

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

APR 29 4 30 PM '80

MAS FUJIMOTO, DELMER EISERT, )  
ROBERT and AGNES GUY, )  
 )  
Petitioners, )

vs. )

LUBA NO. 79-010

METROPOLITAN SERVICE DISTRICT )  
(MSD), formerly Columbia Region )  
Association of Governments )  
(CRAG), )  
 )  
Respondent. )

FINAL OPINION AND  
ORDER ON RESPONDENT'S  
MOTION TO DISMISS

1000 FRIENDS OF OREGON, an )  
Oregon nonprofit corporation, )  
 )  
Petitioner, )

vs. )

LUBA NO. 79-030

METROPOLITAN SERVICE DISTRICT, )  
 )  
Respondent. )

Appeal from Metropolitan Service District.

Terry D. Morgan, Portland, filed a petition for review and legal memoranda and argued the motion for Petitioners Fujimoto, et al.

Robert E. Stacey, Jr., Portland, filed a petition for review and legal memoranda and argued the motion for Petitioner 1000 Friends of Oregon.

E. Andrew Jordan, Portland, filed the motion to dismiss and legal memoranda and argued the motion for Respondent Metropolitan Service District.

Cox, Referee; Bagg, Referee; participated in the decision. Reynolds, Chief Referee, did not participate.

Page Dismissed.

You are entitled to judicial review of this Order. Judicial review is governed by the provisions of Oregon Laws 1979, ch 772, sec. 6(a).



1 proceedings are res judicata as to petitioners and the  
2 petitions must be dismissed.

3 At the time petitioners filed their notices of intent to  
4 appeal with this Board (11-19-79, LUBA No. 79-010), (12/06/79,  
5 LUBA No. 79-030), respondent had pending before the Land  
6 Conservation and Development Commission a request for  
7 acknowledgment of its urban growth boundary. On January 16,  
8 1980 LCDC issued a compliance acknowledgment order in the  
9 matter of the "Metropolitan Service District's Regional Urban  
10 Growth Boundary." Petitioners 1000 Friends filed its petition  
11 for review with this Board on February 5, 1980, and Petitioners  
12 Fujimoto, et al, filed their petition for review on February  
13 15, 1980. On February 27, 1980, the Board received the subject  
14 motion to dismiss.

15 LCDC acknowledged respondents' urban growth boundary based  
16 on a consideration of statewide goals 1, 2 and 14. According  
17 to the record before this Board, it is LCDC policy not to  
18 consider the other statewide goals in acknowledging only urban  
19 growth boundaries.

20 Petitioners Fujimoto, et al, in LUBA No. 79-010 set forth  
21 two assignments of error as follows:

22 "MSD's Adoption of an Urban Growth Boundary  
23 Violates Goals 3, 6, 9, 10, 11, 12 and 13."

24 "MSD's Actions and Omissions in Adopting the  
Regional Urban Growth Boundary Violate Goal 2 and 14."

25 Petitioner 1000 Friends of Oregon in LUBA No. 79-030 sets  
26 forth two assignments of error as follows:

1 "Metro violated Goal 2 and Goal 14 by including  
2 its 'market factor' surplus within the UGB."

3 "The findings do not demonstrate that it is  
4 impossible to exclude land from the UGB, and certain  
5 findings are not supported by substantial evidence."

#### 6 DECISION

7 For the purposes of this Order, pursuant to LUBA Rule 12,  
8 this Board will consolidate the above entitled petitions for  
9 review into one proceeding because we find that the petitions  
10 seek review of the same land use decision and involve the same  
11 or substantially similar issues.

12 It is the decision of this Board that we will not decide  
13 this matter on respondent's motion asserting res judicata as  
14 presented. It is, however, the decision of this Board that the  
15 issues raised in both the above entitled petitions for review  
16 are moot.

17 It is the responsibility of this Board to raise the issue  
18 of mootness on its own motion. Meyers v. Polk Miller Products,  
19 40 CCPA 739, 201 F2d 373 (1953); Magraw v. Donovan, 177 F Supp  
20 803 (1959) and Aucoin v. Evangeline Parish Police Jury, 338  
21 So2d 789 (1976). As the court in Meyers, supra, states at 201  
22 F2d 376:

23 "In cases where issues have become moot as a  
24 result of judicial decisions or otherwise, the courts  
25 unquestionably have the authority and often it becomes  
26 their duty to dismiss cases sua sponte and without any  
27 motion to dismiss being made."

28 A thorough review of both petitions for review and the  
29 record of the contested Metropolitan Service District's adopted

1 and subsequently acknowledged urban growth boundary reveals  
2 that the issues presented in the petitions for review are the  
3 same or similar to those presented at LCDC's acknowledgment  
4 proceeding. In light of the relationship between this Board  
5 and the LCDC regarding allegations of goal violations as well  
6 as the definition of a land use decision as set forth in Oregon  
7 Laws 1979, ch 772, § 5 and 3 respectively, no decision of this  
8 Board can ultimately reverse LCDC's decision to acknowledge  
9 respondent's urban growth boundary. At best, the efforts set  
10 forth by petitioners in their respective petitions for review  
11 are collateral attacks on LCDC's January 16, 1980  
12 acknowledgment order.

13 As was stated in Card v. Flegel, 26 Or App 783, 786, 554  
14 P2d 596 (1976):

15 " \* \* \* An appellate, like every judicial  
16 tribunal, is empowered to decide actual controversies  
17 only, and not to give opinions upon mooted questions \*  
18 \* \*. The rule is general, therefore, that when an  
19 event occurs pending an appeal which renders it  
20 impossible for the court to grant the relief sought,  
21 it will \* \* \* dismiss the appeal \* \* \*.' Greyhound  
22 Park v. Ore. Racing Com., 215 Or 76, 79, 332 P2d 634  
23 (1958) (quoting State ex rel v. Grand Jury, 37 Or 542,  
24 62 P 208 (1900))."

21 LCDC's acknowledgment of the contested urban growth  
22 boundary subsequent to the filing of the two herein addressed  
23 petitions for review mooted those petitions.


24 / /

25 / /

26 / /

1 For the above stated reasons, it is ordered that the  
2 petitions for review in LUBA Nos. 79-010 and 79-030 are hereby  
3 dismissed.

4 Dated this 29<sup>th</sup> day of April, 1980.

5  
6  
7   
8 William C. Cox  
Hearings Referee