

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

3
4 MT. HOOD STEWARDSHIP COUNCIL,)
5)
6 Petitioner,)
7)
8 vs.)
9)
10 CLACKAMAS COUNTY,)
11)
12 Respondent.)

LUBA No. 97-007

FINAL OPINION
AND ORDER

13
14
15 Appeal from Clackamas County.

16
17 Patricia Ferrell-French, West Linn, represented
18 petitioner.

19
20 Michael E. Judd, Chief Assistant County Counsel, Oregon
21 City, represented respondent.

22
23 LIVINGSTON, Referee; HANNA, Chief Referee; GUSTAFSON,
24 Referee, participated in the decision.

25
26 DISMISSED 06/18/97

27
28 You are entitled to judicial review of this Order.
29 Judicial review is governed by the provisions of ORS
30 197.850.

1 Opinion by Livingston.

2 **NATURE OF THE DECISION**

3 Petitioner appeals an order of the county board of
4 commissioners (Order No. 96-742) that implements the
5 county's forest management strategy by ordering the sale of
6 two county-owned forest parcels totaling approximately 279
7 acres.¹

8 **FACTS²**

9 Utilizing the data from a resource evaluation, public
10 comment, and individual site analysis by the county
11 forester, the county adopted a forest management strategy in
12 July, 1996. The county divided its Mt. Hood Corridor forest
13 properties into three categories: (1) parcels that are too

¹Petitioner's notice of intent to appeal states that it appeals three decisions:

- "1. The alleged adoption by the Clackamas County Board of County Commissioners on November 14, 1996, of a revised timber property strategy plan;
- "2. Adopting a revised timber property strategy without issuing an order from which to appeal; and
- "3. Clackamas County Board of Commissioners Order No. 96-742, dated December 12, 1996, which * * * implemented the revised timber property strategy plan in part and ordered the sale of two forested properties in the Mt. Hood/Hoodland area of Clackamas County, * * *."

However, in a subsequent submission, petitioner clarified that it is actually appealing only the adoption of Order No. 96-742. Petitioner's Response to Respondent's Motion to Dismiss 2-3.

²No record has been filed in this appeal. The parties have stipulated to allow us to determine whether we have jurisdiction, based on attachments to submissions filed in connection with the county's motion to dismiss.

1 sensitive to harvest because of view protection, waterway
2 buffering, endangered wildlife or high recreation potential;
3 (2) parcels that should be clear cut because difficult
4 terrain and poor access make them difficult to harvest
5 selectively; and (3) parcels that can be "economically"
6 selectively harvested. The county concluded that parcels in
7 the second category should be sold at auction to the highest
8 and best bidder, on the premise that these parcels would be
9 of higher value on the tax rolls and would be more
10 effectively managed in private hands. The proceeds from the
11 sale of these parcels was to be placed in the county's
12 Forest/Parks Trust Fund, to be used for the acquisition of
13 new park and recreation sites or for capital improvements
14 identified in the county's parks plan.

15 The county eventually identified two parcels in the
16 second category. On December 12, 1996, the county adopted
17 Order No. 96-42, which implemented the forest management
18 strategy, identified as a "timber property strategy." Order
19 No. 96-742 concludes that for various reasons, including
20 flood damage to parks, a proposed golf course development,
21 and other improvements and acquisitions intended for parks,
22 it is appropriate for the county to sell the two parcels.

23 This appeal followed.

24 **MOTION TO DISMISS**

25 The county moves to dismiss this appeal on the ground
26 that the adoption of Order No. 96-742 is not a land use

1 decision over which we have jurisdiction. As the party
2 seeking LUBA review, the burden is on petitioner to
3 establish that the appealed decision is a land use decision.
4 Billington v. Polk County, 299 Or 471, 475, 703 P2d 232
5 (1985).

6 Under ORS 197.825(1), LUBA has exclusive jurisdiction,
7 subject to limitations stated in ORS 197.825(2) and (3),
8 over the review of "land use decisions" and "limited land
9 use decisions"³ that meet either the statutory definitions
10 in ORS 197.015(10) and (12), or the significant impact test
11 referred to in Petersen v. Klamath Falls, 279 Or 249, 566
12 P2d 1193 (1977) and City of Pendleton v. Kerns, 294 Or 126,
13 653 P2d 992 (1982).⁴ Since petitioner concedes the adoption

³Petitioner does not contend the challenged decision is a limited land use decision.

⁴ORS 197.015(10) states, in relevant part:

"'Land use decision':

"(a) Includes:

"(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

"(i) The goals;

"(ii) A comprehensive plan provision;

"(iii) A land use regulation; or

"(iv) A new land use regulation; or

"(B) * * * ; and

"(b) Does not include a decision of a local government:

1 of Order No. 96-742 is not a "significant impact" land use
2 decision, we limit our consideration to whether it is a
3 statutory land use decision.

4 Petitioner argues:

5 "The issues of this appeal are not who purchases
6 the two parcels and not what might be done with
7 the two parcels once they are sold. The issues on
8 appeal [are] whether Respondent, under the Mt.
9 Hood Community Plan and the Comprehensive Plan, **a)**
10 had the authority to determine to sell the land,
11 and **b)** had the authority to determine to sell the
12 land for the reasons stated in Order No. 96-742.
13 The finality necessary under ORS 197.015(10), was
14 met when Respondent ordered the two parcels of
15 land to be sold. Consequently, Order No. 96-742
16 is a final land use decision of the County which
17 clearly concerns the adoption, amendment or
18 application of the comprehensive plan as required
19 for LUBA's review under ORS 197.015(10)."
20 Petitioner's Response to Respondent's Motion to
21 Dismiss 7 (bold in original).

22 Petitioner bases its assertion that the county had no
23 authority to sell or to determine to sell the two parcels on
24 quoted selections from the Clackamas County Comprehensive
25 Plan (CCCP), the Mount Hood Community Plan (MHCP), and the

"(A) Which is made under land use standards which do not
require interpretation or the exercise of policy or
legal judgment;

"(B) Which approves or denies a building permit issued
under clear and objective land use standards;

"(C) Which is a limited land use decision; or

"* * * * *"

1 1976 Mount Hood Community Plan (1976 MHCP).⁵ The
2 relationship between the CCCP, the MHCP and the 1976 MHCP is
3 explained in a subsection of the MHCP entitled "Planning
4 Process":

5 "1.0 The Clackamas County Comprehensive Plan is
6 applicable to the Mt. Hood area; however, the
7 Mt. Hood Community Plan takes precedence
8 where conflicts between the two documents
9 exist.

10 "2.0 The statement of issues and alternatives and
11 the inventories and data of the 1976 Mt. Hood
12 Community Plan, the 1976 Mt. Hood Planning
13 Unit Draft Environmental Statement, and the
14 revisions and additions to these documents
15 are adopted as background reports for the
16 policies and designations of the Mt. Hood
17 Community Plan." CCCP 175.

18 The county contends the selections from the CCCP, MHCP
19 and 1976 MHCP do not state approval standards that apply to
20 the challenged decision. The county argues that since
21 petitioner has not identified applicable approval standards
22 in either the county comprehensive plan or the county's land
23 use regulations, petitioner has not shown the decision to be
24 a land use decision, as the term is defined in ORS
25 197.015(10).

26 Petitioner quotes the following passages from the MHCP:

27 "The Mt. Hood area is unique, and the policies of
28 the Mt. Hood Community Plan recognize this
29 character. The economy of the community is
30 dependent upon the conservation of the

⁵The MHCP is a chapter of the CCCP.

1 environment, which creates the setting so
2 attractive to both residents and visitors." CCCP
3 167 (MHCP "Introduction").

4 "All areas within the 100 year floodplain,
5 wetlands and slopes exceeding 25% in the Mt. Hood
6 area shall be designated Resource Protection Open
7 Space." CCCP 170 (MHCP "Open Space").

8 Petitioner does not explain why these passages apply to
9 the county's decision to sell county forest land. We agree
10 with the county that they do not. The first passage, which
11 is from the introduction to the MHCP, is descriptive. The
12 second passage does not mention the sale of forest land.
13 Petitioner does not contend the county's sale of forest land
14 would affect a designation of the two parcels as Resource
15 Protection Open Space, if they are in fact so designated,
16 and we do not see that it would.

17 Petitioner next quotes passages from the 1976 MHCP.
18 Petitioner argues that since the MHCP states the 1976 MHCP
19 and the revisions and additions to it are adopted as
20 background reports for the policies and designations of the
21 MHCP, "the initial [1976 MHCP] should be referred to in
22 order to determine the intent and purpose of the current
23 [MHCP] and whether Order No. 96-742 complies with the [MHCP]
24 and the [CCCP]." Petitioner's Response to Respondent's
25 Motion to Dismiss 6.

26 Petitioner misunderstands the function of the 1976
27 MHCP. Background reports typically contain data and
28 information that describe a community's resources and

1 features and address the topics specified in the applicable
2 Statewide Planning Goals. Background reports are not the
3 equivalent of comprehensive plans, which set forth the
4 community's long-range objectives and the policies by which
5 it intends to achieve them.⁶ The comprehensive plan is
6 adopted by ordinance and has the force of law. Although a
7 comprehensive plan could conceivably incorporate portions of
8 a background report by reference, petitioner does not show
9 that has occurred here. Even if the 1976 MHCP had the force
10 of law prior to the adoption of the MHCP, it no longer does,
11 as it has been relegated by the MHCP to the status of a
12 background report.

13 Finally, petitioner quotes policies from the CCCP
14 itself:

15 "2.0 Protect native plant species, wetlands, and
16 streambank vegetation on County-managed
17 public lands.

18 "* * * * *

19 "10.0 When natural resource activities (e.g.,
20 commercial timber harvesting) compete with
21 retention of visual or unique/natural
22 resources and values, the County shall
23 coordinate with appropriate state and

⁶ORS 197.015(5) defines "comprehensive plan," in relevant part, as

"* * * a generalized, coordinated land use map and policy statement of the governing body of a local government that interrelates all functional and natural systems and activities relating to the use of lands, including but not limited to sewer and water systems, transportation systems, educational facilities, recreational facilities, and natural resources and air and water quality management programs. * * *"

1 federal agencies to minimize significant
2 adverse impacts. The County also will
3 encourage the public acquisition of land
4 through purchase or land exchange, or
5 conservation easements in designated scenic
6 corridors or vistas and unique/distinctive
7 natural areas (see Map III-4)." CCCP
8 Wildlife Habitats and Distinctive Resource
9 Areas Element, Policies 2.0 and 10.0.

10 and

11 "7.0 Adopt and implement an updated Forest
12 Management Plan for County-owned forest
13 land, emphasizing consolidation/exchange of
14 scattered County holdings to facilitate more
15 intensive programs for timber management,
16 park development and acquisition, and
17 protection of any recognized watershed,
18 recreation, or scenic values." CCCP Forest
19 Element, Policy 7.0.

20 Policies 2.0 and 10.0 of the CCCP Wildlife Habitats and
21 Distinctive Resource Areas element clearly are not
22 applicable to a decision to sell county forest land. Policy
23 2.0 applies to county-owned land, but nothing in it suggests
24 that the county cannot sell land. Policy 10.0 encourages
25 the public acquisition of land through purchase or land
26 exchange, but it too does not prohibit the county from
27 selling land.

28 Petitioner argues that Policy 7.0 of the CCCP Forest
29 Element applies, on the theory that the forest management
30 strategy adopted in July, 1996 constitutes an "updated
31 Forest Management Plan for County-owned forest land," and
32 the sale of the two parcels implements the strategy.
33 Petitioner states that the question on appeal is whether the

1 requirements of the CCCP were met in the approval and
2 implementation of the forest management strategy, which, in
3 turn, resulted in Order No. 96-742 authorizing the sale of
4 the two parcels.

5 In determining whether a local government decision
6 concerns the application of a comprehensive plan provision
7 or a land use regulation,

8 "* * * it is not sufficient that a decision may
9 touch on some aspects of the comprehensive plan
10 [or land use regulations], rather the
11 comprehensive plan [or regulations] must contain
12 provisions intended as standards or criteria for
13 making the appealed decision." Billington v. Polk
14 County, 299 Or 471, 475, 703 P2d 232 (1985).

15 Even if we assume that the forest management strategy
16 adopted in July, 1996 constitutes an "updated Forest
17 Management Plan" for county-owned forest land and that the
18 sale of the two parcels implements the strategy, we do not
19 agree with petitioner that a decision to sell the two
20 parcels pursuant to the strategy implements the CCCP.
21 Petitioner does not demonstrate that the strategy is itself
22 a part of the CCCP. See Miller v. City of Dayton, 22 Or
23 LUBA 661, 664-65, aff'd 113 Or App 300 (1992) (a
24 comprehensive plan policy to protect trees on city property
25 is not an approval standard for a park expansion that will
26 require the removal of trees); City of Portland v. Multnomah
27 County, 19 Or LUBA 468 (1990) (where a county plan policy
28 directs the county to enter into urban area planning
29 agreements, but does not adopt such agreements as part of

1 the comprehensive plan, the application of such agreements
2 is not an application of the county comprehensive plan over
3 which we have jurisdiction under ORS 197.015(10)).

4 Petitioner has not carried its burden of demonstrating
5 the challenged decision is a land use decision. This appeal
6 is dismissed.