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

JOEL GISLER,)
)
Petitioner,)
)
vs.)
)
DESCHUTES COUNTY,)
)
Respondent.)

LUBA No. 96-164

FINAL OPINION
AND ORDER

Appeal from Deschutes County.

Dan Van Vactor filed the petition for review.

No appearance by respondent.

GUSTAFSON, Referee; HANNA, Chief Referee; LIVINGSTON,
Referee, participated in the decision.

AFFIRMED 06/10/97

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

1 Opinion by Gustafson.

2 **NATURE OF THE DECISION**

3 Petitioner appeals the county's denial of a subdivision
4 application.

5 **FACTS**

6 Petitioner applied to the county for approval of a 10-
7 lot subdivision on a 30-acre site outside the county's urban
8 growth boundary (UGB) in the county's suburban low-density
9 residential zone (SR 2-1/2). All development in the SR 2-
10 1/2 zone is subject to compliance with Deschutes Development
11 Code (DDC) Chapter 19.20.

12 DDC Chapter 19.20 requires that all new subdivision
13 lots in the SR 2-1/2 zone "shall be connected to a
14 Department of Environmental Quality-permitted community or
15 municipal sewer system." DCC 19.20.055(A)(4). At the time
16 of petitioner's application, the county had not implemented
17 the 1994 amendments to Statewide Planning Goal 11 (Goal 11),
18 which state, in relevant part:

19 "Counties shall not allow the establishment of new
20 sewer systems outside urban growth boundaries or
21 unincorporated community boundaries, or allow new
22 extensions of sewer lines from within urban growth
23 boundaries or unincorporated community boundaries
24 to land outside those boundaries."

25 The Goal 11 amendments became effective immediately upon
26 their adoption.

27 The proposed subdivision is not connected to an
28 existing sewer service. Because the Goal 11 amendments

1 prohibit the extension of sewer lines inside the UGB to
2 serve the subject property, petitioner proposed individual
3 septic systems for each of the subdivision lots. The county
4 hearings officer denied petitioner's application for failure
5 to satisfy DCC 19.20.055(A)(4).

6 Petitioner attempted to appeal the denial to the county
7 board of commissioners (commissioners), which declined to
8 hear the appeal. This appeal followed.

9 **FIRST ASSIGNMENT OF ERROR**

10 Petitioner contends that Goal 11, as amended, prohibits
11 the county "from requiring subdivisions outside the UGB to
12 be connected to sewer systems." Petition for Review 10.
13 Petitioner argues that Goal 11 "effectively repeal[s] DCC
14 19.20.055(A)(4)," and that, in accordance with Goal 11, the
15 county was required to consider DCC 19.20.55 invalidated,
16 and to approve the application by allowing each lot in the
17 subdivision to be connected to an individual septic system.¹
18 Petition for Review 16. Alternatively, petitioner argues
19 that if DCC 19.20.55 cannot be severed from the remainder of

¹Petitioner relies on DDC 19.20.010, the "Purpose" section of Chapter 19.20, to conclude that Chapter 19.20 allows rural residential subdivisions to be connected to individual septic systems if sewer is unavailable. DDC 19.20.010 states that the purpose of Chapter 19.20 is:

"To encourage, accommodate, maintain and protect large lot suburban type residential development in areas with DEQ permitted community or municipal sewer systems or individual sewage disposal systems where soil will accommodate individual disposal systems and sewer service is not available and in areas which, because of location and physical characteristics, are well suited for such development.

1 Chapter 19.20, the county should have invalidated the entire
2 chapter and approved the application under DCC Title 17, the
3 county's urban subdivision ordinance.

4 The hearings officer's decision states:

5 "Goal 11 now provides that counties 'shall not * *
6 * allow new extensions of sewer lines from within
7 urban growth boundaries * * * to land outside
8 those boundaries.' DCC 19.20.055(A)(4) provides
9 that lots created by a new subdivision 'shall be
10 connected to a Department of Environmental quality
11 permitted community or municipal sewer system.'
12 This section further states: 'Connection of the
13 lots to sewer shall be a condition of tentative
14 plat approval.'

15 "The applicant's vacant 30-acre parcel on Overtree
16 Road is located outside of the UGB. Currently,
17 the nearest sewer connection is located quite a
18 distance away and within the UGB. Compliance with
19 DCC 19.20.055 would require a new extension of
20 sewer line from land inside the UGB to land
21 outside of the UGB.

22 "Deschutes County has not yet formally addressed
23 the interplay of Goal 11 with its zoning
24 requirements. In this circumstance, ORS
25 197.646(3) requires the Hearings Officer to
26 directly apply the amended Goal 11.

27 "Under Goal 11, Deschutes County may not allow the
28 extension of sewer from within the UGB to lands
29 outside of the UGB. However, contrary to the
30 applicant's contention, Goal 11 does not prohibit
31 Deschutes County from requiring new lots created
32 by the subdivision of land located outside the UGB
33 to be connected to a sewer system." Record 32.

34 We find the hearings officer's interpretations of Goal
35 11 and DCC 19.20.055, and the relationship between the two,
36 to be reasonable and correct. There is nothing in the
37 language of Goal 11 to support petitioner's argument that

1 the goal requires the county to allow subdivisions outside
2 the UGB to be connected to individual septic systems.
3 Likewise, there is nothing in the goal that prohibits the
4 county from requiring such subdivisions to be connected to a
5 sewer system. The goal does not prohibit the establishment
6 of sewer systems outside the UGB. Rather, it prohibits what
7 petitioner proposes here: extending sewer systems from
8 within the UGB to areas outside the UGB. Goal 11 does not
9 invalidate DDC 19.20.55(A)(4) or otherwise preclude the
10 county from applying that provision to petitioner's
11 application.

12 The first assignment of error is denied.

13 **SECOND ASSIGNMENT OF ERROR**

14 Petitioner asserts the county's denial of his
15 application "amounts to an illegal de facto moratorium on
16 the development of subdivisions outside the urban growth
17 boundary in violation of ORS 197.520." Petition for Review
18 14.

19 ORS 197.505(1) defines "Moratorium on construction or
20 land development" as

21 "engaging in a pattern or practice of delaying or
22 stopping issuance of permits, authorizations or
23 approvals necessary for the subdivision and
24 partitioning of, or construction on, any land. It
25 does not include denial or delay of permits or
26 authorization because they are inconsistent with
27 applicable statutes, rules, zoning or other laws
28 or ordinances, or a public facilities strategy
29 that meets the provisions of ORS 197.768."

30 Based on that definition, petitioner argues that "any

1 attempt to apply inapplicable statutes, rules, zoning or
2 other laws ordinances to an application must be seen as an
3 impermissible moratorium." Petition for Review 15 (emphasis
4 in original). Petitioner argues DCC 19.20.055(A)(4) is
5 inapplicable, having been "effectively repealed" by the Goal
6 11 amendments.

7 As explained above, we affirm the county's conclusions
8 that DCC 19.20.055(A)(5) applies to this application and
9 that petitioner's application does not satisfy that
10 provision. The decision does not establish a pattern or
11 practice of delaying or stopping development in violation of
12 ORS 197.520.

13 The second assignment of error is denied.

14 The city's decision is affirmed.