

BEFORE THE LAND USE BOARD OF APPEALS Nov 14 4 35 PM '80
OF THE STATE OF OREGON

BEAR CREEK VALLEY SANITARY)
AUTHORITY, a municipal)
corporation,)
Petitioner,) LUBA No. 80-090
v.) FINAL OPINION
JACKSON COUNTY, OREGON) AND ORDER
a political subdivision,)
et al,)
Respondent.)

Appeal from Jackson County.

Manville M. Heisel, Medford, filed the brief and argued the cause for Petitioner Bear Creek Valley Sanitary Authority.

John L. Dubay, Medford, filed the brief and argued the cause for Respondent Jackson County.

Robert E. Stacey, Jr., Portland, filed the brief and argued the cause for Respondent City of Ashland. With him on the brief was Ronald L. Salter, Ashland.

REYNOLDS, Chief Referee; COX, Referee; BAGG, Referee; participated in this decision.

REVERSED 11/14/80

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 REYNOLDS, Chief Referee.

2 NATURE OF THE PROCEEDINGS

3 Petitioner Bear Creek Valley Sanitary Authority ("BCVSA")
4 challenges Jackson County Ordinance No. 80-13, adopted on July
5 14, 1980. The ordinance adopted the public facilities and
6 services element of the Jackson County Comprehensive Plan.
7 Petitioner s challenge to the validity of that ordinance is
8 limited to that portion of the public facilities and services
9 element (Findings and Policies I through VII) having to do with
10 sanitary sewer service.¹

11 Policy I establishes four levels of sanitation service
12 permissible within Jackson County and specifies where each
13 level of service is to be allowed. Category "A" level of
14 service is for those areas within the city limits or within a
15 city's urban growth boundary (UGB). The method of service for
16 category "A" involves conventional sewage collection and
17 treatment as part of a regional or subregional sewage system
18 designed to accommodate an urban level of development.
19 Category "B" level of service is for those areas in an
20 unincorporated urban containment boundary or for those areas
21 that are outside a UGB, constitute a pocket of existing urban
22 or suburban level of development and within which a probable
23 health hazard is deemed by the county to exist. This method of
24 service also involves conventional sewage collection and
25 treatment as part of a regional or subregional system, except
26 that new service mains, trunks and lateral lines for such areas

1 can be designed only to serve existing and in-fill development.

2 Category "C" level of sewer service is for new development
3 outside a UGB which meets the rural or suburban lands element
4 of the county's comprehensive plan, or existing pockets of
5 development which are outside a UGB as well as any urban
6 containment boundary and for which a probable health hazard is
7 deemed by the county to exist. The method of service is
8 on-site management (i.e., septic tanks) or small community
9 waste disposal systems.

10 Finally, category "D" level of service is for areas
11 designated for or already developed to low density. The
12 service method involves on site waste disposal systems (i.e.,
13 septic tanks).

14 Policy II of the public facilities and services element
15 challenged by petitioner prohibits new extensions of sewer
16 projects outside any UGB except as allowed by Policy I. The
17 effect of this policy, basically, is to limit sewer line
18 extensions outside any UGB to only those pockets of development
19 for which a health hazard is deemed to exist. Furthermore, the
20 sewer lines which are allowed can only be of a size adequate to
21 serve the existing development and any infill development which
22 may be allowed.

23 Policy III expresses the committment to allow infill
24 development in areas in which a health hazard has been removed
25 in order such new development may help to offset the cost of
26 providing sewers necessary to remove the health hazard. Policy

1 4. The county violated Goal 2 in not coordinating
2 development of the county's plan with the plans and programs of
3 the BCVSA and by violating the terms of the cooperative
4 agreement between the county and BCVSA.

5 5. The county violated Goal 6 because the standards
6 adopted for limiting or prohibiting sewer facilities extensions
7 do not achieve the purposes of Goal 6.

8 6. Policies I through V of the public facilities and
9 services element violated Goals 11 and 14 because they limit
10 sewer service until a health hazard exists and size the sewer
11 facility for existing development only.

12 7. The county ordinance impairs contract rights of
13 citizens residing or owning property within BCVSA's
14 jurisdiction, as well as rights of BCVSA under the cooperative
15 agreement, in violation of Article I, section 10, of the United
16 States Constitution and Article I, section 21 of the Oregon
17 Constitution.

18 STATEMENT OF FACTS

19 The Bear Creek Valley Sanitary Authority ("BCVSA") was
20 formed, following an election, by order of Jackson County
21 entered on September 21, 1966. BCVSA encompasses approximately
22 208 square miles in the Bear Creek Valley. In October of 1976,
23 BCVSA adopted a comprehensive sewer plan. This plan was
24 reviewed by the Jackson County Board of Commissioners and its
25 planning staff. In April of 1978 the board of commissioners
26 prepared an informal "composite" of its observations concerning

1 IV would effectively prohibit new development outside a UGB and
2 outside an urban containment boundary from connecting to sewer
3 lines.

4 Policy V would prohibit new sewage lines which are allowed
5 to be extended from passing through lands designated for
6 agricultural use unless no other reasonable route is
7 available. Policy VI provides that where sewer lines are
8 required to be extended through agricultural lands that there
9 will be a sewer assessment deferral for such lands. Finally,
10 Policy VII states that the presence or absence of sewers and
11 other public facilities should be balanced against other
12 development concerns so that disproportionate emphasis is not
13 given to public facilities in determining whether new
14 development should be allowed.

15 ASSIGNMENTS OF ERROR

16 The seven assignments of error in the Petition for Review
17 can be summarized as follows:

18 1. The county exceeded its legal authority in adopting the
19 public facilities and services element relating to sewers and
20 usurped the authority and responsibility of BCVSA.

21 2. The findings prefacing Policies I through VII are not
22 supported by substantial evidence.

23 3. The county failed to follow the applicable procedure,
24 in that instead of reviewing BCVSA's plan and informing BCVSA
25 of what BCVSA needed to do in order to make its plan conform to
26 the goals, the county adopted its own sewer plan.

1 the plan. The county noted its inability to "fully perform
2 [its] duties of coordinating this plan with others"... "because
3 the county plan is not in compliance with state goals." The
4 board of commissioners proposed that final action on the plan

5 "follow the joint development of a time schedule
6 of BCVSA compliance which will necessarily be delayed
7 due to its coordination with the county's plan for
8 public facilities and services."

9 In June of 1978, BCVSA and Jackson County entered into a
10 Cooperative Agreement which set forth the process by which
11 Jackson County and BCVSA would coordinate development of the
12 county's comprehensive plan with the BCVSA plan with the aim
13 toward eventual inclusion of the BCVSA sewer plan within the
14 county's plan as a portion of the public facilities element of
15 the county plan.

16 Following adoption of the cooperative agreement Jackson
17 County proceeded over a two year period to draft and ultimately
18 adopt a public facilities and services element of its
19 comprehensive plan. Notwithstanding the provisions in the
20 cooperative agreement the planning commission took the approach
21 that it was the county's responsibility to itself adopt a
22 specific, detailed plan setting forth the circumstances in
23 which sewer services were to be provided and the type and level
24 of services which would be allowed. The county board
25 essentially adopted the position of the planning commission and
26 with it the planning commission's April 16, 1980, draft public
facilities and services element. The board required, however,

1 that Policies I and IV of the element be revised by the
2 planning commission to conform with the board's views on those
3 policies as expressed during the meeting.

4 By letter to the Jackson County Board of Commissioners,
5 BCVSA objected to what it perceived to be the "unnecessarily
6 restrictive policies of the proposed Public Facilities and
7 Services Element." Referring to the Cooperative Agreement
8 entered into between BCVSA and Jackson County in June of 1978,
9 BCVSA charged that the county had failed to abide by that
10 agreement because no joint development of plans "relative to
11 the type and levels of service proposed for urban, rural and
12 other land use categories" had taken place. BCVSA in this
13 letter and in previous letters asserted that the county had
14 virtually ignored the BCVSA Comprehensive Sewer Plan's
15 provisions in preparing the proposed public facilities and
16 services element.

17 It is apparent from the record that the county was of the
18 opinion that the BCVSA sewer plan did not conform to the
19 requirements of the statewide planning goals. It is also
20 evident, as reflected in a letter from the planning commission
21 responding to BCVSA's letter of June 23, 1980, referenced
22 above, that the county viewed the public facilities and
23 services element as not a plan:

24 "The element is not a plan. The element
25 establishes guidelines for development of public
26 facilities and public facilities plans. The element,
along with the official comprehensive plan and zoning
map, adequately address the key issues. Service

1 agencies such as BCVSA have the responsibility to
2 develop the detailed plans necessary to implement the
3 plan and state goal eleven." Letter to BCVSA Chairman
4 Dunn from Ted Bedlock, Vice Chairman, Planning
5 Commission. Rec. Supp 1.

6 On July 14, 1980, the board of commissioners enacted
7 Ordinance No. 80-13, adopting the public facilities and
8 services element of the Jackson County comprehensive plan.

9 OPINION

10 Petitioner's first and third assignments of error are that
11 the county exceeded its statutory authority in adopting the
12 public facilities and services element with respect to sewers
13 (Policies I through VII). BCVSA argues that under the
14 legislative scheme set forth in ORS ch 197 and ORS ch 450,
15 special districts such as a sanitary authority are the agencies
16 responsible for adopting a plan or plan elements of the kind
17 contained in the public facilities and services element of
18 Jackson County's comprehensive plan.

19 The county's response seems to be that the county must
20 adopt a comprehensive plan which, by definition, includes
21 provisions relating to sewer services. Goal 11 requires the
22 county to develop a timely, orderly and efficient arrangement of
23 public facilities and services to serve as a framework for
24 urban and rural development. It is BCVSA's responsibility,
25 according to the county, to construct sewer lines and adopt a
26 plan for their provision in accordance with the sewer servicing
27 policies adopted by the county.

28 It is our opinion, however, that the county has read too

1 narrowly the statutory authority given special districts to
2 adopt plans relating to provision of sewer services and has
3 read too broadly the county's responsibility in adopting
4 comprehensive plans and coordinating the plans of special
5 districts.

6 1. Planning Responsibility of Counties and Special
7 Districts

8 ORS 197.175(2) requires counties to adopt comprehensive
9 plans consistent with statewide planning goals. See also ORS
10 215.050. A comprehensive plan is defined in ORS 197.015(5):

11 "Comprehensive plan" means a generalized,
12 coordinated land use map and policy statement of the
13 governing body of a state agency, city, county or
14 special district that interrelates all functional and
15 natural systems and activities relating to the use of
16 lands, including but not limited to sewer and water
17 systems, transportation systems, educational systems,
18 recreational facilities, and natural resources and air
19 and water quality management programs.

20 "Comprehensive" means all-inclusive, both in terms of
21 the geographic area covered and functional and natural
22 activities and systems occurring in the area covered
23 by the plan. "General nature" means a summary of
24 policies and proposals in broad categories and does
25 not necessarily indicate specific locations of any
26 area, activity or use. A plan is "coordinated" when
the needs of all levels of governments, semipublic and
private agencies and the citizens of Oregon have been
considered and accommodated as much as possible.

"Land" includes water, both surface and subsurface,
and the air.

Based solely upon the above, it would appear that the
county's responsibility to adopt a comprehensive plan would
clearly include the responsibility to adopt an element
pertaining to provision of sewer services for the county.

However, ORS 197.185 recognizes that special districts²

1 have plans or programs which affect land use and that these
2 plans or programs must comply with the statewide goals. See
3 also ORS 197.190, 197.250, 197.254(2), 197.255, 197.300 (1979
4 Replacement Part), 197.320. Sanitary districts such as BCVSA
5 are specifically granted statutory authority to adopt plans
6 relative to provision of sewer services within their territory
7 by ORS 450.825:

8 "As soon as practicable after the election of the
9 first members of the board, the board shall make a
10 study and survey of the existing sewage disposal
11 facilities and systems in the authority and of its
12 sewage disposal needs, both present and future, and
13 prepare an overall coordinated plan for the authority
14 which incorporates, so far as is practicable, existing
15 sewage disposal and drainage systems, future sewage
16 treatment plants, including connecting trunk and
17 lateral sewers, and future drainage systems. Such
18 plans shall be revised from time to time as
19 circumstances may require. In preparing the plan or
20 revisions thereto, the board shall take into
21 consideration expected fluctuations in population and
22 in business and industrial activity."

23 While it would now appear that a conflict exists as to
24 whether a special district such as a sanitary district or the
25 county itself has the ultimate responsibility to adopt a plan
26 pertaining to provision of sewer services, this apparent
27 conflict has been resolved by additional provisions in ORS ch
28 197. These provisions make it clear that the county's role in
29 the formulation of plans or plan elements within the subject
30 matter of a special district is to coordinate the special
31 district's development of that plan or plan element to ensure
32 that the plan or element is consistent with the county's
33 comprehensive plan, the plans of other affected governing

1 bodies and the statewide goals. Thus, ORS 197.185(2) (added by
2 Or Laws 1977 ch 164, sec 14) requires a special district
3 operating within the boundaries of a county to enter into a
4 cooperative agreement with the county. The cooperative
5 agreement is to include a listing of the tasks which the
6 special district must complete in order to bring its plan or
7 program into conformity with the statewide goals, including a
8 generalized time schedule showing when the tasks are to be
9 completed and when the plan or program which complies with the
10 goals is to be adopted by the district. The cooperative
11 agreement is not unlike a compliance schedule entered into
12 between LCDC and a county (see ORS 197.251(2)), except that in
13 the case of a cooperative agreement it is the county that
14 monitors the progress of the special district in meeting the
15 terms and conditions set forth in the agreement. See ORS
16 197.254(2).

17 In addition to the above, a county is required by ORS
18 197.190 to

19 "coordinate all planning activities affecting
20 land use within the county, including those of the
21 county, cities, special districts and state agencies,
to assure an integrated comprehensive plan for the
entire area of the county."

22 A special district which refuses to coordinate its plan with
23 the county's comprehensive plan may be barred by the county
24 from contesting the county's request for acknowledgement of
25 compliance of its comprehensive plan. ORS 197.254(2). If the
26 county determines that the special district's plan does not

1 conform to the statewide planning goals, it must so advise the
2 special district. If the special district refuses to revise
3 its plan, and if LCDC agrees with the county's position that
4 the special district plan does not conform to the goals, LCDC
5 must issue an enforcement order

6 "requiring a...special district to take action
7 necessary to bring its...plan or program into
8 conformity with the statewide planning goals..."

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9 "The order issued must specify the nature of the
10 non-compliance, including but not limited to
11 the...contents of a plan, program or regulation
12 affecting land use adopted by a...special district
13 that do not comply with statewide planning goals..."
14 ORS 197.320.

15 Under this legislative scheme, a county does not have the
16 power or authority to unilaterally take over the planning
17 responsibilities of a special district just because the county
18 does not believe that the special district's plan conforms to
19 applicable goal requirements. We believe the legislature
20 clearly specified that special districts are responsible for
21 adopting plans relative to their sphere of influence (in this
22 case provision of sewer services). This responsibility,
23 however, must be exercised consistent with the statewide
24 planning goals, in coordination with the county and consistent
25 with the goals and policies in the county's comprehensive
26 plan. Under this scheme the county is responsible for
determining the timing and location of growth in coordination
with cities which may be affected by such growth. ORS

1 197.015(5); Goal 2. A special district's plan providing
2 services such as sewer services must be consistent with such
3 growth policies.

4 The end result of this process will probably involve
5 incorporation of the special district's plan into the county's
6 comprehensive plan. As was stated in 38 Op Ag 1713 (1978),
7 where the subject of the opinion involved a school district's
8 policy statement concerning the educational system:

9 "In conclusion, it is our opinion that an
10 appropriate element of a county's comprehensive plan
11 is the actual and projected facilities and activities
12 making up the educational systems and activities
13 within the county. Where these facilities and
14 activities are the responsibility of the school
15 district, the governing body of the entity will have
16 its own written program or policy statement concerning
17 the effect of its facilities and activities on land
18 use. Such a program should be developed and
19 coordinated with the county's land use concerns and
20 must be shown as an element of the county's
21 comprehensive plan. Inclusion of the program in the
22 county plan must reflect the cooperative agreement of
23 the parties under ORS 197.015(4), 197.185(2), and
24 197.190(1)." 38 Op Ag at 1717. (emphasis added).

25 2. Whether the public facilities and services element of
26 the Jackson County Plan relative to sewers fell within BCVSA's
responsibility to adopt a sewer plan.

As was mentioned at the beginning of this opinion, the
first seven policies of the public facilities and services
element of the Jackson County comprehensive plan with the
exception of Policies III and VII are fairly specific as to the
type, and level of sewer services and the circumstances under
which they may be provided. Policy III relating to authorizing
infill development, and Policy VII relating to the emphasis to

1 be given to existence of sewers for purposes of determining
2 whether development should proceed do not relate specifically
3 to provision of sewers but relate more to regulating or
4 directing growth. As such, they are planning policies which
5 are outside BCVSA's sphere of authority.³

6 But Policies I, II, IV, V and VI are policies which BCVSA
7 should have adopted if anyone was to adopt them. The
8 provision of sewer services within the BCVSA territory is the
9 responsibility of BCVSA. As such, BCVSA must, as part of its
10 planning responsibilities, prepare "its own written program or
11 policy statement concerning the effect of its facilities and
12 activities on land use." 38 Op Ag 1713 at 1717. This program
13 or policy statement must be coordinated with the county's plan,
14 with other affected plans, and be consistent with statewide
15 goals. It is the county's responsibility to oversee the
16 special district's planning efforts to ensure coordination and
17 consistency are achieved. Disputes are to be resolved by LCDC.

18 In summary, Jackson County exceeded its authority in
19 adopting Policies I, II, IV, V and VI of its public facilities
20 and services element of its comprehensive plan. Its action
21 with respect to such adoption is, accordingly, reversed.⁴

FOOTNOTES

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¹ The public facilities and services element also addresses such matters as water service, police protection, fire protection, schools and health care.

² Special districts are defined in ORS 197.015(10) and include sanitary districts.

³ By letter to the Board, BCVSA has withdrawn its challenge to the validity of Policies III and VII.

⁴ In view of our holding on this issue, we express no opinion as to the remaining assignments of error.