BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

METROPOLITAN SERVICE DISTRICT, Petitioner, vs. CLACKAMAS COUNTY, and ASGHAR SADRI, Respondents.	LUBA NOS. 80-148 and 80-149 FINAL OPINION AND ORDER

Appeal from Clackamas County.

Mike A. Holstun, Portland, filed a brief and argued the cause Petitioner.

Scott Parker, John E. Schwab and Jon S. Henricksen, Oregon City and Gladstone, filed a brief for Respondents Clackamas County and Asghar Sadri and John E. Schwab and John S. Henricksen argued the cause for respondents.

Bagg, Referee; Reynolds, Chief Referee; Cox, Referee; participated in the decision.

REMANDED 2/19/81

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).

BAGG, Referee.

NATURE OF THE PROCEEDING

These two cases are about extensions of time for development and plat revisions for two previously approved subdivisions called "Sunwood" (LUBA No. 80-148) and "Bush Gardens III (LUBA No. 80-149). Both subdivisions are outside the Metropolitan Service District boundaries but within Clackamas County.

STANDING

Standing is an issue in this case. In its petition for review, Metropolitan Service Distict asserts that these approvals

> "would adversely affect Clackamas County residents' interest in, and enjoyment of, nearby rural lands in Clackamas County by interfering with scenic views, eliminating open spaces in agricultural lands, increasing traffic on rural roads." Petition for Review at 2.

Metro further asserts that "Clackamas County Metro Residents" will suffer an increased tax burden as may be required to fund services in rural areas. The closest statement Metro makes in its discussion of standing that might be taken as an allegation of Metro's interest is as follows:

> "Metro has an interest in seeing that its Clackamas County residents' interests in adjacent rural lands, the efficient provision of services, and efficient urbanization within the UGB are protected." Ibid

Nowhere in the section on standing does Metro assert anything other than what appears to be a kind of representational claim

to standing. The only place allegations of fact supporting Metro's standing appear is later in the body of the petition.

On page 18 of the petition during the discussion of an alleged goal 2 violation, Metro announces that "residential development has a signficant impact upon the integrity of an [sic] UGB." Metro says that such development encourages sprawl and alleges that "such development attracts commercial support uses which further exacerbate such sprawl." Ibid. Later, Metro claims public facilities that are "basic requirements of any urban subdivision" with the exception of sanitary sewers are being provided to the subdivisions. Petition at 21. Metro then concludes that the county is "not creating a rural use but is rather converting 'rural land' to 'urban land.'" Ibid.

Metro's interest cannot be claimed through citizens who have not themselves come forward and made a claim. If Metro seeks representational standing, it must be evident that one or more of its residents has standing. Warth v. Seldin, 422 US 490, 95 S Ct 2197, 45 L Ed 2d 343 (1975); Clark v. Dagg, 38 Or App 71, 588 P2d 1298 (1979). 1000 Friends v. Marion Co., ___ Or LUBA ____, (LUBA No. 79-005, 1980). Under this rule, if Metro's only claim to standing is through the representation of one of its residents, Metro's claim must fail and the case must be dismissed.[1]

We are tempted, because of this obvious error, to dismiss this case. However, very generously read, Metro's petition does include an allegation that Metro itself, as the public

body responsible for adopting an urban growth boundary in the area affected or near it, is responsible for the protection of that boundary. That purpose, found in ORS 268.390(3), along with the allegation that the developments complained of will disrupt urban services and threaten the integrity of the urban growth boundary by allowing essentially urban growth outside the boundary, is enough to grant Metro standing.

FACTS

The Sunwood Subdivision was originally approved in February of 1973. One of the conditions for approval was that water must be provided by the Holcomb-Outlook Water District, but the district has not allowed additional water services since 1973, making it impossible for the applicant to meet this condition. Time extensions for development of the subdivision were, therefore, granted in 1975, 1976 and 1977.

The original application was for 29 lots on a parcel of some 28 acres, but this density was revised in the county action on appeal here to 12 lots on the same acreage so that the lots might be served by individual wells, thus avoiding the difficulty with the service from the Holcomb Outlook Water District. In its approval of the time extension and the lot size changes, the county required the subdivision to connect to a public water system when available. The Sunwood Subdivision is within one and one-half miles of the Metro municipal boundary.

The Bush Gardens III subdivision was originally approved in

January of 1972. A first phase was developed with 20 lots in 1973, and a second phase was developed with 24 lots in 1976. The act on appeal to the Land Use Board of Appeals is a request for a time extension and a revision of the plat to allow development of 13 lots on some 31 acres. This property suffers from the same difficulties with service from the Holcomb-Outlook Water District as the "Sunwood" property. Again, water would be provided by individual wells, with a condition that the lots must be connected to a public water system when one becomes available. Bush Gardens III is approximately one-half mile southeast of the Metro municipal boundary.

Both subdivisions lie on land defined by goal 3 as agricultural land. With both properties, the county board found that an exception to goal 3 was justified. In its orders, the county finds there is residential development adjacent to the properties and in the area. The county then concludes the properties lie in areas committed to nonfarm uses.

The county bolsters its findings by referencing findings made in its Rural Plan Amendment II (RUPA II) wherein the county sought to take an exception to Goal 3 based on the belief that the subject properties were "committed to nonfarm" uses. RUPA II is on appeal to this Board in LUBA No. 80-075 and 80-076. It is not clear to us from the county's orders how many of the parcels existing in the area are built upon, with the exception of the Bush Garden III subdivision where 44 lots

are described in the county's order as "developed."

ASSIGNMENT OF ERROR NO. 1

The first assignment of error alleges the county's actions to be in violation of Goal 3 "by authorizing nonfarm uses on agricultural land without taking a proper goal 2 exception or demonstrating commitment to nonfarm use." Petitioner says Respondent Clackamas County may authorize residential housing on two acre lots (which it characterizes as nonfarm uses) "if the property is within an urban growth boundary, if the property is designated for a forest use, or if an exception is taken to Goal 3. Meyer v. Lord, 37 Or App 59 (1978)."[2] As none of these possible avenues allowing this nonfarm use are met, petitioner claims the approvals must fail.

The county defends itself by saying that the petitioner's attack on these subdivision plats is not timely. Both plats were approved many years ago. All the Clackamas County Board of Commissioners has done here is to (1) allow extensions of time within which certain conditions must be met, (2) allow modification of the plats to create fewer and larger lots, and (3) allow the use of individual or shared wells until such time as public water becomes available. Any conversion of agricultural land or residential use or any other use was allowed years ago and may not be attacked now, according to respondent.

As support for its position, the county cites us to 1000 Friends of Oregon v. Clackamas County, 40 Or App 529 (1979)

wherein the county granted a variance to a subdivision plat. Petitioners in that case asserted that the statewide goals, and in particular goal 3, had to be applied at the time the variance was considered. The court held that the substance of the petitioner's argument was an attempt to collaterally attack the original approval of the subdivision. The substance of the variance, to allow the subdivision to be served by individual wells rather than a single well, did not, in the court's view, "convert agricultural land to residential, and is not tantamount to approval of the subdivision." 49 Or App at 533-534.

It is the Board's view that the 1000 Friends case cited supra may be distinguished from the present case in that the approval for the Sunwood and Bush Gardens III will expire unless time extensions are given. Article IV of the Clackamas County Subdivision Ordinance paragraph 8 provides that the county may grant time extensions for a year at a time, but it is not bound to do so. The county may deny the request, request that the subdivision be resubmitted, or "may also require modification, revision, or change within the proposed subdivision or major partition to benefit the public interest in granting one (1) year time extension." It appears to the Board this provision does not excuse a landowner from meeting substantive requirements that may be passed prior to his request for a time extension. Generally, land use requirements enacted prior to the time a vested right has accrued to the

developer must be met. See Clackamas County v. Holmes, 265 Or 193, 508 P2d 190 (1973); Apperson v. Multnomah County, 27 Or App 279, 555 P2d 929 (1973); 8 McQuillin, Municipal Corporations, sec 25.155 to 25.157 (3d Ed (1976) Here, the respondent does not argue a vested right to develop the property.

But even if required to apply statewide goals and authorized to do so under their own ordinance, the county goes on to argue that an exception to goal 3 was already taken to these parcels. During the county's rural plan amendment II proceedings, "an exception based on a finding of commitment" was taken for areas including the property subject to these petitions for review. Respondent's brief at 7. The county argues that if MSD wished to challenge the exceptions, it should have done so at the time of the rural plan amendment adoption. Respondents note that, in fact, MSD did contest some rural plan amendment II designations, one of which was on three sides of the Bush Gardens Subdivision and another within a quarter of a mile of the Sunwood Subdivision. In short, the county claims it need not take the exception again.

It is not clear to us whether Clackamas County attempted to take an exception to Goal 3 in its orders on appeal here or not. The county says an exception is "justified" and recites a few facts to show commitment of the land to other uses. Also, the county mentions the RUPA II findings that justify a "Rural" designation of these properties, in an apparent attempt to show

that the land is "irrevocably committed" to nonfarm use. The county's referece to the RUPA II findings is as follows:

> "The Board further finds that there is no violation of Goal 14, urbanization, because two acres is essentially rural instead of urban, as MSD asserts. The findings of the Planning Commission for the Rural Plan Amendment II, (RUPA II) Order No. 80-1205, Exhibit D, Section R-25 support this findings."

Generously read, this reference is enough to include the RUPA findings for these properties into these orders.

We do not believe it is now appropriate for us to discuss the adequacy of these findings to support an exception based on commitment. The RUPA II actions are an appeal to this Board in LUBA Nos. 80-075 and 80-076 and no final order has been issued. A proposed opinion and order issued November 18, 1980 was modified by the Commission and returned to this Board for further consideration. Part of our reconsideration will be what test the county must meet to show commitment.

Petitioner and the county are parties to 80-075 and 80-076. The final determination in those cases will control the outcome of this assignment of error. As this case is to be remanded to the county, we do not believe the parties are prejudiced by our refusal to pass on this portion of assignment of error no. 1.

ASSIGNMENT OF ERROR NO. 2

The second assignment of error alleges a violation of goal 2 because the orders "are uncoordinated with regional plans and they are inconsistent with Clackamas County's Own Plan."

Petitioner here argues that there are no findings showing any coordination between the county and Metro.

Petitioner says that residential development has an impact on "the integrity" of the urban growth boundary, and residential development "is sprawl - precisely what Goal No. 14 and the UGB seeks to prevent." Petition at 18. The county failed to make a necessary determination as to whether these approvals might affect or violate regional plans, alleges petitioner.

Included within this assignment of error is the assertion that the Clackamas County plan has been violated by the creation of the two acre subdivision lots. Clackamas County designated these areas "rural" and "RRFF-5" in its rural plan amendment II (RUPA II) proceeding. These designations require lots of not less than five acres. The lots in the two subdivisions are of two acres. Petitioner asserts this inconsistency violates Goal 2 in that "plan shall be the bases for specific implementation measures. These measures shall be consistent with and adequate to carry out the plan." In other words, as the lots created violate the RUPA II plan designation, they violate Goal 2.

The county responds to the allegation of a violation of Goal 2 by saying that the primary decisions in this matter were made long before MSD existed. Goal 2, according to respondent, requires that each plan "and related implementation measures shall be coordinated with the plans of affected governmental

units." MSD was not in existence and, therefore, hardly an "affected governmental" unit.

As to the assertion that the designations violate the plan and through that violation Goal 2, the county says that the decisions were made in 1972 and 1973 and did comply with the zoning ordinances in existence at that time. Respondent claims there is nothing in the law requiring a county to force developers to revise their plats to conform to new planning densities.

Goal 2 defines "implementation measures" as

> "the means used to carry out the plan. These are of two general types: (1) management implementation measures such as ordinances, regulations or project plans, and (2) site or area specific implementation measures such as permits and grants for construction, construction of public facilities or provision of services."

As it appears a specific land use action, such as a subdivision approval, may be called an implementation measure, we must agree that the orders had to be "coordinated" with Metro as an "affected governmental" unit. We believe they were "coordinated."

Coordination between units of government does not mean they must agree. Metro was given notice of the pendency of these actions and was allowed to appear and voice its concerns. Record 211. In fact, MSD appealed these cases from the Planning Commission to the Board of Commissioners. Surely this level of participation would allow any coordination the parties choose to exercise. The point here is that throughout the

whole proceeding they were in contact with each other on all the issues, and they simply did not agree. Compare Twin Rocks v. Rockaway, LUBA No 80-039 (1980).

With respect to the allegation that the complained of land use actions violate the Clackamas County Plan and therefore Goal 2, we must agree with petitioner. It is clear that the two acre parcel designations in the subdivisions do not comply with the five acre parcel designations in the plan. It may be that other portions of the Clackamas County Plan or certain implementation ordinances may explain away or make permissible this apparent discrepancy, but the county cites us to no such provisions. As Goal 2 requires the local plans to "be the basis for specific implementation measures," the discrepancy results in a violation of Goal 2.

To the extent that petitioner argues that the approvals on appeal violate the county comprehensive plan, and, therefore, Goal 2, we must sustain this assignment of error.[4]

ASSIGNMENT OF ERROR NO. 3

The third assignment of error alleges violations of goals 2, 11 and 14.[5] The major discussion under this assignment of error is about Goal 14. Goal 14 is alleged to be violated by the county's allowance of "urban development outside the urban growth boundary without urban services."

It is petitioner's view that these subdivisions comprising two acre lots are "urban" in nature. Placement of the subdivisions outside the adopted urban growth boundary

undermines the validity of the urban growth boundary. The "urban" services alleged to be provided for this subdivision include public streets to county street standards, surface drainage facilities and storm sewers.

The county's findings in each case conclude that no violation of Goal 14 has occurred "because two acres is essentially rural instead of urban, as MSD asserts." These two acre lots do not have public water (at least at present) or public sewers. Record 134-137, 186-189. There are paved roads, and curbing is provided along with underground telephone and electricity. Record 1-5.

We do not view these facts taken in sum to result in a conclusion that the properties are "urban" as a matter of law. However, the proximity of the developments to the urban growth boundary and the limits of Metro's jurisdiction suggests to us that Clackamas County had a duty under Goal 14 to consider whether the urban growth boundary would be affected by the approval of the expansion of the subdivisions. As Metro notes, it is the county's responsibility to show that its actions are consistent with Goal 14. Petition at 24. While we do not view the approvals as creating, necessarily, a island of urban use outside the urban growth boundary, we do believe the county should have included some facts and made a finding as to the effect of the approval of the developments on the urban growth boundary. Of particular interest to us is whether these developments would contribute to a kind of sprawl or leap

frogging development that might undermine the effectiveness of an urban growth boundary enacted to contain intense development. See MSD v. Washington Co., LUBA No. 80-034 (1980).

We cannot determine, therefore, whether an improper conversion of rural to urban or urbanizable land has occurred. We decline to find the county in violation of Goal 14 on petitioner's theory that these lots are "urban." We must return the matter to the county for findings on this issue.

Goal 2 specifically is alleged to be violated in that goal 2, according to petitioner, requires that respondent address "the goal 11 and 14 inconsistencies identified by Metro at the hearing before the respondent." Apparently here petitioner is arguing for an application of Goal 2's requirement that the factual bases for land use decisions be articulated.[5]

We agree Goal 2 requires the county to articulate its reasons for a particular course of conduct. Gruber v. Lincoln Co., Proposed Opinion, LUBA No. 80-088 (1981). It appears that the orders in these cases attempt to articulate the reasons for the decision. The question is the adequacy of the county's discussion or "findings."

As we note in our discussion of goal 14, the county had a duty to discuss the impact of these approvals on the urban growth boundary, and its failure to do so is a violtion of goal 2.

The third assignment of error is sustained as to the alleged violations of goal 2, and these cases are remanded to the county for action consistent with this opinion.

FOOTNOTES

[1] Metro did appear in the proceeding below, satisfying Oregon Laws 1979, ch 772, sec 4(3)(a).

Oregon Laws 1979, ch 772, sec 4(3) states as follows:

"(3) Any person who has filed a notice of intent to appeal as provided in subsection (4) of this section may petition the board for review of a quasi-judicial land use decision if the person:

"(a) Appeared before the city, county or special district governing body or state agency orally or in writing; and

"(b) Was a person entitled as of right to notice and hearing prior to the decision to be reviewed or was a person whose interests are adversely affected or who was aggrieved by the decision."

[2] We do not comment on whether these conditions, if met, would in fact allow the use applied for here.

[3] The county explains its inclusion of facts claiming an exception is "justified" based on commitment by saying it did so "as protection against the current confusion in this area of the law." Respondent's Brief at 8.

[4] "All land use plans shall include indentification of issues and problems, inventories and other factual information for each applicable state-wide planning goal, evaluation of alternative courses of action and ultimate policy choices, taking into consideration social, economic, energy and environmental needs. The required information shall be contained in the plan document or in supporting documents.

[5] We do not find any specific mention of Goal 11 in the discussion of the third assignment of error or how it is that Goal 11 has been violated. Because there is no discussion of how it is that Goal 11 has been violated, we

will now deny that portion of assignment of error no. 3 that alleges a violation of Goal 11. We believe the petitioner should articulate his reasons for asserting a goal violation beyond simply asserting a goal by name or number in a heading naming an assignment of error.