

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

3  
4 DONALD CHURCHILL,                   )  
5    )  
6                   Petitioner,                    )  
7    )  
8                   vs.    )  
9    )   LUBA Nos. 94-014 and 94-043  
10 NEAHKAHNIE WATER DISTRICT,                    )  
11    )                   FINAL OPINION  
12                   Respondent,                    )                   AND ORDER  
13    )  
14                   and    )  
15    )  
16 MEADOWVIEW CORPORATION,                    )  
17    )  
18                   Intervenor-Respondent.                    )

19  
20  
21                   Appeal from Neahkahnie Water District.

22  
23                   Donald Churchill, Nehalem, filed the petition for  
24 review and argued on his own behalf.

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26                   Lawrence R. Derr, Portland, filed a response brief and  
27 argued on behalf of respondent. With him on the brief was  
28 Josselson, Potter & Roberts.

29  
30                   Timothy J, Sercombe, Portland, filed a response brief  
31 and argued on behalf of intervenor-respondent. With him on  
32 the brief was Preston Gates & Ellis.

33  
34                   SHERTON, Chief Referee; GUSTAFSON, Referee,  
35 participated in the decision.

36  
37                   AFFIRMED (LUBA No. 94-014)   06/27/95  
38                   DISMISSED (LUBA No. 94-043)

39  
40                   You are entitled to judicial review of this Order.  
41 Judicial review is governed by the provisions of ORS  
42 197.850.

1 Opinion by Sherton.

2 **NATURE OF THE DECISION**

3 Petitioner appeals a Neahkahnie Water District  
4 (district) ordinance repealing the district's water  
5 allocation policy and a district decision to provide  
6 domestic water service to a particular subdivision in the  
7 Neahkahnie area.

8 **MOTION TO INTERVENE**

9 Meadowview Corporation, the developer of the  
10 subdivision in question, moves to intervene in this  
11 proceeding on the side of respondent. There is no objection  
12 to the motion, and it is allowed.

13 **FACTS**

14 The district is a domestic water supply district formed  
15 pursuant to ORS chapter 264. The district is in Tillamook  
16 County (county).<sup>1</sup> The district's territory includes the  
17 area known as Neahkahnie, which is unincorporated but  
18 contains urban level residential development. The Tillamook  
19 County Comprehensive Plan (plan) includes a "community  
20 growth boundary" (CGB) for the Neahkahnie area.<sup>2</sup>

21 In Churchill v. Neahkahnie Water District, 27 Or LUBA

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<sup>1</sup>Tillamook County's comprehensive plan and land use regulations have been acknowledged by the Land Conservation and Development Commission (LCDC) pursuant to ORS 197.251.

<sup>2</sup>The CGB is not an "urban growth boundary" (UGB) under the Statewide Planning Goals, because it does not contain an incorporated city.

1 721, 721-23 (1994) (Churchill), an order denying the  
2 district's and intervenor's (respondents') motions to  
3 dismiss this appeal for lack of jurisdiction, we set out the  
4 relevant facts as follows:

5 "Ordinance No. 1, initially adopted by the  
6 district on April 26, 1982 and subsequently  
7 amended in September 1983 (hereafter Ordinance),  
8 establishes the regulations governing the  
9 district's operation. Ordinance Section 18  
10 describes the extent of the water service provided  
11 by the district:

12 "The District will provide water for  
13 domestic use only for a single dwelling  
14 unit to each [Tax Lot] (or platted lots  
15 therein) of record within the District  
16 on the County Assessor's rolls as of  
17 November 1, 1979 which meets the current  
18 zoning standards of the Tillamook County  
19 Zoning Ordinance with a minimum area of  
20 4000 sq. ft., and to recorded assignees  
21 of surplus water available beyond those  
22 demands. \* \* \*'

23 "Ordinance Section 19 provides, with regard to  
24 allocation of surplus water:

25 "Water sources available within the  
26 District in excess of existing  
27 commitments may be allocated to new  
28 users [and] shall be prorated on the  
29 basis of acreage or zoning limitations  
30 whichever is the lesser \* \* \*.'

31 "Ordinance Section 23 establishes procedures and  
32 standards for granting variances from the  
33 requirements of the Ordinance.

34 "On January 15, 1994, the district governing body  
35 adopted Ordinance No. 1994-1 (hereafter amended  
36 Ordinance), amending and deleting various  
37 provisions of the Ordinance. The amended  
38 Ordinance repeals the water allocation-related  
39 Sections 18, 19 and 23 and adopted a new Section 2

1 describing the water service provided by the  
2 district as follows:

3 "Subject to the ordinances, rules and  
4 regulations of the District and  
5 ORS ch 264, the District shall supply  
6 domestic water to all residential  
7 structures now existing within its  
8 territories, and to all residential  
9 structures hereafter constructed  
10 pursuant to a valid [county] building  
11 permit. \* \* \*' Record 1.

12 "The amended Ordinance is the subject of LUBA  
13 No. 94-014.

14 "On February 21, 1994, the governing body issued a  
15 decision in the form of a memorandum to the county  
16 planning director stating that '[i]n compliance  
17 with Ordinance 1994-1,' the district:

18 "'\* \* \* will supply domestic water to  
19 all residential structures hereafter  
20 constructed in Meadowview's Neah-Kah-Nie  
21 Meadow [subdivision], Phase II, a 35 lot  
22 proposed subdivision. This service will  
23 be subject to the ordinances, rules and  
24 regulations of the District and pursuant  
25 to a valid building permit provided by  
26 Tillamook County.' Record 87.

27 "This decision is the subject of LUBA No. 94-043."

28 **LUBA NO. 94-014**

29 **A. Jurisdiction**

30 Respondents renew their objections to this Board's  
31 jurisdiction, arguing the amended Ordinance is not a "land  
32 use decision." However, for the reasons stated in  
33 Churchill, supra, 27 Or LUBA at 723-24, we conclude the  
34 amended Ordinance is a land use decision pursuant to

1 ORS 197.015(10)(a)(A)(i).<sup>3</sup>

2 **B. First Assignment of Error**

3 ORS 195.020(1) (formerly codified as ORS 197.185(1))  
4 provides:

5 "Special districts shall exercise their planning  
6 duties, powers and responsibilities \* \* \* in  
7 accordance with goals approved pursuant to ORS  
8 chapters 195, 196 and 197."

9 As we understand it, petitioner argues that  
10 ORS 195.020(1) gives the district land use planning  
11 responsibilities, which the district abdicated by repealing  
12 its water allocation program and refusing to treat adoption  
13 of the amended Ordinance as a land use decision. Petitioner  
14 specifically contends "the District exceeded its  
15 jurisdiction by refusing to exercise its statutorily  
16 mandated duties and responsibilities." Petition for  
17 Review 7.

18 ORS 195.020(1) does not give special districts land use  
19 planning responsibilities. Rather, it limits a special  
20 district's exercise of its land use planning  
21 responsibilities if, in fact, the special district has such  
22 responsibilities. Whether a special district does have such  
23 responsibilities is determined by other legal authority.  
24 Petitioner cites no statutory source of a requirement that

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<sup>3</sup>ORS 197.015(10)(a)(A)(i) provides that a "land use decision" includes a final decision of a special district that concerns the application of the Statewide Planning Goals (goals).

1 the district maintain a water allocation program for land  
2 use planning purposes.<sup>4</sup>

3 The first assignment of error is denied.

4 **C. Second and Third Assignments of Error**

5 Petitioner contends the amended Ordinance violates  
6 certain county comprehensive plan provisions.<sup>5</sup> Petitioner  
7 first points to discussion in the plan stating that plan  
8 goal 11 requires the county to set "[m]aximums [on service  
9 provision] because the over provision of facilities and  
10 services is costly and can lead to urban sprawl." Petition  
11 for Review App-1. Petitioner next argues certain plan  
12 findings concerning the district's water system and the  
13 justification for establishment of the Neahkahnie CGB  
14 establish "a total combined need of 476 [water] hookups to  
15 be supplied by the district, inside the Neahkahnie [CGB]."  
16 Petition for Review 12. Because the amended Ordinance would  
17 potentially allow more than 476 water hookups in the  
18 Neahkahnie CGB, petitioner contends the amended Ordinance  
19 violates a plan policy that water system expansion be  
20 approved "only if such systems are limited to the  
21 development needs allowed by the comprehensive plan."

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<sup>4</sup>Petitioners' arguments concerning county comprehensive plan and statewide planning goal requirements are addressed under the other assignments of error, infra.

<sup>5</sup>The third assignment of error also alleges violation of Goal 14 (Urbanization). All allegations of goal violations are addressed under the following section of this opinion.

1 Petition for Review App-2. Petitioner also contends the  
2 amended Ordinance violates the plan's exceptions to Goals 3  
3 (Agricultural Land), 4 (Forest Lands) and 17 (Coastal  
4 Shorelands) for land within the Neahkahnie CGB, because  
5 those exceptions do not allow urban levels of use on these  
6 lands.

7 The plan findings cited by petitioner simply describe  
8 the state of the district's water system at the time the  
9 plan was adopted and express expectations about the extent  
10 of development that will occur within the Neahkahnie CGB.  
11 These findings do not establish a maximum limit on the  
12 number of water hookups that may be granted within the  
13 Neahkahnie CGB. The plan policy relied on by petitioner  
14 provides that water systems may be expanded if the system is  
15 "limited to the development needs allowed by the  
16 comprehensive plan." Petitioner cites no other plan  
17 policies limiting the development allowed in this area. We  
18 agree with respondents that the development allowed by the  
19 comprehensive plan in the district's territory is determined  
20 by the acknowledged plan map designations applied to such  
21 land and the county's acknowledged implementing measures.<sup>6</sup>

22 The amended Ordinance provides the district will  
23 "supply domestic water to all residential structures now  
24 existing within its territories, and to all residential

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<sup>6</sup>The county has adopted a single map establishing both plan and zoning designations for the relevant area.

1 structures hereafter constructed pursuant to a valid  
2 [county] building permit." Record 1. The county may issue  
3 building permits only if such permits are consistent with  
4 its acknowledged plan and implementing regulations.  
5 Therefore, the amended Ordinance is not inconsistent with  
6 the county plan.

7 One additional point merits comment. ORS 197.732(8)  
8 requires that the county's exceptions to Goals 3, 4 and 17  
9 for the Neahkahnie area be adopted as part of the  
10 comprehensive plan, and we do not understand respondents to  
11 deny that the exceptions in question are part of the plan.  
12 However, the "committed" exceptions cited by petitioner  
13 simply address the existing state of the subject and  
14 surrounding properties and explain why an exception to  
15 Goals 3, 4 or 17 is justified. They do not, of themselves,  
16 purport to establish limitations on the future use of the  
17 subject properties. Whether the uses of the subject  
18 property allowed under the plan and amended Ordinance comply  
19 with other statewide planning goals and their implementing  
20 rules (e.g., Goal 14 and OAR 661-10-018, concerning planning  
21 and zoning for goal exception areas) is an issue of goal  
22 compliance, and is addressed in the following section.

23 The second and third assignments of error are denied.

24 **D. Remaining Assignments of Error**

25 Petitioner's remaining assignments of error allege the  
26 amended Ordinance fails to comply with various statewide

1 planning goals and their implementing rules. These  
2 assignments are based on the requirement of ORS 195.020(1)  
3 that district actions with regard to programs affecting land  
4 use be in accordance with the goals.

5 In Churchill, supra, 27 Or LUBA at 724 n3, we  
6 explained:

7 " \* \* \* ORS 195.080 provides, in relevant part:

8 " 'Nothing in ORS 195.020 \* \* \* shall be  
9 construed to prevent planning for,  
10 installation of or connection to public  
11 facilities or services consistent with  
12 acknowledged comprehensive plans and  
13 land use regulations.' "

14 "Therefore, if petitioner fails to successfully  
15 challenge the amended Ordinance on grounds of  
16 noncompliance with the acknowledged county plan  
17 and regulations, we will be required to affirm the  
18 district's decision, without any additional  
19 inquiry into whether the decision complies with  
20 other aspects of the goals. Dept. of Land  
21 Conservation v. Fargo Interchange, [129 Or App  
22 447, 455, 879 P2d 224 (1994)]."

23 We reject, supra, petitioner's contentions that the  
24 amended Ordinance fails to comply with the county's  
25 acknowledged plan. Therefore, the district decision  
26 challenged in LUBA No. 94-014 is affirmed.

27 **LUBA NO. 94-043**

28 In Churchill, supra, 27 Or LUBA at 724, we stated, with  
29 regard to the district decision to provide water service to  
30 intervenor's subdivision challenged in LUBA No. 94-043:

31 "If the district's water allocation program was  
32 not properly repealed by the decision challenged

1 in LUBA No. 94-014, then a decision made under  
2 that program is an 'action \* \* \* with respect to a  
3 program affecting land use' and, therefore, a land  
4 use decision subject to LUBA review. Olson [v.  
5 Neahkahnne Water District, 25 Or LUBA 776, 781  
6 (1993)]. On the other hand, if we affirm the  
7 decision repealing the district water allocation  
8 program challenged in LUBA No. 94-014, then the  
9 decision challenged in this appeal does nothing  
10 more than authorize the provision of domestic  
11 water service to property designated and zoned for  
12 residential use under an acknowledged county plan  
13 and regulations. Such a decision is not an  
14 'action \* \* \* with respect to a program affecting  
15 land use' or a land use decision subject to LUBA  
16 review. Keating v. Heceta Water District, 24  
17 Or LUBA 175 (1992). \* \* \*

18 As explained above, because we affirm the amended  
19 Ordinance repealing the district's water allocation program,  
20 the decision challenged in this appeal is not a land use  
21 decision subject to our review jurisdiction.

22 LUBA No. 94-043 is dismissed.