1986). The  
22 statutes governing our scope of review clarify  
23 when the statewide planning goals continue to  
24 apply following acknowledgment and when they do  
25 not. ORS 197.835(4) and (5) make it clear that  
26 the statewide planning goals continue to apply  
27 directly to decisions amending an acknowledged  
28 plan or land use regulations or adopting new plan  
29 or land use regulation provisions. ORS 197.835(6)  
30 makes it clear that for other kinds of decisions  
31 governed by an acknowledged plan and land use  
32 regulations, the statewide planning goals do not  
33 apply. [A decision approving the formation of a  
34 special district] falls into the latter category,  
35 and the goals do not apply." (Emphasis in  
36 original.)

37 The only question remaining is whether ORS 199.462(1)  
38 and 199.410(3)(d) make the statewide planning goals  
39 applicable standards for the challenged decisions, as argued  
40 by petitioner. ORS chapter 199 concerns local government  
41 boundary commissions. ORS 198.805(1) states that a county

1 decision on a petition for formation of a special district  
2 must be made "in accordance with the criteria prescribed by  
3 ORS 199.462." ORS 199.462 provides, in relevant part:

4       "(1) In order to carry out the purposes described  
5           by ORS 199.410 when reviewing a petition for  
6           a boundary change or application under  
7           ORS 199.464, a boundary commission shall  
8           consider local comprehensive planning for the  
9           area, \* \* \* and the [statewide planning]  
10          goals adopted under ORS 197.225.

11       "\* \* \* \* \*" (Emphasis added.)

12       The "criteria" prescribed by ORS 199.462(1) are the  
13 considerations emphasized above. We therefore agree with  
14 petitioner that ORS 198.805(1) makes these portions of  
15 ORS 199.462(1) applicable to the challenged decisions.<sup>6</sup>  
16 However, these provisions of ORS 199.462(1) simply require  
17 the county to "consider," among other things, the  
18 comprehensive plan for the area and the statewide planning  
19 goals. This requirement should be interpreted together with

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<sup>6</sup>We do not believe the reference in ORS 199.462(1) to the purposes described in ORS 199.410 has the effect of incorporating those "purposes" as approval criteria for county decisions pursuant to ORS 197.805(1). ORS 199.410(3), relied on by petitioner, lists the "purposes of ORS 199.410 to 199.534," i.e. the purposes of the statute authorizing the creation and operation of local government boundary commissions. A local government boundary commission is a state agency. ORS 197.432(2). A state agency is not subject to the provisions of ORS 197.175 and 197.835 regarding the applicability of comprehensive plans to land use decisions after acknowledgment. Also, ORS 197.835(7)(b) specifically authorizes this Board to reverse or remand a state agency decision that violates the statewide planning goals. Therefore, that ORS 199.410(3)(d) (see n 4) apparently authorizes a state agency, in certain instances, to apply the statewide planning goals after the comprehensive plan for the relevant area is acknowledged, does not mean that ORS 199.462(1), as made applicable through ORS 198.805(1), should be interpreted to require a county to do the same.

1 the provisions of ORS 197.175 and 197.835, to establish that  
2 prior to acknowledgment the goals are applicable to such a  
3 county decision, but after acknowledgment it is the  
4 acknowledged plan that is applicable.

5 There is no dispute that the county's comprehensive  
6 plan and land use regulations are acknowledged.  
7 Consequently, the challenged decisions do not concern the  
8 application of the statewide planning goals.

9 **2. Applicability of Comprehensive Plan**

10 We agree with respondents that for a decision to  
11 concern application of a comprehensive plan, as provided in  
12 ORS 197.015(10)(a)(A)(ii), the plan must contain provisions  
13 that are standards or criteria for making the challenged  
14 decision. City of Portland v. Multnomah County, supra;  
15 Portland Oil Service Co. v. City of Beaverton, supra.  
16 Furthermore, as the party seeking LUBA review, the burden is  
17 on petitioner to establish that the appealed decision is a  
18 land use decision. Billington v. Polk County, supra, 299 Or  
19 at 475; City of Pendleton v. Kerns, 294 Or at 134 n 7;  
20 Miller v. City of Dayton, 22 Or LUBA 661, 665, aff'd 113  
21 Or App 300, rev den 314 Or 573 (1992); City of Portland v.  
22 Multnomah County, 19 Or LUBA at 471 (1990); Portland Oil  
23 Service Co. v. City of Beaverton, supra. Petitioner fails  
24 to identify any county comprehensive plan provision as  
25 applicable or to argue that any plan provision is an  
26 approval standard for the challenged decisions. We conclude

1 the challenged decisions do not concern the application of a  
2 comprehensive plan.

3 Based on the above, we conclude the challenged  
4 decisions do not meet the statutory definition of a "land  
5 use decision."

6 **B. Significant Impacts Test**

7 Respondents contend the challenged decisions will not  
8 have significant impacts on present or future land use.  
9 Respondents argue that because the subject area is already  
10 provided with services by the existing water district and  
11 sewer district, and the boundaries of the proposed districts  
12 are the same as those of the existing districts, the only  
13 effect of the creation of the proposed domestic water supply  
14 district and sanitary district will be to replace the county  
15 board of commissioners with locally elected district  
16 governing bodies.

17 Petitioner does not contend the challenged decisions  
18 are significant impacts test land use decisions. Petitioner  
19 does, however, object to our considering facts that are not  
20 in the challenged decisions themselves, in making a decision  
21 regarding our jurisdiction.<sup>7</sup>

22 As stated above, the burden is on petitioner to  
23 establish our jurisdiction. Where petitioner does not  
24 contend a challenged decision is a land use decision under

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<sup>7</sup>The local record has not yet been submitted.

1 the significant impacts test and, based on the parties'  
2 submittals, it is not obvious to us that it is, we conclude  
3 the challenged decision does not satisfy the significant  
4 impacts test for a "land use decision."<sup>8</sup>

5 Because the challenged decision satisfies neither the  
6 statutory nor significant impacts tests for being a "land  
7 use decision," respondents' motion to dismiss is granted.

8 This appeal is dismissed.

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<sup>8</sup>In any case, we note we have previously held that we may consider evidence outside the record in determining whether we have jurisdiction. Hemstreet v. Seaside Improvement Comm., 16 Or LUBA 630, 532 (1988). Based on the county's submittal, we would conclude that the only significant effect of the creation of the proposed districts will be a change in the identity of the bodies governing the districts providing water and sewer service to the Arch Cape community. Such a change does not constitute a significant impact on the present or future uses of land in the area. See City of Portland v. Multnomah County, supra, 19 Or LUBA at 477-78.