

1 BEFORE THE LAND USE BOARD OF APPEALS
2 OF THE STATE OF OREGON
3

4 CITY OF SALEM,)
5)
6 Petitioner,)
7)
8 vs.)
9)
10 CITY OF KEIZER,)
11)
12 Respondent.)
13 _____)

LUBA Nos. 97-165, 97-166,
and 97-167

14 FINAL OPINION
15 AND ORDER

16 MARION COUNTY,)
17)
18 Petitioner,)
19)
20 vs.)
21)
22 CITY OF KEIZER,)
23)
24 Respondent.)

LUBA Nos. 97-168, 97-169,
and 97-170

25 Appeal from City of Keizer.

26
27 Paul Lee, Assistant City Attorney, Salem, and Jane Ellen Stonecipher, Assistant
28 County Counsel, Salem, filed a combined brief and argued on behalf of petitioners. With
29 them on the brief was Stephanie Smythe, City Attorney, and Michael J. Hansen, County
30 Legal Counsel.

31
32 E. Shannon Johnson, Keizer, filed the response brief and argued on behalf of
33 respondent. With him on the brief was Lien and Johnson.

34
35 BASSHAM, Board Member; HOLSTUN, Board Chair; BRIGGS, Board Member,
36 participated in the decision.

37
38 REVERSED 06/07/99

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

1 Opinion by Bassham.

2 **NATURE OF THE DECISION**

3 In these consolidated appeals, petitioners¹ appeal three related decisions by the City
4 of Keizer (Keizer): (1) an order approving a 73-lot subdivision; (2) an ordinance amending
5 the city's comprehensive plan and zoning ordinance designations for certain properties; and
6 (3) a resolution declaring the effect of an intergovernmental agreement with respect to a
7 sewage treatment plant.

8 **FACTS**

9 Prior to 1980 the city of Salem (Salem) built the Willow Lake Wastewater Treatment
10 Plant (the plant) in what was then an unincorporated portion of Marion County. In the early
11 1980s, Keizer incorporated, adopting the Keizer Comprehensive Plan (KCP) as a post-
12 acknowledgment amendment to the Salem Area Comprehensive Plan (SACP).² The plant is
13 presently included within Keizer's municipal boundaries. Salem continues to operate the
14 plant, which receives waste from both cities and other portions of both Marion and Polk
15 counties.

16 Salem, Keizer, Marion County and Polk County have each adopted as part of their
17 respective comprehensive plans an element entitled Salem/Keizer Urban Area (Regional)
18 Procedures and Policies (RPP). Provisions of the RPP define certain areas of exclusive

¹Petitioner City of Salem and petitioner Marion County filed a joint petition for review. We refer to both parties as petitioners.

²This opinion includes a number of acronyms. For ease of reference, each of the acronyms used in this opinion is set forth below in order of appearance in this opinion:

KCP	Keizer Comprehensive Plan
SACP	Salem Area Comprehensive Plan
RPP	Salem/Keizer Urban Area (Regional) Procedures and Policies.
SKAPAC	Salem/Keizer Area Plan Advisory Committee
DIAA	Dual Interest Area Agreement
SPA	Special Policy Area

1 geographic jurisdiction as well as certain areas of overlapping jurisdiction or interests known
2 as “Regional Policies.” The RPP defines a “Regional Policy” as any policy which the four
3 jurisdictions have concurred in and which is identified in each jurisdiction's comprehensive
4 plan as a regional policy. Among the issues that the four jurisdictions have agreed constitute
5 a regional policy is the Willow Lake Wastewater Treatment Plant.

6 Under the RPP, any jurisdiction may initiate a “Regional Planning Action” in order to
7 amend a regional policy; however, the RPP requires that regional planning actions “shall be
8 made solely on the basis of the concurrence of all jurisdictions[.]” Further, the RPP requires
9 that regional planning actions “shall be adopted by each jurisdiction with the identical
10 language.” The RPP describes a procedure for considering regional planning actions, but
11 specifies that “[i]f jurisdictions disagree as to regional planning actions * * * the issue may
12 be resolved through the Salem Keizer Area Plan Advisory Committee [SKAPAC] process.”
13 The SKAPAC process begins with meetings of a subcommittee formed from the staffs of
14 affected jurisdictions. If the staff subcommittee cannot resolve the dispute, an elected
15 officials’ subcommittee meets. If that subcommittee cannot resolve the dispute, a joint
16 meeting of the governing bodies of all affected jurisdictions is held. If the governing bodies
17 cannot reach unanimous agreement, the proposing jurisdiction may take whatever action it
18 deems appropriate, with appellate standing conferred on the other jurisdictions.

19 The RPP also defines “Dual Interest Areas,” which are geographic areas located
20 within the exclusive jurisdiction of one entity where two or more entities have established,
21 by agreement, a means to regulate shared land use interests. The RPP specifies that
22 decisions regarding a Dual Interest Areas Agreement (DIAA) “shall be governed by the
23 terms of such agreement.”

24 In 1991, Keizer, Salem and Marion County entered into a Dual Interest Area
25 Agreement for Willow Lake Wastewater Treatment Plant Area (Willow Lake DIAA).
26 Section 1 of the Willow Lake DIAA establishes “the nature and scope of coordinated land

1 use regulation” in a defined area surrounding the plant. Section 2 requires that the three
2 jurisdictions jointly participate in studies to identify (1) plant modifications to mitigate noise
3 and odor; (2) uses compatible with plant operation; and (3) land use policies that minimize
4 adverse plant impacts. Section 2 also specifies that the studies shall be completed by June
5 30, 1993, and that “[s]tudy recommendations should be implemented within a reasonable
6 time thereafter.” Section 3 of the Willow Lake DIAA, entitled “Interim Controls,” sets forth
7 various policies governing development within the area “[u]ntil the above-noted studies are
8 implemented[.]” The section 3 policies limit development in the area to industrial,
9 commercial and agricultural uses that are not adversely affected by the plant's noise and
10 odor. Subdivisions within the area are prohibited.

11 Section 4 of the Willow Lake DIAA provides that

12 “Quasi-judicial procedural rights to notice and opportunity to comment shall
13 be extended to the interested jurisdictions prior to any land use decisions in
14 the area. Should disagreements arise, the SKAPAC conflict resolution
15 process * * * shall be pursued prior to a final land use decision affecting the
16 area.”

17 Finally, section 5 requires that any amendments to the Willow Lake DIAA be in writing and
18 approved by all parties.

19 Keizer implemented the terms of the Willow Lake DIAA by zoning the area defined
20 in the DIAA for Exclusive Farm Use (EFU) and designating that area as a Special Policy
21 Area (SPA). Salem implemented the Willow Lake DIAA by amending the SACP to
22 designate the SPA area as “Community Service: Sewage and Solid Waste.” The SPA
23 designation prohibits residential subdivisions and limits allowed uses to those that will not be
24 adversely affected by noise and odor from the plant.

25 In 1993, the studies required by section 2 of the Willow Lake DIAA were completed.
26 With respect to the first element of section 2, the studies identified three phases of plant
27 improvements designed to mitigate odor and noise. Phases one and two have been
28 implemented, but not phase three. To address the second and third elements of section 2, the

1 affected jurisdictions' staff drafted an Agricultural-Industrial zone, but the affected
2 jurisdictions have not yet adopted it.

3 The 1993 studies also identified certain properties within the SPA zone that were
4 largely outside the odor plume from the plant. Using this information, Keizer initiated the
5 SKAPAC process in May 1995, asking that the other three jurisdictions review the Willow
6 Lake DIAA to amend certain terms and the boundary of the area restricted by that agreement.
7 The effect of the proposed amendments was to exclude those properties lying outside the
8 odor plume from the SPA zone, thus enabling residential development of those properties.
9 The jurisdictions were not able to achieve complete consensus at the staff, elected official, or
10 governing body stages of the SKAPAC process.³ Accordingly, on July 31, 1997, Keizer
11 notified the other jurisdictions that it intended to proceed unilaterally.

12 On August 4, 1997, Keizer adopted the decisions challenged in these appeals, without
13 obtaining the concurrence of the other jurisdictions. Resolution R97-981 declares that the
14 land use controls in section 3 of the Willow Lake DIAA no longer govern because the
15 recommendations in the 1993 studies have been implemented. Ordinance 97-370 amends the
16 KCP designation for certain properties from SPA to Low Density Residential (LDR) and
17 zoning ordinance designation from EFU to Single Family Residential (RS). Order 96-05
18 approves a 73-lot subdivision on the redesignated properties.

19 These appeals followed.

20 **FOURTH AND FIFTH ASSIGNMENTS OF ERROR**

21 Resolution R97-981 declares that the 1993 study recommendations have been
22 implemented and thus, by the terms of the Willow Lake DIAA, the interim controls provided
23 in section 3 no longer govern. In addition, Resolution R97-981 finds that the interim

³At oral argument, petitioners disputed whether the three stages of the SKAPAC process were conducted in the appropriate sequence. However, petitioners did not include that dispute in any assignment of error and have not argued that the alleged procedural error provides a basis for reversal or remand of the challenged decisions. We therefore do not consider that dispute further.

1 controls no longer govern because the study recommendations were to have been
2 implemented within “a reasonable time” after June 30, 1993, and more than four years had
3 passed since that date, which is more than a reasonable time.⁴ Resolution R97-981 is the
4 basis for the other two decisions challenged in these consolidated appeals.

5 In the fourth assignment of error, petitioners argue that the Willow Lake DIAA is a
6 land use regulation, and that Resolution R97-981 improperly amends the agreement in a
7 manner that is prohibited by the Willow Lake DIAA. In addition, petitioners contend that
8 the city’s action brings the Willow Lake DIAA into conflict with petitioners' comprehensive
9 plans. Petitioners explain that the parties' comprehensive plans (i.e. the RPP) require that
10 decisions regarding the plant area be governed by the terms of the Willow Lake DIAA.
11 Petitioners argue that Resolution R97-981 is contrary to section 5 of the Willow Lake DIAA,
12 which requires that any amendment to that agreement shall be in writing and approved by all

⁴In relevant part, Resolution R97-981 states:

"WHEREAS, [the DIAA] further provided that studies would be completed to identify, among other things, practical plan modifications to reasonably mitigate noise and odor emanating from the plant;

"WHEREAS, such studies were completed and certain study recommendations were implemented thereafter;

"WHEREAS, policies regarding land in the Dual Interest area were to remain in effect only until the studies were implemented;

WHEREAS, such studies have been implemented and there is no further necessity for the Dual Interest Agreement;

WHEREAS, the [DIAA] provides the studies' recommendations will be implemented within a reasonable time after the June 30, 1993 completion date;

WHEREAS, more than four years have passed since such date which is more than a reasonable time for such implementation;

"NOW, THEREFORE,

"BE IT RESOLVED that the policies in Section 3 of the [DIAA] no longer govern development in the subject property." Supp Record 7-8.

1 parties. According to petitioners, the Willow Lake DIAA does not allow a party to modify
2 the terms of the agreement without the written agreement of the other parties.

3 In the fifth assignment of error, petitioners argue that Keizer's findings in Resolution
4 R97-981 that the 1993 recommendations have been implemented are not supported by facts
5 in the record and, to the extent those findings contain interpretations of the Willow Lake
6 DIAA, are contrary to its terms.

7 In response to both assignments of error, Keizer argues that the 1993 studies have
8 been implemented, and that the challenged resolution does not amend the agreement, but
9 “only states what the DIAA already says; namely that the interim controls only govern until
10 the studies are implemented. Such an interpretation cannot be wrong.” Respondent's Brief
11 19-20.

12 We agree with petitioners that the recommendations in the 1993 studies regarding the
13 three elements of section 2 have only been partially implemented, and thus the finding in
14 Resolution R97-981 that the 1993 studies have been implemented is not supported by
15 substantial evidence in the record. ORS 197.835(9)(a)(C). Although certain
16 recommendations regarding element one, plant operations, have been implemented, other
17 recommendations regarding plant operations have not. Keizer does not attempt to argue that
18 recommendations regarding elements two and three have been implemented.

19 Keizer also does not attempt to defend the second basis stated in Resolution R97-981
20 for the conclusion that section 3 no longer governs. Implicit in Resolution R97-981's
21 findings is the view that Keizer can terminate the section 3 controls after a “reasonable time”
22 has elapsed, whether or not the section 2 recommendations have been implemented.
23 Petitioners argue, and we agree, that to the extent that view is at issue in this appeal, it is
24 contrary to the terms of section 3, which provides that “[u]ntil the [section 2] studies are

1 implemented, the [section 3] policies shall govern development within the area[.]”⁵ Section
2 2 requires the parties to implement the studies' recommendations within a reasonable time,
3 but nothing in the Willow Lake DIAA indicates that the parties' failure to do so is a basis to
4 declare that section 3 has been superseded.

5 For the same reasons, we also agree with petitioners that Resolution R97-981 is
6 contrary to the terms of the Willow Lake DIAA. Keizer initiated the SKAPAC process in
7 1995 seeking to amend the Willow Lake DIAA to redraw the boundaries of the area subject
8 to the agreement and allow development not permitted by the section 3 controls. The effect
9 of Resolution R97-981 and the two other decisions dependent on Resolution R97-981 is to
10 amend the Willow Lake DIAA to declare the section 3 controls invalid and to redraw the
11 boundaries of the area subject to the DIAA. As we discuss further in resolving the first
12 assignment of error, section 5 of the Willow Lake DIAA requires that Salem and Marion
13 County approve such amendments, while section 4 governs disagreements over whether to
14 adopt land use decisions that are consistent with the Willow Lake DIAA. Accordingly, we
15 conclude that the unilateral amendments to the Willow Lake DIAA reflected in Resolution
16 R97-981 are prohibited.

⁵Petitioners argue that any such interpretations of the Willow Lake DIAA are not entitled to deference under ORS 197.829(1) and Clark v. Jackson County, 313 Or 508, 836 P2d 710 (1992) because deference is due only when the governing body interpreting the regulation is the body that enacted it. Gage v. City of Portland, 319 Or 308, 317, 877 P2d 1187 (1994). Petitioners argue that because Salem, Keizer and Marion County adopted the Willow Lake DIAA, no deference is due to any interpretation of the Willow Lake DIAA unless all three governing bodies join in that interpretation. Even if deference is due to Keizer’s implied interpretation of section 2 of the Willow Lake DIAA, petitioners argue, that interpretation conflicts with the plain terms of section 3 and is thus “clearly wrong.” Goose Hollow Foothills League v. City of Portland, 117 Or App 211, 217, 843 P2d 992 (1992).

We need not and do not resolve whether petitioners are correct that no deference is due Keizer’s implied interpretation of section 2 in the absence of corresponding interpretations from Salem and Marion County. But see Trademark Construction, Inc. v. Marion County, 155 Or App 84, 88, 962 P2d 772 (1998) (deference is due to county interpretation of city comprehensive plan provisions that the county adopted into its comprehensive plan). In the present case, Keizer does not defend, much less argue that LUBA must defer to, the implied interpretation in Resolution R97-981 that the section 3 controls lapse automatically once a “reasonable time” has elapsed. Even if the Clark standard applies in this circumstance, we agree with petitioners that Keizer’s implied interpretation of section 2 is contrary to the express language of section 3, and therefore is clearly wrong.

1 The fourth and fifth assignment of error are sustained.

2 **FIRST ASSIGNMENT OF ERROR**

3 Petitioners argue that Keizer violated the KCP and petitioners' comprehensive plans
4 when it adopted Ordinance 97-370 and Order 96-05 without obtaining petitioners'
5 concurrence. According to petitioners, the challenged decisions amount to a regional
6 planning action, which under the RPP must be based solely on the concurrence of all four
7 jurisdictions.

8 Keizer responds that by the terms of both the RPP and the Willow Lake DIAA, it was
9 not required to obtain the concurrence of other jurisdictions in order to adopt Ordinance 97-
10 370 and Order 96-05. Keizer notes that the RPP provides that “[d]ecision[s] regarding areas
11 identified by agreement as Dual Interest Areas shall be governed by the terms of such
12 agreement.” Further, Keizer explains, section 4 of the Willow Lake DIAA provides that
13 “[s]hould disagreements arise, the SKAPAC conflict resolution process * * * shall be
14 pursued prior to a final land use decision affecting the area.” Keizer argues that the
15 SKAPAC process allows Keizer to proceed with the development allowed by Ordinance 97-
16 370 and Order 96-05 without obtaining the concurrence of other jurisdictions. Thus, Keizer
17 concludes, the challenged decisions are not subject to the RPP concurrence requirement.

18 We agree with Keizer that by the terms of the RPP, decisions regarding the Willow
19 Lake DIAA are governed by the terms of that agreement, and hence the RPP concurrence
20 requirement does not directly apply. However, we disagree that section 4 of the Willow
21 Lake DIAA allows Keizer to invoke the SKAPAC process in order to adopt the decisions
22 challenged in these appeals.

23 Read in isolation, section 4 does appear to require that all disagreements regarding
24 the Willow Lake DIAA be resolved under the SKAPAC process, as Keizer suggests.
25 However, that view is inconsistent with section 5, which requires that any amendment to the
26 agreement be in writing and approved by all parties, requirements that are inconsistent with

1 the unilateral action allowed by the SKAPAC process. As noted in our discussion of the
2 fourth and fifth assignments of error, the challenged decisions effectively amend the terms of
3 the Willow Lake DIAA, by redrawing the boundaries of the area subject to the DIAA, and by
4 declaring that the section 3 controls no longer govern. When section 4 and 5 are read
5 together and harmonized, as they must, it is clear that section 4 governs disagreements over
6 whether to adopt land use decisions that are consistent with the existing terms of the Willow
7 Lake DIAA.⁶ However, any decision that is inconsistent with the Willow Lake DIAA and
8 effectively amends the terms of that agreement is not governed by section 4; such a decision
9 is governed by section 5. Section 5 requires the approval, that is, the concurrence, of all
10 parties to the Willow Lake DIAA. Therefore, the provisions of section 5 prohibit Keizer
11 from acting unilaterally.

12 Consequently, we agree with petitioners that Keizer erred in adopting the challenged
13 decisions without obtaining the approval of Salem and Marion County.

14 The first assignment of error is sustained.

15 **REMAINING ASSIGNMENTS OF ERROR**

16 In the second assignment of error, petitioners contend that the challenged decisions
17 violate the consistency requirement of Statewide Planning Goal 2 and Marion County's
18 coordination authority under ORS 195.025(1) because they amend the KCP and Keizer's
19 zoning ordinance in ways that conflict with petitioners' acknowledged plans and regulations.
20 In the third assignment of error, petitioners argues that Keizer committed procedural errors in
21 adopting the challenged decisions that prejudice petitioners' substantial rights, and thus
22 remand is appropriate to address those errors. ORS 197.835(9)(a)(B).

⁶For example, section 4 would require that the SKAPAC process be followed where a proposed land use decision is consistent with the DIAA but one or more jurisdictions believe the decision would violate other applicable criteria. If the proposing jurisdiction followed the SKAPAC process and ultimately proceeded to adopt such a decision unilaterally, the opposing jurisdictions could appeal the land use decision on the basis that the decision violates such other applicable criteria.

1 However, in resolving the first, fourth and fifth assignments of error we determined
2 that the challenged decisions violate the applicable law and are prohibited as a matter of law.
3 Accordingly, the appropriate disposition of these appeals is to reverse the challenged
4 decisions. OAR 661-010-0071(1)(c). Because we reverse the challenged decisions under
5 those assignments of error, there is no point in resolving the remaining assignments of error.
6 Rochlin v. Multnomah County, 25 Or LUBA 637, 642 (1993).

7 The city's decision is reversed.