

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

1  
2  
3 THE STATE OF OREGON, acting )  
4 by and through the Housing )  
5 Division and State Housing )  
6 Council of the Department )  
7 of Commerce, )  
8 Petitioner, )  
9 and )  
10 HOUSING DEVELOPMENT )  
11 CORPORATION OF WASHINGTON )  
12 COUNTY and CHRIS NELSON, )  
13 Petitioner- )  
14 Participants, )  
15 v. )  
16 CITY OF FOREST GROVE, )  
17 Respondent. )

LUBA No. 82-101  
FINAL OPINION  
AND ORDER

14 Appeal from City of Forest Grove.

15 Barry Bennett, Salem, filed the Petition for Review and  
16 argued the cause for Petitioner State of Oregon.

17 Marilyn Lindgren and Charlie Harris, Hillsboro, filed a  
18 motion to intervene and Petition for Review and argued the  
19 cause on behalf of Petitioner-Intervenor Housing Development  
Corporation of Washington County.

20 David G. Frost, Hillsboro, filed a brief and argued the  
cause on behalf of Respondent City of Forest Grove.

21 BAGG, Board Member.

22 REVERSED 9/28/83

23  
24 You are entitled to judicial review of this Order.  
25 Judicial review is governed by the provisions of Oregon Laws  
1979, ch 772, sec 6(a), as amended by Oregon Laws 1981, ch 748.

1 BAGG, Board Member.

2 STATEMENT OF CASE

3 Petitioner appeals an amendment to the charter of the City  
4 of Forest Grove. The amendment was enacted pursuant to an  
5 initiative measure (Ballot Measure 51) which was enacted by the  
6 voters on November 2, 1982. Petitioner asks the Board to  
7 declare the charter amendment "illegal and unconstitutional."  
8 Petition for Review at 45.

9 FACTS

10 This charter amendment was approved by the electors of the  
11 City of Forest Grove by vote of 1504 in favor to 1432 opposed.  
12 The election was held on November 2, 1982, and on November 8,  
13 1982, the city council passed a resolution canvassing the  
14 results of the election and certifying the vote. The charter  
15 amendment took effect on December 2, 1982.

16 ASSIGNMENTS OF ERROR

17 Petitioner Housing Division, Department of Commerce and  
18 Intervenors Housing Development Corporation of Washington  
19 County argue paragraphs 3, 4, 5 and 7 violate provisions of the  
20 United States and Oregon Constitutions and provisions of the  
21 Fair Housing Act, 42 USC §3601-3619.

22 The charter amendment states as follows:

23 1 "The City Charter of the City of Forest Grove, Oregon,  
24 a municipal corporation and political subdivision of  
the State of Oregon be amended as follows:

25 2 "This proposed Charter Amendment shall embrace the  
26 Forest Grove Comprehensive Plan and matters connected  
and related to the Forest Grove Comprehensive Plan.

1  
2 3 "All ORS 456, Housing and Urban Development (HUD) and  
3 Housing Development Corporation (HDC) programs,  
4 projects, development plans, designations, grants and  
5 agreements is abolished with one (1) exception, which  
6 would be housing that was occupied one hundred (100)  
7 percent by the elderly, within the City limits of  
8 Forest Grove.

9 4 "All HUD agreements and Block Grants, shall be  
10 returned to the Washington County Housing Authority  
11 and the Washington County Community Development Block  
12 Grant Program.

13 5 "Effective upon passage of this agreement, the Forest  
14 Grove City Council may not properly resolve that there  
15 is a need for a HUD renewal agency nor that any HUD  
16 agency may exercise powers within the City of Forest  
17 Grove unless the question of whether or not there is a  
18 need for a HUD renewal agency or whether there are  
19 blighted or deteriorated areas within Forest Grove  
20 which are impairing economic values and decreasing tax  
21 revenues 13% yearly has been voted upon by the  
22 electorate at a general election. If by majority  
23 vote, the voters determine that there is a need for a  
24 HUD agency or program within the Forest Grove City  
25 Limits, the City Council may create such an agency.

26 6 Any such declaration or resolution by the City Council  
absent a majority vote by the electorate is  
automatically void.

7 "All non-conforming uses now existing shall be a  
permitted use.

8 "All 'multi-family' dwellings and dwellings used for  
non-continuous residency, or involves occupancy for  
between four to six months each year by a changing  
population shall not be allowed in any residential  
zone.

9 "All property owners shall be notified of any  
enactment or proposed enactment that would change the  
zoning of their property within the City limits of  
Forest Grove. This notice must be by certified mail  
and not by publication in a local newspaper or by  
other methods of general posting. In addition there  
must be a hearing on any zoning changes and property  
owners must have the opportunity to register any  
objections to the proposed changes.

1 10 "All provisions of this amendment apply to other  
2 sections, if this Charter Amendment is incorporated in  
3 the City Charter, it may not be severed, separated, or  
4 changed by any action of the Mayor or Forest Grove  
5 City Council.

6 11 "This proposed Charter Amendment must be on the ballot  
7 of the general election November 2, 1982." Emphasis  
8 in original.

9 During the pendency of this appeal, the legislature enacted  
10 Senate Bill 406, 1983 Or Laws, ch 795. 1983 Or Laws, ch 795  
11 provides, in pertinent part:

12 "No city or county may by charter prohibit from all  
13 residential zones attached or detached single family  
14 housing, multi-family housing for both owner and  
15 renter occupancy or manufactured homes. No city or  
16 county may by charter prohibit government assisted  
17 housing or impose additional approval standards on  
18 government assisted housing that are not applied to  
19 similar but unassisted housing." 1983 Or Laws, ch 795,  
20 §5.

21 The law defines "government assisted housing" as

22 "Housing that is financed in whole or part by either a  
23 federal or state housing agency or a local housing  
24 authority as defined in ORS 456.005 to 456.720, or  
25 housing that is occupied by a tenant or tenants who  
26 benefit from rent supplements or housing vouchers  
provided by either a federal or state housing agency  
or a local housing authority." Id., §1(2).

The act included an emergency clause and, therefore, took  
effect upon its passage. It was signed by the Governor and  
filed in the office of the Secretary of State on August 8,  
1983.

The new law is asserted by petitioner to be applicable to  
all municipalities in Oregon and to repeal, by implication,  
charters and ordinances that are in conflict. So. Pacific Co.  
v Consolidated Freightways, 203 Or 657, 281 P2d 693 (1955).

1 Petitioner advises the Board is required to apply the law in  
2 this case and declare the charter amendment void.

3 Respondent City of Forest Grove does not disagree that the  
4 new law is applicable to existing city charters, but the city  
5 argues the charter amendment is unclear and in need of  
6 interpretation. Specifically, respondent advises it is unclear  
7 whether the amendment abolishes all housing programs or simply  
8 those in which the city is involved. Under the city's view,  
9 the charter amendment does not prohibit multi-family housing  
10 for both owner and renter occupancy in all residential zones  
11 which are zoned for multi-family housing. Respondent argues  
12 the amendment only prohibits city involvement in Housing and  
13 Urban Development (HUD) and Housing Development Corporation  
14 (HDC) programs. In other words, while the city may not  
15 participate directly itself in such programs, private  
16 organizations and individuals are free to do so notwithstanding  
17 the charter amendment.

18 The city also argues:

19 "In addition, under the Oregon Constitution, the  
20 citizens have the right to refer any legislative  
21 decision made by the governing body. If Section 5 of  
22 the new law is interpreted to mean that a local  
23 governing body cannot make a legislative decision to  
24 implement the powers of ORS Chapter 456 government  
25 assisted housing, then it means, at least by  
26 implication, that the provisions giving this power to  
the City legislative bodies in Chapter 456 have been  
repealed. On the other hand, if the legislative  
body's decision cannot be referred to the voters, then  
the new law interferes with the rights of initiative  
and referendum guaranteed by the Oregon Constitution  
[sic]. For instance, assume that Forest Grove  
exercises its statutory authority under ORS 456.075 to

1 declare that there is a need for a housing authority  
2 within the city, and this decision is referred to the  
3 voters. Have the voters been deprived of their right  
4 to vote upon this question by Section 5 of the new  
5 Act?"

6 The city charter amendment abolishes HUD and HDC programs  
7 excepting housing occupied "one hundred (100) by the elderly"  
8 within the city. It prohibits any such housing assistance and  
9 removes the power of the city to declare a need for a HUD  
10 renewal agency without approval by the voters at a general  
11 election. These provisions are in violation of 1983 Or Laws,  
12 ch 795 because they seek to "impose additional approval  
13 standards on government assisted housing that are not applied  
14 to similar but unassisted housing." It is the Board's view  
15 that Respondent City's concern about who is prohibited under  
16 the charter from approving certain kinds of assisted housing is  
17 beside the point. The law prohibits charters from imposing  
18 such requirements. The fact that the charter speaks to the  
19 issue and seeks to limit in any way such assistance programs is  
20 sufficient to put the charter in conflict with the law.

21 The Board rejects the city's argument that the new law  
22 interferes with the rights of initiative and referendum.  
23 Nothing in 1983 Or Laws, ch 795 repeals any provision of ORS ch  
24 456, including the power to implement the provisions of the  
25 housing law with a resolution of need. The Board understands  
26 1983 Or Laws, ch 795 to control city and county charters, not  
eliminate other requirements of state law or rights that may be  
held by citizens.

1       The charter amendment also prohibits multi-family dwellings  
2 and dwellings used for "non-continuous residency" or "occupancy  
3 for between four to six months each year by a changing  
4 population" in any residential zone. These provisions also are  
5 in violation of 1983 Or Laws, ch 795. The law does not permit  
6 a city or county charter to "prohibit from all residential  
7 zones attached or detached single-family housing, multi-family  
8 housing for both owner and renter occupancy or manufactured  
9 homes." In this regard, the words "any residential zone" in  
10 the charter and "all residential zones" in the new law have the  
11 same effect. Because the new law prohibits what the charter  
12 amendment allows, the portions of the charter amendment in  
13 conflict with the new law are of no force or effect.

14       Now, what is left of the charter amendment? The Board is  
15 guided by the rule that, where possible, voided parts of a law  
16 will be severed from valid portions.

17       "The fact that a statute or ordinance is void in part  
18 does not necessarily render the whole statute or  
19 ordinance invalid; the court will sustain those parts  
20 which are valid and which are not necessarily depended  
upon, or which are independent of, and not necessarily  
connected with, the void parts." 6 E. McQuillin,  
§20.64 (3d ed., 1980).

21       The amendment includes a provision, quoted above, which  
22 prohibits "the Mayor or Forest Grove City Council from  
23 severing, separating or changing any portion of the charter."  
24 The Board does not understand this provision to mean that  
25 should a part of the charter amendment be declared invalid, the  
26 whole charter amendment is invalid. The provision only tells

1 the mayor and the governing body there will be no tampering  
2 with the amendment. This prohibition does not explain what is  
3 to happen if a body such as LUBA or a court should declare a  
4 part of the amendment invalid. The Board believes it must  
5 attempt to learn the intent of the amendment before it can  
6 decide if any provisions are severable. Dodd v. Ind. Accident  
7 Comm., 211 Or 99, 310 P2d 324, 311 P2d 458, 315 P2d 138  
8 (1957). The first place to look is to the amendment itself.  
9 ORS 174.010-.020, Lane Co. v. Heintz Const. Co., et al, 228 Or  
10 152, 364 P2d 627 (1961).

11 The amendment includes not only provisions that prohibit  
12 certain kinds of assisted housing and uses within residential  
13 zones, the amendment also includes a provision making all  
14 non-conforming uses into permitted uses, a provision requiring  
15 notice of any zone change and a restriction on city action to  
16 amend the charter amendment. These subjects have nothing to do  
17 with assisted housing or uses in residential zones and are  
18 independent of each other. The Board concludes the provisions  
19 about non-commercial uses, notice and the power to change the  
20 amendment may be severed from the provisions about housing and  
21 financial assistance.

22 The Board holds, therefore, the following provisions of the  
23 charter amendment of the City of Forest Grove enacted pursuant  
24 Ballot Measure 51 are not valid and must be reversed.

25 "All ORS 456, Housing and Urban Development (HUD) and  
26 Housing Development Corporation (HDC) programs,  
projects, development plans, designations, grants and

1 agreements is abolished with one (1) exception, which  
2 would be housing that was occupied one hundred (100)  
3 percent by the elderly, within the City limits of  
4 Forest Grove.

5 "All HUD agreements and Block Grants, shall be  
6 returned to the Washington County Housing Authority  
7 and the Washington County Community Development Block  
8 Grant Program."

9 "Effective upon passage of this agreement, the Forest  
10 Grove City Council may not properly resolve that there  
11 is a need for a HUD renewal agency nor that any HUD  
12 agency may exercise powers within the City of Forest  
13 Grove unless the question of whether or not there is a  
14 need for a HUD renewal agency or whether there are  
15 blighted or deteriorated areas within Forest Grove  
16 which are impairing economic values and decreasing tax  
17 revenues 13% yearly has been voted upon by the  
18 electorate at a general election. If by majority  
19 vote, the voters determine that there is a need for a  
20 HUD agency or program within the Forest Grove City  
21 Limits, the City Council may create such an agency.  
22 Any such declaration or resolution by the City Council  
23 absent a majority vote by the electorate is  
24 automatically void."

25 "All 'multi-family' dwellings and dwellings used for  
26 non-continuous residency, or involves occupancy for  
between four to six months each year by a changing  
population shall not be allowed in any residential  
zone."

The provisions of the charter amendment not affected by  
this order are as follows:

"The City Charter of the City of Forest Grove, Oregon,  
a municipal corporation and political subdivision of  
the State of Oregon be amended as follows:

"This proposed Charter Amendment shall embrace the  
Forest Grove Comprehensive Plan and matters connected  
and related to th Forest Grove Comprehensive Plan."

"All non-conforming uses now existing shall be a  
permitted use."

"All property owners shall be notified of any  
enactment or proposed enactment that would change the  
zoning of their property within the City limits of

1 Forest Grove. This notice must be by certified mail  
2 and not by publication in a local newspaper or by  
3 other methods of general posting. In addition there  
4 must be a hearing on any zoning changes and property  
5 owners must have the opportunity to register any  
6 objections to the proposed changes."

7 "All provisions of this amendment apply to other  
8 sections, if this Charter Amendment is incorporated in  
9 the City Charter, it may not be severed, separated, or  
10 changed by any action of the Mayor or Forest Grove  
11 City Council." Proposed Charter Amendment.

12 This charter amendment is reversed in part and affirmed in  
13 part.  
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